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THE NEW PSYCHOLOGICAL CONTRACT: IMPLICATIONS OF THE CHANGING WORKPLACE FOR LABOR AND EMPLOYMENT LAW

Katherine V.W. Stone[e]

Abstract

In this Article, Professor Stone describes the profound changes that are occurring in the employment relationship in the United States. Firms are dismantling their internal labor markets and abandoning their implicit promises of orderly promotion and long-term job security. No longer is employment centered on a single, primary employer. Instead, employees operate in a boundaryless workplace in which they expect to move frequently between firms, and between divisions within firms, throughout their working lives. At the same time, employers and employees have a new understanding of their mutual obligations, a new psychological contract, in which expectations of job security and promotional opportunities have been replaced by expectations of employability, training, human capital development, and networking opportunities.

The changes in the nature of the employment relationship have many implications for labor and employment regulation. The U.S. system of labor and employment law that originated in the New Deal period is built upon the assumption of long-term attachment between employer and employee. The collective bargaining laws as well as the social welfare

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measures that provide old age assistance, unemployment insurance, health insurance, and disability insurance are employer-centered and depend upon an on-going employment relationship. These legal structures are not well-suited to the boundaryless workplace. Professor Stone discusses the implications of the new workplace for three issues that are problematic in the new workplace: ownership of human capital, employment discrimination, and employee representation. In each area, she makes suggestions to address problems of insecurity, unfairness and injustice that frequently arise. These proposals are part of an effort to begin to imagine, and create, a new labor and employment law, one that can foster equity and justice in the new workplace.

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INTRODUCTION

In January 2000, the London Underground trains carried an advertisement that captures the ambiguity in the employment relationship at the turn of the Millennium. The ad, for a leading employment placement agency, pictures a rumpled tee-shirt on which appears the slogan, "I'M ONLY HERE FOR THE BEER MONEY." Next to the shirt is the following text:

> Are you putting in effort or just hours? There's nothing wrong with being in it for the money so long as there's something in it for your employer. Commitment has nothing to do with the hours you work and everything to do with your attitude. Want to work 3 days a week? Go ahead. Fancy 6 months off? It's your life. It ain't what you do, it's the way that you do it. Talk to Brook Street. Whatever you want to do, we'll help you make a career of it.

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From a certain vantage point—the vantage point of the past one hundred years—this ad reeks with irony. A "career" involving three days a week? "Commitment" when you are only working for the money? While the ad gives its blessing to this what-me-worry, air-head type of worker, it also speaks of mutual obligations between employer and employee. It says there's nothing wrong with remaining uninvolved so long as there's something in it for your employer. Therein lies the irony. How can this three day a week, six month off at a time, beer-drinking, day-dreaming employee have something to offer an employer? Clearly the mutual expectations of the employment relationship have undergone a profound transformation. What the new expectations are, and how they can foster a mutually productive employment relationship, needs to be examined.

Roughly one hundred years ago, the employment relationship underwent a transformation that persisted throughout most of the twentieth century. Now we are witnessing another such change. The changes are as much in the implicit understandings that both employees and employers bring to the relationship as in the institutional arrangements that formally govern them. By understanding both the previous and the current transformations, we can identify the institutional and policy choices that are available for shaping employment relations into the next century.

In nineteenth century America, skilled workers had a monopoly of knowledge about production. With their exclusive skills, knowledge, and expertise, nineteenth century craftworkers ensured themselves jobs and exerted considerable bargaining power vis-à-vis the manufacturers. By controlling skill, they controlled the choice of production process, the pace of work, and the distribution of revenues. Skilled workers transmitted their skills to others through elaborate apprenticeship systems that limited access to skill and ensured that it remained in the possession of the workers.[1]

1 . *See generally* WORKERS' CONTROL IN AMERICA 9–31 (David Montgomery ed., 1979); Katherine Stone, *The Origins of Job Structures in the Steel Industry*, *in* LABOR MARKET SEGMENTATION 27 (Richard C. Edwards et al. eds., 1975).

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Toward the end of the century, the manufacturers set out to break the skilled workers' monopoly of knowledge about production. Once they succeeded, they enlisted the help of a group of industrial engineers to design a means to transfer skills and knowledge about production from the workers to management. Numerous systems of work rationalization were devised in that period, of which the most famous was Frederick Winslow Taylor's system called scientific management.

Throughout the twentieth century, scientific management and its close relative, Fordism, came to characterize the labor relations policies of most large manufacturing firms. While the methods were not implemented universally, the theory and practices of scientific management have shaped the dominant employment practices throughout the economy. They have also shaped ideas in society more generally about the meaning and value of efficiency.[2] In addition, scientific management formed the dominant template against which American labor organizations strategized and American policymakers regulated. Thus the assumptions of scientific management have shaped the goals and conduct of twentieth century labor unions, as well as the content and interpretation of the labor laws.

One of the key teachings of scientific management was that employers should construct employment structures comprised of hierarchical job ladders and limited ports of entry—a form of job structure known today as an internal labor market.[3] The internal labor market involved employers giving their workers an implicit promise of

2 . *See generally* SAMUEL HABER, EFFICIENCY AND UPLIFT: SCIENTIFIC MANAGEMENT IN THE PROGRESSIVE ERA, 1890–1920 (1964); JUDITH A. MERKLE, MANAGEMENT AND IDEOLOGY: THE LEGACY OF THE INTERNATIONAL SCIENTIFIC MANAGEMENT MOVEMENT (1980); DANIEL NELSON, FREDERICK W. TAYLOR AND THE RISE OF THE INTERNATIONAL SCIENTIFIC MANAGEMENT (1980).

3 . Scientific management also urged employers to use a pay system called differential piece rates, and to use time and motion studies to determine each worker's individual productivity and set appropriate rates. Another central element involved the deskilling of jobs by extracting skill from the worker performing it, and the repositioning of that skill either in management (as in classic scientific management) or in machine (as in assembly-line Fordist variations). *See* FREDERICK WINSLOW TAYLOR, PRINCIPLES OF SCIENTIFIC MANAGEMENT ___ (1911) [hereinafter TAYLOR, SCIENTIFIC MANAGEMENT]; FREDERICK WINSLOW TAYLOR, SHOP MANAGEMENT 58 (1911) [hereinafter TAYLOR, SHOP MANAGEMENT].

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long-term employment—a tacit promise that if they did their job and refrained from disruptive oppositional conduct, they would have a job for life. The implicit contract for long-term job security has been a central feature of employment relations in large U.S. firms for most of this century.[4]

In the past decade, many of the most dynamic firms in the American economy have again radically transformed their employment practices. They have abandoned Taylorism, dismantled their internal labor market modes of organization, and instead have attempted to substitute more flexible forms of work. Employers have discovered the value of having workers who possess a variety of skills that can be deployed on many different job assignments.

The effort to redefine work within large organizations has many names, including Total Quality Management, high-commitment work practices, and competency-based organization. These new organizational behavior theories and practices aim to inculcate knowledge and skill in the worker at every level. They also aim to build a high-commitment work force. A related aspect of the new employment practices is that firms have abandoned or renounced the implicit promises of job security that were embedded in the internal labor market setting. By making these changes, firms have had to create a new system of job structures, with new bases for motivation, incentives for skill acquisition, sources of morale, and inducements for loyalty. Yet, there is a paradox: How can employers motivate employees to build their skills and give employers high commitment when employers no longer give employees any promise of job security or prospect of promotion? The resolution of this paradox is what management practitioners and organizational theorists refer to as "the new psychological contract."

This Article describes the new psychological contract and places it in the context of other recent changes in the employment setting. Once the terms of the new psychological contract are understood, it is possible to consider the impact of the new workplace on several

4. S*ee infra* Part I.

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important issues in employment regulation today, including issues of ownership of human capital, discrimination, employee representation, and income inequality.

Part I describes the old psychological contract, which arose out of the scientific management and other workplace rationalization movements in the early 1900s that dominated employment relations throughout most of this century. The old psychological contract, with its promise of long-term job security, orderly promotional opportunities, longevity-linked pay and benefits, and long-term pension vesting, encouraged worker attachment to the firm.

Part II presents the U.S. Department of Labor and Bureau of the Census data on changes in the labor market since the 1970s. In particular, data is presented to demonstrate that long-term jobs are declining and that job tenure is decreasing, particularly among older male workers, the ones who were the primary beneficiaries of the former internal labor markets structures.

Part III analyzes recent organizational behavior and management theory, as well as attempts by management consultants and practitioners to discern the terms of the new psychological contract. It pays particular attention to the concepts of the psychological contract, a boundaryless career, and organizational citizenship behavior. It also analyzes the specific proposals for workplace organization in the theories of competency-based organizations and total quality management. By analyzing the ideas of management theorists and practitioners, the terms of the new psychological contract are identified. Some of these terms are: general skills training, upskilling of jobs, networking opportunities, contact with firm constituents for employees at all levels of the firm, microlevel job control, market-based pay, and firm-specific dispute resolution institutions for ensuring procedural fairness.

Part IV identifies features of existing labor and employment regulation that are ill-suited to a workplace patterned on the new psychological contract. It introduces the issues addressed in the remainder of the Article—the implications of the new psychological contract for the law of ownership of human capital, employment discrimination, employee representation, and income distribution.

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Part V applies insights about the new psychological contract to the problem of ownership of human capital. With increasing frequency, employers are suing their former employees to restrain them from working for competitors. Courts are increasingly willing to enforce covenants not to compete against former employees and restrain their use of trade secrets. Courts have introduced into the analysis of human capital cases such factors as whether the employer provided the employee with training and whether the employee had contact with customers. It is argued that enforcing covenants based upon these factors is inconsistent with the terms of the new psychological contract. One of the most important terms of the new psychological contract is the promise of employers to give employees general skills and training. This is known as the promise of employability security, and it is treated as a substitute for the former promise of employment security. Part V argues that when training and skill development are part of the employment deal, employees who leave firms to take other jobs should be able to take their general human capital with them. Similarly, the new psychological contract promises employees networking opportunities and customer contact in order to enable them to build and manage their own careers. Thus, courts should not enjoin departing employees from dealing with former firm customers when such contact was part of the tacit understanding of the employment relationship.

Part VI addresses the impact of the new psychological contract on employment discrimination. It argues that the old internal labor market models excluded women and minorities, contributing to labor market inequality. The new psychological contract, with its emphasis on horizontal mobility and boundaryless careers, does not pose the same danger of exclusion and marginalization to these groups. On the other hand, the new psychological contract renders lines of authority and chains of command within firms invisible, thereby making informal and invisible power structures more significant. It is argued that the very informality and invisibility of the new power structures make it difficult for traditional outsiders—especially women and minorities—to attain positions of power within firms. Part VI also argues that the new labor practices pose a challenge to equal employment litigation strategies. Until now, much employment

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discrimination litigation has sought to provide advancement opportunities for women and minorities up orderly job ladders and chains of progression. Without such visible promotion targets, new antidiscrimination strategies need to be devised. Part VI concludes with suggestions for new strategies to combat discrimination, and new dispute resolution procedures by which discrimination can be challenged.

Part VII addresses the consequences of the new psychological contract for employee representation and for labor law. It argues that present union practices and existing labor law are grounded in the old psychological contract and, therefore, are not easily adapted to the new workplace practices. Two new models of union organization are presented—new craft unionism and citizenship unionism. The ability of these forms of unionism to address problems of representation, benefits, income distribution, and other issues that arise in the new workplace is explored. In addition, Part VII presents suggestions for changes in the labor laws that would enable unions to provide representation and employee protection in the boundaryless workplace.

The Conclusion summarizes the impact of the new psychological contract on issues of the ownership of human capital, employment discrimination, and employee representation. It concludes that it is both necessary and possible to design a system for regulating the new workplace that preserves social justice for employees.

I.

THE OLD PSYCHOLOGICAL CONTRACT

A. Production and Knowledge in the Early Twentieth Century

In the nineteenth century, skilled workers controlled most aspects of the production process. Skilled workers, acting in teams, determined the process to be used, the division of labor among themselves, the division of payment, and often the design of the product. Their ability to do so was based on their exclusive knowledge of the production process and the "mysteries" of the craft.

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Skilled workers did work that required training, experience, dexterity, and judgment. They had unskilled helpers to do the heavy manual work of lifting, pushing, carrying, and hoisting.[5]

Skilled workers saw production as a partnership in which they determined what needed to be done and how to do it, while the manufacturers provided the workplace, the raw materials, the tools, and the marketing. For example, in the steel industry, skilled workers hired their own unskilled helpers, whom they paid out of their own paychecks. Steel was made by skilled workers with unskilled helpers, using the companies' equipment and raw materials. With their monopoly of knowledge of the production process, skilled workers were able to ensure themselves reasonably steady jobs, acceptable levels of pay, and social status within their communities.[6]

In the nineteenth century steel industry, wages were based upon a combination of the tonnage produced and the market price for iron and steel. This was essentially a profit-sharing arrangement in which the workers benefited when prices were high but sacrificed when prices were low.[7] As Andrew Carnegie said of the wage system in the nineteenth century, "It is the solution of the capital and labor problem because it really makes them partners—alike in prosperity and adversity."[8] Once the wage pool was established, the distribution of wages within the ranks of the skilled workers, and between the skilled workers and their helpers, was determined by the workers themselves.[9] Thus, each individual's wages were set by a combination of market

5. *See* JOHN A. FITCH, THE STEEL WORKERS 154 (Univ. Pittsburg Press 1989) (1910). *See generally* Stone, *supra* note 1, at 32.

6. *See* Stone, *supra* note 1, at 30–33.

7. *See id.* at 30–31.

8. ANDREW CARNEGIE, AUTOBIOGRAPHY OF ANDREW CARNEGIE 238 (2d ed. 1948).

9. *See* MONTGOMERY, *supra* note 1, at 11–12, *cited in* Stone, *supra* note 1, at 32.

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demand for the product, group effort, and intragroup decisions about equity; the employer had little role in the process.

The ability of the nineteenth century skilled workers to control their wages and working conditions was a result of both their skills and their unions. In that period, craft unions were repositories of skill and guarantors of its value, akin to the European craft guilds in early modern times.[10] Senior members of the craft transmitted their knowledge to newcomers through the union-controlled apprenticeship system. Craft unions devised and enforced detailed craft governance rules and apprenticeship arrangements that determined the circumstances under which such training was permitted. The apprenticeship system thus protected the skilled workers' human capital, limited the future labor supply, and at the same time enhanced the union's prestige. Thus, the unions were complex systems for transmitting human capital between generations while restricting access to the craft and protecting its economic value.[11]

When product markets expanded in the late nineteenth century, largely as a result of increased international trade by American producers, employers needed to raise the productivity of labor in order to compete.[12] Employer efforts to increase productivity lead to increased union agitation and increasingly violent labor-management confrontations.[13] Because the craft-dominated labor system did not permit employers to raise productivity, employers self-consciously set about to destroy the skilled workers' unions and their control of the production process. Thus, employers formed organizations such as

10 . For a succinct description of the early modern guild system, see Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 632–33 (1960).

11 . *See generally* Stone, *supra* note 1, at 32.

12 . Between 1880 and 1910, the United States experienced unprecedented economic expansion, and at the same time the population more than doubled. *See* REINHARD BENDIX, WORK AND AUTHORITY IN INDUSTRY: IDEOLOGIES OF MANAGEMENT IN THE COURSE OF INDUSTRIALIZATION 254–55 (1956).

13 . *Id.* at 265–66.

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the National Association of Manufacturers and other industry-specific trade associations, and embarked on a concentrated open shop campaign in order to break the growing union movement. According to sociologist Reinhard Bendix:

> [T]he employers' endorsement of the need for collective action was a clear-cut departure from established ideas and practices. To be sure, employers had organized in the past in order to have their common interests represented more effectively. But never had they organized in order to solve problems of management within the enterprise . . . .
>
> The outlook of American employers changed also in other respects during the open-shop campaign. . . . One of these changes consisted in the fact that employers were being forced to concern themselves with labor as a problem rather than "solve" it by simply dismissing the worker who would not do.[14]

The lockout at Carnegie Steel Corporation's Homestead Works in 1892 was the first significant battle over control of the production process between skilled workers and manufacturers in American industry. With the help of the state militia, Carnegie defeated the Amalgamated Association of Iron, Steel, and Tin Workers, thereby gaining the freedom to set the work rules and production techniques within the firm.[15] Other firms soon followed suit.[16]

B. The Era of Scientific Management

After Homestead, many American manufacturers embarked on a program to take knowledge about production away from the skilled

14. *Id.* at 267.

15. For a description of the Homestead lockout, see DAVID BRODY, STEELWORKERS IN AMERICA: THE NONUNION ERA 53–57 (Univ. Ill. Press 1998) (1960); Stone, *supra* note 1, at 34–35.

16. *See* MONTGOMERY, *supra* note 1, at 24.

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workers and thereby break their power. They turned to a new field of expertise, industrial engineering, which was concerned with rationalizing and redesigning the production process so as to give management control over production and to increase the productivity of labor.[17] Their initial efforts were directed toward payment methods. Frederick Halsey devised a two-tier payment plan in which a standard rate was set for each job, but those workers who completed the job more quickly received a bonus. The bonus amounted to a portion of the savings created by the workers' increased productivity. The Halsey premium plan became a model for many productivity-focused payment systems that were devised in that period.[18]

Frederick Winslow Taylor was an industrial engineer who also worked on the problem of wage payment systems. His payment plan, called a differential piece rate, was modeled on the Halsey plan. In Taylor's plan, the employer established two rates—a low day rate for the average workman and a high piece rate for the "first-class workman." As with the Halsey plan, the higher rate in Taylor's plan was calculated to give the worker a portion of the earnings from the increased output, but unlike Halsey's, it used a piece rate to increase productivity.[19] Taylor also proposed a method to measure each individual's output so that piece rates could be "scientifically" established. His famous time and motion studies were devised in order to determine the correct rate for each job.

Taylor's system was originally designed to increase labor productivity. But unlike the other work rationalizers of the era, Taylor developed a comprehensive, systematic approach for reinventing the workplace, a system he called scientific management.[20] Scientific

17. *See* SANFORD JACOBY, EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN AMERICAN INDUSTRY, 1900–1945, at 39–47 (1985).

18. *See* Stone, *supra* note 1, at 42.

19. *See* TAYLOR, SHOP MANAGEMENT, *supra* note 3, at 70–71.

20.

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management addressed not only payment and incentives, but also the other aspects of the perceived "labor problems" of the day: low morale, high turnover, militant unionism, restriction of output, and the lack of skilled operators. The latter problem was the result of a crisis of apprenticeship in the early twentieth century. Employers found that having broken the craft unions and their apprenticeship systems, they could not get the skilled workers they needed.[21] To address these issues, the practitioners of scientific management advocated three central policies.

First, Taylor insisted that firms take knowledge away from the workers and locate it in management. He wrote, "All possible brain work should be removed from the shop floor and centered in the planning or laying-out department."[22] He urged companies to set up a planning department to serve as the central control for the flow of all the work through the entire production process. The planning department was to develop a series of charts showing the path of each piece of material as it progressed through the plant and how much time each operation took. All production work was to be programmed in advance and put on these charts. The planning department would then issue direction cards to foremen, who would then issue directions to the workers. This system was designed to separate thinking from doing, with all the thinking done by management.[23]

Second, Taylor devised a technique called time and motion studies to teach management the "One Best Way" to perform each task in a given production process.[24] The purpose of determining the one best

21. *See* TAYLOR, SCIENTIFIC MANAGEMENT, *supra* note 3, at 9.

22. *See* Stone, *supra* note 1, at 55–57.

23. TAYLOR, SCIENTIFIC MANAGEMENT, *supra* note 3, at __.

24. *See generally* Stone, *supra* note 1, at 55.

See, e.g., ROBERT KANIGEL, THE ONE BEST WAY: FREDERICK WINSLOW TAYLOR AND THE ENIGMA OF EFFICIENCY 327–34 (1997) (describing derivation of Frederick Winslow Taylor and Carl G. Barth's "law of heavy laboring" in which, to handle 92 pounds of pig iron, a man must be

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way was to enable management to describe fully each work task and determine its scientifically accurate piece rate. Armed with the results of the the time and motion study, the foreman's job was to see to it that each specific task was performed precisely in the prescribed manner.[25]

Third, advocates of scientific management urged firms to establish rigid promotion hierarchies, with clearly defined career ladders and limited ports of entry from outside.[26] In the ladder, each job should provide the necessary training for the one above it, so that over time workers would get the training they needed to advance up the ladder. One purpose of the job ladders was to bind the worker to the firm, thereby encouraging loyalty, decreasing turnover, and discouraging oppositional behavior. The other purpose was to give workers an incentive to train others and to gain knowledge themselves so that they could advance.[27]

While Taylor applied the principles of scientific management primarily in the steel industry, the practices quickly spread to many sectors of American industry.[28] At about the same time, another major figure in twentieth century industry, Henry Ford, developed a work relations system of his own. Ford's assembly line production

under the load 43 percent of the day and as entirely free of load during 57 percent of the day and as the load becomes lighter, the time during which the man can remain under the load increases).

25. For example, in a paper entitled "On the Art of Cutting Metals," published in 1906, Taylor described in 248 pages and 2 dozen foldout charts the "one best way" to cut every known industrial metal using every known cutting tool. *See id.* at 387–88.

26. *See, e.g.*, MEYER BLOOMFIELD, LABOR AND COMPENSATION (1921).

27. The emphasis on orderly promotions along job ladders with limited ports of entry came not from Taylor, but from subsequent applications of Taylorist methods. *See* JACOBY, *supra* note 17, at 92–93; Stone, *supra* note 1, at 45–49. In general, the term scientific management has come to mean systems that organize promotions in job ladders with limited ports of entry, together with the other principles that Taylor expressly propounded.

28. *See, e.g.*, HUGH G.J. AITKEN, TAYLORISM AT WATERTOWN ARSENAL: SCIENTIFIC MANAGEMENT IN ACTION 1908–1915, at 17 (1960); DANIEL NELSON, FREDERICK W. TAYLOR AND THE RISE OF SCIENTIFIC MANAGEMENT 3 (1980); HABER, *supra* note 2, at 26; CLARENCE BERTRAND THOMPSON, SCIENTIFIC MANAGEMENT: A COLLECTION OF THE MORE SIGNIFICANT ARTICLES DESCRIBING THE TAYLOR SYSTEM OF MANAGEMENT 11, 12 (1914).

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shared many attributes of Taylor's system, but differed in several respects. The assembly line developed by Henry Ford was based on the premise that jobs should require minimal skill. The Fordist assembly line was not a hierarchical job ladder, but was instead a flattened job structure in which each worker could, with minimal training, perform all the jobs on the line. Rather than inducing workers to train others, Ford's goal was to embody the skills in the technology itself so that the workers needed to acquire little human capital to make the system work. Like Taylorism, the assembly line aimed to remove knowledge from the control of the workers, but unlike Taylorism, knowledge was reposed in the technology of the assembly line rather than in the planning department.[29]

Time and motion studies and differential piece rates were not major factors in the human resource model of the assembly line because there it was not important to determine the one best way to do each assembly line task. Workers on the assembly line already had little discretion about the pace or process of work. For productivity purposes, what mattered was the speed of the line, which was set by management. There was little need to provide inducements for fast work. On the other hand, because assembly line plants did not have complex multitiered job ladders, they initially experienced severe problems of low morale, turnover rates and aggressive union agitation. These problems were solved by Ford in three ways: First, by means of a high wage—five dollars a day—a wage that was so much higher than what the workers could earn elsewhere that it operated to bind them to the firm.[30] Second, the Ford Motor company encouraged long-term loyalty by developing a wide range of social services to bind the worker to the firm. The company constructed housing, playgrounds, swimming pools, and bandstands. It started orchestras and bands,

29 . *See* STEPHEN MEYER III, THE FIVE DOLLAR DAY: LABOR MANAGEMENT AND SOCIAL CONTROL IN THE FORD MOTOR COMPANY, 1908–1921, at 37–38 (1981); RUTH MILKMAN, FAREWELL TO THE FACTORY: AUTO WORKERS IN THE LATE TWENTIETH CENTURY 23–24 (1997).

30 . *See* MEYER, *supra* note 29, at 1; Daniel M.G. Raff & Lawrence H. Summers, *Did Henry Ford Pay Efficiency Wages?*, J. LAB. ECON., Oct. 1987, at S57, S72–S73.

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with instruments provided by the company. It built hospitals and retained nurses to visit employees' families in their homes. It helped build public schools and libraries, and offered night courses in English to immigrants.[31] Third, the company adopted a policy against frivolous or arbitrary dismissals, which it advertised to its workers and enforced against despotic line supervisors.[32]

Taylorism and Fordism became the two dominant types 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—a process recently termed "deskilling"—while at the same time, it encouraged employee-firm attachment through promotion and retention policies, explicit or de facto seniority arrangements, elaborate welfare schemes, and longevity-linked benefit packages. While these systems had their origins in the blue-collar workplace of the smokestack industrial heartland in the 1910s, by the 1960s they were adapted to large white-collar workplaces such as insurance companies and banks.[33]

When unions entered large manufacturing establishments through the organizing drives of the 1930s, they were not the American Federation of Labor (AFL)-affiliated craft unions of the nineteenth century. Rather, they were industrial unions, affiliated with the newly formed Congress for Industrial Organization (CIO), uniting workers around a common employer or industry rather than on the basis of a common skill. Many of the newly organized workers in the 1930s were unskilled or semiskilled and did not partake of the craft legacy of the old AFL at all. In their organizing, the CIO unions appealed to a sense of solidarity based not on skill but on employment status. Once

31. For a detailed description of the corporate welfare work, see JACOBY, *supra* note 17, at 49–54, and Stone, *supra* note 1, at 49–54. Ford Motor Company's Sociology Department was heavily criticized in the 1930s because it observed and intruded in the workers' personal and family lives. *See* MEYER, *supra* note 29, at 164–67.

32. *See* JACOBY, *supra* note 17, at 118.

33. *See* HARRY BRAVERMAN, LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY 335, 340 (1974).

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established, these unions did not seek to restore workers' skills and power in production. Rather, they bargained for pay and benefits that were consistent with internal labor market job structures, such as seniority, just cause provisions, and longevity-based benefits.[34]

The labor and employment laws that emerged in the 1930s reinforced the Taylorist and Fordist internal labor market job structures. The old age assistance and unemployment compensation provisions of the Social Security Act of 1935[35] tied benefits to employment. The National Labor Relations Act of 1935[36] (also now as the Wagner Act) while facially neutral between the craft and industrial styles of unionism, in operation favored employer-based and plant-based forms of organization.[37]

In the 1940s, the War Labor Board (WLB) began to promote employer-specific grievance and arbitration systems in order to resolve disputes without strikes. From these experiences, academics and policymakers who served on the WLB came to appreciate the value of private dispute resolution in the organized workplace.[38] So after the war, the U.S. Supreme Court fashioned a body of industrial common law to support the growing institution of grievance arbitration.[39] Labor arbitration within the unionized workplace reinforced internal

34. *See* NELSON LICHTENSTEIN, THE MOST DANGEROUS MAN IN DETROIT: WALTER REUTHER AND THE FATE OF AMERICAN LABOR 149–53 (1995) (describing the impact of unionization in the automobile industry); Stone, *supra* note 1, at 70–72 (describing the impact of unionization on internal labor market job structures in the steel industry).

35. 49 Stat. 620, 42 U.S.C. §§ 361–305.

36. 49 Stat. 449, 29 U.S.C. §§ 151–___.

37. *See* JAMES A. GROSS, 1 THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD 134–37 (1974).

38. *See* JAMES B. ATLESON, LABOR AND THE WARTIME STATE: LABOR RELATIONS AND LAW DURING WORLD WAR II 60–64 (1998).

39. Textiles Works v. Lincoln Mills, 353 U.S. 448, 456 (1957); *see* Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1524–25 (1981).

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labor markets by enabling unions to enforce employers' implicit promises of job security and orderly promotion.[40]

Management theorists in the 1930s and 1940s built upon the basic ideas of Taylorism and Fordism. The human relations school developed from experiments at Western Electric about the effects of workplace design on productivity. These experiments yielded a number of insights about the ways in which small informal work groups can restrict production and develop oppositional attitudes.[41] Human relations school theorists advised management to break the counterproductive dynamics of informal work groups using individualized employment counseling and giving individuals opportunities to let off steam. The goals of the human relations school were to prevent wildcat strikes, spontaneous work stoppages, and other localized job actions so that internal labor markets could operate smoothly.[42]

The organizational and human resource theorists of the 1940s and 1950s similarly did not challenge the assumptions of scientific management. These theorists were concerned with issues of how to design and operate large bureaucratic organizations, manage the authority and status hierarchies, and organize large, sprawling organizational structures.[43]

40 . *See* Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 622–24 (1992).

41 . *See* F.J. ROETHLISBERGER & WILLIAM J. DICKSON, MANAGEMENT AND THE WORKER: AN ACCOUNT OF A RESEARCH PROGRAM CONDUCTED BY THE WESTERN ELECTRIC COMPANY HAWTHORNE WORKS, CHICAGO (1967) (describing the history and analysis of the results of the Hawthorne Experiments). *See generally* LOREN BARITZ, THE SERVANTS OF POWER: A HISTORY OF THE USE OF SOCIAL SCIENCE IN AMERICAN INDUSTRY 77–116 (1960); BENDIX, *supra* note 12, at 308–19.

42 . *See* BENDIX, *supra* note 12, at 317–18; Stone, *supra* note 39, at 1566–69.

43 . *See* HOWELL JOHN HARRIS, THE RIGHT TO MANAGE: INDUSTRIAL RELATIONS POLICIES OF AMERICAN BUSINESS IN THE 1940S, at 60–66 (1982).

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In the 1940s and 1950s, the AFL and the CIO unions fought hard to organize and win recognition. Unions in industrial establishments bargained for pay, benefits, grievance procedures, seniority systems, and highly specific, narrow job definitions—all consistent with the Taylorist job structures. The seniority systems dovetailed with existing job ladders, although often the union input forced employers to make modifications in the specific mobility paths available for upward mobility and the specific bumping paths for downward mobility. The union-initiated job definitions were a form of protection against foremen's demands for intensified efforts. They gave workers control over the pace of work, not individually as nineteenth century skilled craftworkers possessed, but collectively as specified in the periodic collective agreements. Narrow job definitions were also seen by unions as protecting job security and overtime pay because, by preventing cross-utilization, narrow definitions forced employers to utilize more workers than might have been necessary to complete specific tasks.[44] Unfortunately, the price of specific job definitions in an era of deskilling was that boring jobs became even more narrow and deadening. In addition, by emphasizing specific and narrow job definitions, unions opened themselves up to charges of featherbedding.

44. *See, e.g.*, MILKMAN, *supra* note 29, at 24–25 (describing union emphasis on institutionalizing seniority and promoting solid job classification system at the Linden, New Jersey General Motors plant).

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C. The State of the Internal Labor Market in the 1970s

By the 1970s, most large companies had established internal labor markets for at least the blue-collar portions of their operations.[45] These internal labor markets were characterized by job ladders, limited ports of entry, and implicit contracts for long-term job security. Employers promised long-term job security, and in return workers invested in developing firm-specific skills.

Some labor economists have developed a model of career wage trajectories to explain compensation levels in the internal labor market over the course of an individual's employment. This model of wages makes apparent the reciprocal nature of the implicit promises within an internal labor market.[46] The model is as follows: Both companies and workers invest in the acquisition of skills and knowledge on the job, skills and knowledge that are necessary for employees to function productively. Some of this investment in human capital is general and gives workers an asset they can sell in the general labor market. However, some of this investment is firm-specific, so that the knowledge gained redounds primarily to the firm.[47] By definition, employees only benefit from acquiring firm-specific capital if their firm rewards them for acquiring it.

Because some of the investment employees make in their training is firm-specific, the employees' value to their employer increases over time as they acquire firm-specific capital, while their value to other

45 . See CLAUDIA DALE GOLDIN, UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN 247 n.38 (1990) for a review of the economic literature on internal labor market institutions.

46 . This model is described in more detail in Katherine Van Wezel Stone, *Policing Employment Contracts Within the Nexus-of-Contracts Firm*, 43 U. TORONTO L.J. 353, 363–69 (1993).

47 . *See generally* PETER B. DOERINGER & MICHAEL J. PIORE, INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS 13–40 (1971) (defining general and firm-specific skills). *See also* Robert J. Willis, *Wage Determinants: A Survey and Reinterpretation of Human Capital Earnings Functions*, *in* 1 HANDBOOK OF LABOR ECONOMICS 525, 594 (Orley Ashenfelter & Richard Layard eds., 1986).

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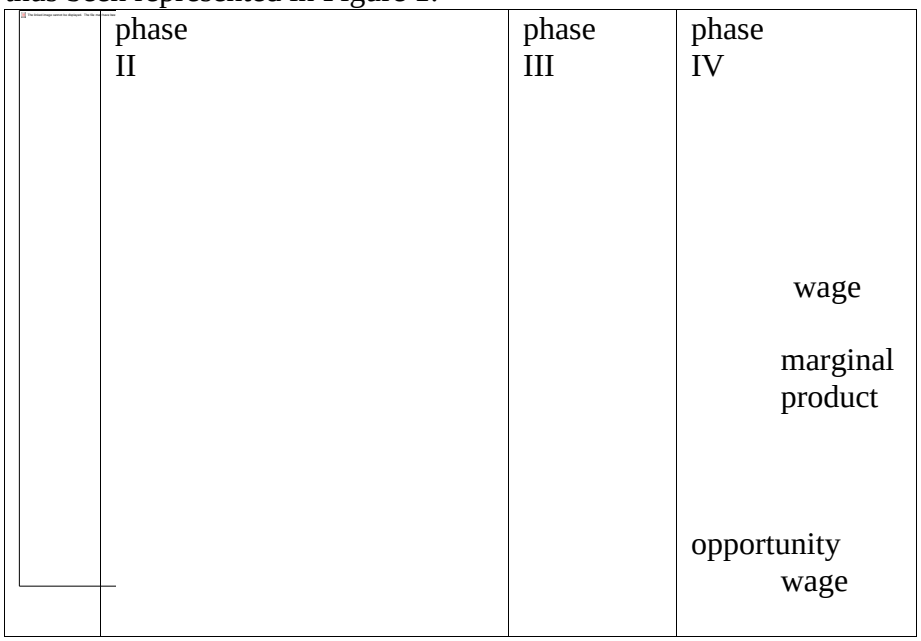
employers might not. The interaction between employees' compensation, and the value of their marginal product over time, has thus been represented in Figure 1:[48]



48 . This graph appears in Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. PA. L. REV. 1349, 1362 (1988). It is a variation on a diagram first developed by Edward P. Lazear. *See* Edwad P. Lazear, *Why is There Mandatory Retirement?*, 86 J. POL. ECON. 1261, 1265 fig.1 (1979); *see also* GARY S. BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS, WITH SPECIAL REFERENCE TO EDUCATION 23 chart 1 (2d ed. 1975) (charting relation of earnings to age).

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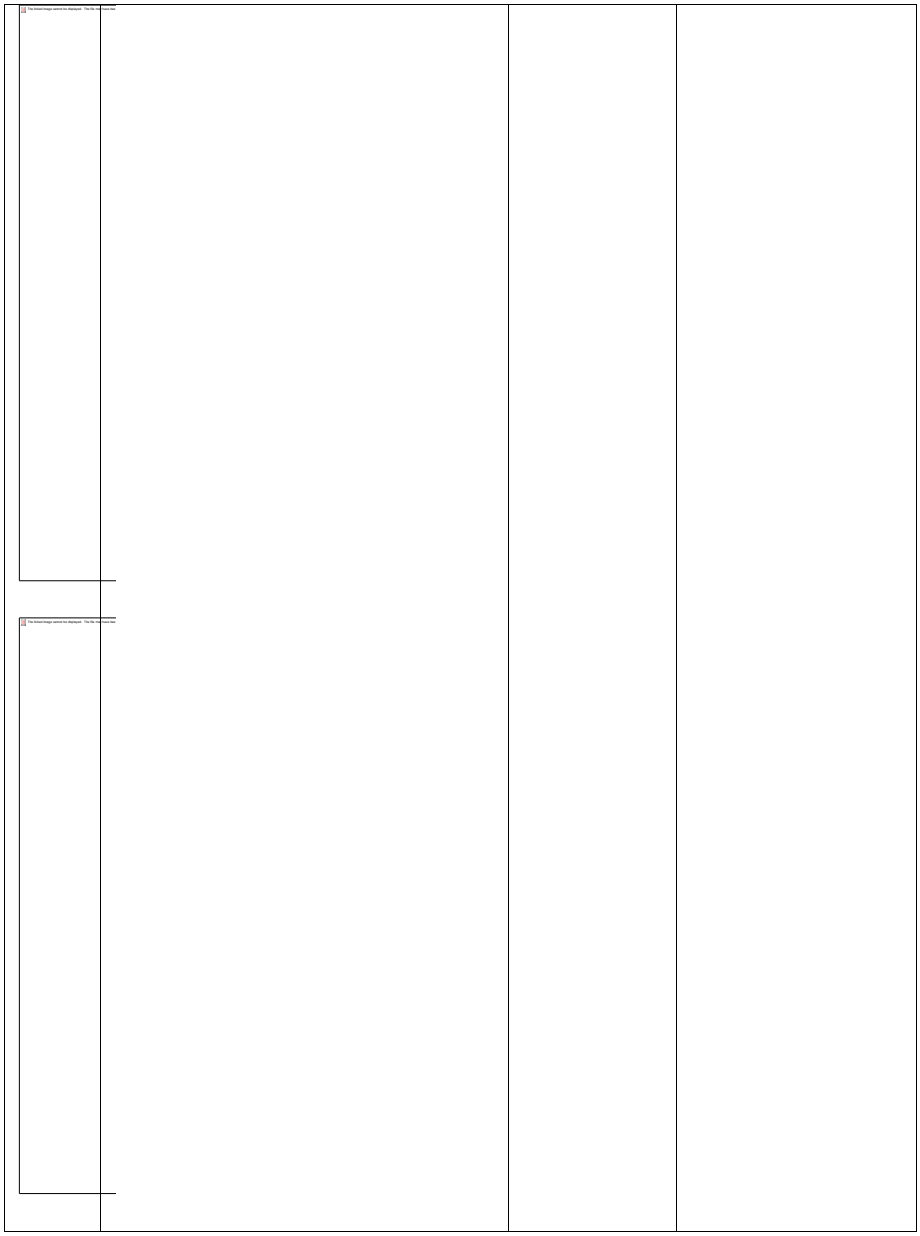

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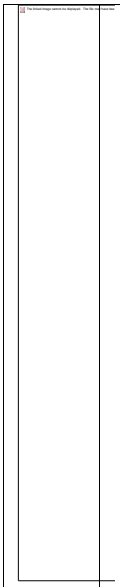 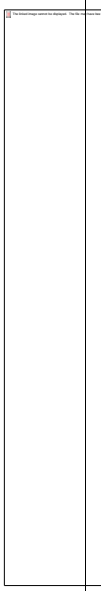 phase			

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As shown, in the first phase of employment, a new employee in an internal labor market is paid an amount that equals or is slightly greater than the value of her marginal product, and less than the value of her opportunity wage—the amount she could command in the general labor market. This is because she is acquiring human capital, and both she and her employer are investing in its acquisition. As stated earlier, some of this human capital is firm-specific and some is not.

At some point the employee acquires enough capital to become useful to the employer so that the value of her marginal product rises. This is phase two. In the second phase of employment, the employee is paid less than the value of her marginal product. Hence the firm is already benefitting from the joint investment in phase one.

What is most notable about phase two is that the employee is paid not only less than the value of her marginal product, but also less than her opportunity wage. Why, we might ask, would anyone accept a rate of pay that is lower than she could earn elsewhere? The reason is that in this phase, the employee has an expectation that the job will be steady and the wage will keep rising throughout her working career. On the basis of that expectation, she defers compensation. The expectation, created by the employer, is a defining element in the notion of the internal labor market. Thus, in phase two, the employee is investing in acquiring human capital and is deferring compensation.

In the third phase, the firm-specific nature of the human capital the employee has acquired means that she is worth more to her employer than she is to other employers. Hence, the value of her marginal product to her employer is greater than the value of her marginal product to other employers. In this period she is paid more than her opportunity wage, but less than the value of her marginal product.

And in phase four—the employee's later years—her productivity begins to lag. However, due to customs, norms, policies, or incentive schemes, her pay is not reduced. Instead, her wage level either continues to rise or levels off. Thus, in this period she is paid more than the value of her marginal product and more than her opportunity

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wage. This is the recoupment stage in which the employee recovers on her investment in firm-specific training and deferred compensation.

The model illustrates the fact that during the middle two periods, employees have made an investment for which they have not yet been compensated and for which they anticipate deferred compensation. Their investments in firm-specific human capital and willingness to work for deferred compensation are made not on the basis of some explicit contractual arrangement, but rather take the form of an implicit contract.[49] As modeled, the implicit contract is that in the early phases of their careers, employees will be paid less than the value of their marginal product and less than their opportunity wage. In exchange, they receive a promise of job security and a wage rate later in their working lives that is greater than the value of both their marginal product and their opportunity wage.[50] Thus, employees in internal labor markets are investing in the firm during their training and high productivity periods with the expectation of recouping on the investment in their declining years.[51]

In order to be plausible, the internal labor market model and the notion of an implicit contract by which employees defer compensation must be accompanied by a theory that explains why an employer would

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. On the implicit contract in the internal labor market, see *id.* at __. S*ee also* RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 170–71 (6th ed. 1997); OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING 249 (1985).

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. *See* Sherwin Rosen, *Implicit Contracts: A Survey*, 23 J. ECON. LITERATURE 1144, 1147 ("Wage income is in part an installment payment on specific-investments."); *see also* Martin Segal, *Post-Institutionalism in Labor Economics: The Forties and Fifties Revisited*, 39 INDUS. & LAB. REL. REV. 388, 400–01 (1986) (discussing empirical studies which "reinforce the view . . . that many managerial practices concerning hiring, promotions, and wages reflect an approach in which the process of employment is seen as representing a long-term relationship between the firm and its individual workers").

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make such a promise and why an employee would accept it. Nobel Laureate Gary Becker explains the widespread use of internal labor markets in terms of human capital. He argues that employers make an implicit promise of deferred compensation in order to induce employees to invest in firm-specific training. Without such a promise, he says, employees will not invest in such training. And if they do not, those employers that require employees to have firm-specific skills will have to pay for the training themselves. Once they do, they bear a risk that the trained employees will leave their firm. In order to discourage turnover, Becker reasons that employers will get employees to share some of the costs of firm-specific training, and to do that, employers will "offer . . . higher wages after training than could be received elsewhere."[52]

The Becker explanation of internal labor markets is a plausible model of rational employer behavior. It becomes even more powerful when joined with an historical understanding of the role of implicit promises of job security and deferred compensation in personnel relations. As discussed above, the implicit promise of scientific management has served at least two employer goals. First, it has encouraged employee longevity, discouraged turnover, and provided employee motivation. [auth: the following sentence is edited as indicated, but it is unclear: please revise] Employers believe that long-term employees high morale and productivity, and their tendency to shirk, sabotage, or unionize will disappear. This view was held and expounded by many of the nineteenth and early twentieth century captains of industry, including Andrew Carnegie and Henry Ford.[53]

Second, implicit promises solve the problem of training. Training became problematic after employers broke the craft unions and abolished the union-controlled apprenticeship systems at the end of the nineteenth century. Firms responded to a lack of skilled workers

52. BECKER, *supra* note 48, at 29–30; *see also* PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 64–67, 140–50 (1990) (describing benefits to employers of long-term career relationships with their employees).

53. *See* JACOBY, *supra* note 17, at 115–26.

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by adopting methods and processes that relied upon firm-specific rather than generalized skills. However, employers still needed experienced workers to teach those skills and to share their knowledge about production with new recruits. Yet, experienced workers were reluctant to share their knowledge with younger workers in the absence of craft unions. Without some mechanism to ensure them job security, older workers knew that if they trained their juniors, they stand to be replaced as soon as their own speed, dexterity, and strength began to fade. Yet firms knew that if older workers did not provide new workers with such training, years of valuable knowledge and experience would be lost to the firm.

Personnel managers have used many techniques to solve the training problem, including such techniques as suggestion boxes and quality circles. However, the most effective means to solve the problem has been to promise workers that they will not be fired in their later years, despite some decline in their faculties. The implicit promise of job security and deferred compensation in the internal labor market thus solved the training dilemma.

So for almost one hundred years, promises of job security have been made to employees. They appear in many forms, such as in explicit oral promises made by supervisors, in recruitment brochures, in employment manuals, and in general knowledge transmitted through the in-plant grapevines.[54] They have served as a fundamental fact of life in most medium- and large-sized establishments, whether they be in the industrial or service sectors.[55] Implicit promises are made in

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. *See, e.g.*, MILKMAN, *supra* note 29, at __ Even though employers benefit from giving implicit promises, there are many circumstances in which employers have an incentive to reneg. Thus, for example, an unjust dismissal or a large corporate down-sizing is interpreted by employees as a breach of an implicit promise. *See infra*. at __; s*ee also* Local 1330, United Steelworkers v.

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both union and nonunion workplaces. In unionized shops, negotiated seniority provisions, just cause for discharge clauses, pension vesting rules, and other mechanisms reinforce the implicit promise. These promises comprise what organizational behavior theorists have come to call the "psychological contract" between the employee and the employer.[56]

I.

THE CHANGING NATURE OF EMPLOYMENT

Sometime in the late 1970s, employment practices began to change. The first indication of a fundamental change in the Taylorist system was the rapid growth of temporary agencies.[57] In the 1970s, temporary agencies, once limited to providing short-term secretarial help and intermittent nursing services, began to provide workers for many other types of jobs, including maintenance work, custodial services, legal services, computer programming, and health care.[58] Temporary employees were hired by temporary agencies and then placed in short-term positions with multiple and rotating firms. Between 1980 and 1989, the number of employees working for temporary agencies doubled, from 518,000 to 1,032,000. This number continued to rise dramatically in the early 1990s.[59] Similarly,

United States Steel Corp., 631 F.2d 1264, 1265–66 (6th Cir. 1980) (describing a union attempting to enforce implicit promise by steel company to stay in the community).

56. Denise M. Rousseau, *Psychological and Implied Contracts in Organizations*, 2 EMPLOYEE RESPONSIBILITIES & RIGHTS J. 121, 121 (1989).

57. *See* Francoise J. Carré, *Temporary Employment in the Eighties*, *in* NEW POLICIES FOR THE PART-TIME AND CONTINGENT WORKFORCE 48 (Virginia L. duRivage ed., 1992).

58. *See* PETER F. DRUCKER, MANAGING IN A TIME OF GREAT CHANGE 66–67 (1995) (describing change in composition of temporary workers).

59. *See* CPS data, *infra*. However, since 1995, there has been little rise in the percent of workers in atypical employment categories. According to the Census Department's Current Population Survey, the percentage of the workforce who work for temporary help agencies or as independent contractors did not change from 1995 to 1999. *See Contingent and Alternative*

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the number of part-time employees and independent contractors increased.[60] Also, a number of employers established pools of temporary or provisional workers within their own firms—workers who were hired under express understandings of their impermanent status.[61] Thus, in the past 20 years, a growing number of workers have become part of an atypical workforce, a workforce comprised of workers who lack a specific employer and/or have no long-term attachment to a firm.

Even though the numbers of contingent and provisional workers increased, total the number of such workers remains a minuscule percentage of the workforce. In 1999, the U.S. Census Bureau's Current Population Survey (CPS) found that temporary agency employees, on-call workers, and persons employed by contract labor firms together constituted merely 3 percent of the workforce, or roughly 4 million workers out of a total work force of 131 million.[62] Independent contractors constituted a larger group—6.3 percent of the workforce, or roughly 8.2 million workers—but still a far cry from the majority of the working population.[63] More important than the rise of these new atypical workers is the change in the implicit psychological contract of workers who continue to be employed full-time by major corporations.

Employment Arrangements, at http://stats.bls.gov/news.release/ conemp.nws.htm (Dec. 21, 1999) [hereinafter *Contingent Employment*] (presenting 1999 data); *see also* Sharon R. Cohany, *Workers in Alternative Employment Arrangements: A Second Look*, MONTHLY LAB. REV., Nov. 1998, at 3, 4 ex.1, 5 tbl.1 (presenting 1995 and 1997 data).

60. *See* Chris Tilly, *Short Hours, Short Shrift: The Causes and Consequences of Part-Time Employment*, *in* NEW POLICIES FOR THE PART-TIME AND CONTINGENT WORKFORCE, *supra* note 57, at 15, 17 fig.1.

61. *See, e.g.*, Vizcaino v. United States Dist. Court, 173 F.3d 713, 716–17 (9th Cir. 1999) (describing Microsoft's in-house temporary workforce).

62. *See Contingent Employment*, *supra* note 59. This data is almost unchanged from 1995 and 1997. *See* Cohany, *supra* note 59, at 4–6 tbl. 1–2.

63. *See Contingent Employment*, *supra* note 59; *see also* Cohany, *supra* note 59, at 4–6.

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It has been widely reported that large corporations no longer offer their employees implicit contracts for lifetime employment.[64] Work has become contingent, not in the sense that it is formally defined as short-term or episodic, but in the sense that the attachment between the firm and the worker has been reduced. The recasualization of work has reportedly become a fact of life both for blue collar workers and for high-end professionals and managers. This was expressed eloquently by Jack Welch, the miracle-maker chief executive officer of General Electric Company (GE), in an interview with the Harvard Business Review in 1989:

> [Harvard:] All corporations, but especially giant corporations like GE, have implicit social and psychological contracts with their employees mutual responsibilities and loyalties by which each side abides. What is GE's psychological contract with its people?
>
> [Jack Welch:] Like many other large companies in the United States, Europe, and Japan, GE has had an implicit psychological contract based on perceived lifetime employment. People were rarely dismissed except for cause or severe business downturns, like in Aerospace after Vietnam. 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.[65]

64. *See, e.g.*, *The Future of Work: Career Evolution*, ECONOMIST, Jan. 29–Feb. 4, 2000, at 89; *see also* DRUCKER, *supra* note 58, at __; ROSABETH KANTER, ON THE FRONTIERS OF MANAGEMENT 190 (1997); RICHARD SENNETT, THE CORROSION OF CHARACTER 23 (1998).

65. Noel Tichy & Ram Charan, *Speed, Simplicity, Self-Confidence: An Interview with Jack Welch*, HARV. BUS. REV., Sept.–Oct. 1989, at 112, 120 (emphasis omitted).

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Some economists have raised questions about whether there has in fact been a trend away from long-term worker-firm attachment and toward contingent employment.[66] The empirical debate reflects two sources of disagreement. First, there is disagreement about what constitutes contingent employment. Some commentators lump together all forms of atypical employment, including part-time work, flexible hours, and seasonal employment, even when such work is long-term and ongoing. Others include independent contractors in the definition, even though many of these are, by definition, not employees at all. Yet others include long-term employees who work at home. The definition of contingency one uses determines how extensive one finds the phenomena to be, and whether one sees it as a growing or declining feature of the labor market.[67]

For the purposes of understanding the new work relationship, it is useful to understand contingent employment as work that has no explicit or implicit promise of continuity. For the sake of linguistic clarity, I propose to substitute the term "precarious employment" for contingent employment, with precarious employment meaning the opposite of long-term stable employment organized in an internal labor market. Thus, precarious employment characterizes the employment relations of employees who do not have a long-term attachment to their firm. The term includes many temporary help agency workers, as well as workers hired as provisional or short-term workers. But it most importantly includes workers who have steady, full-time jobs but do not have any implicit or explicit promise of job security. Thus, the precariously employed are many of those presently considered contingent workers, as well as many who are regular employees but

66. *See* Henry Farber, *Are Lifetime Jobs Disappearing? Job Duration in the United States: 1981–1993*, at 25 (Nat'l Bureau of Econ. Research, Working Paper No. 5014, 1995); Kenneth L. Deavers, *There Is No Evidence "Lifetime Jobs" Are Disappearing*, Employment Policy Foundation Newsletter, *available at* www.epf.org (Oct. 16, 1998).

67. *See, e.g.*, Gillian Lester, *Careers and Contingency*, 51 STAN. L. REV. 73, 79–81 (1998) (criticizing RICHARD BELOUS, THE CONTINGENT ECONOMY (1989), for failing to distinguish atypical employment from contingent employment).

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hired with different tacit or explicit understandings than their predecessors.

The second reason for the empirical dispute over whether or not precarious employment is a growing and significant feature of the labor market lies in the difficulties of measurement. The category of precarious employment is difficult to measure. It includes not merely workers who are explicitly labeled temporary, but also workers who have steady, full-time work, but lack a reasonable expectation of job security. None of the published studies discuss this class of workers, and indeed it would be difficult to devise a methodology for doing so.[68]

The CPS, in conjunction with the U.S. Department of Labor, conducted studies of "contingent employment" in 1995, 1997, and 1999. The studies defined contingent workers as "those who do not have an explicit or implicit contract for long-term employment."[69] These studies used three different definitions of contingent employment and found three different results concerning the percentage of the workforce considered to be contingent.[70] The range of results was as follows:

68 . The General Social Survey administered by the University of Michigan National Opinion Research Center has asked employees periodically since 1972, "How likely do you think you are to lose your job in the next year?" The results varied in different years, but the survey found a strong procyclical variation but no general downward trend. However, this survey question does not ask about an employees' belief in the existence of a promise of lifetime, or even long-term, employment. A one-year time frame is not enough to elicit views about the precariousness of one's job—it is just as likely to elicit a respondent's natural optimism that at least in the short-run, all will be well. Indeed, the fact that the results track the business cycle suggests that the respondents are simply reporting their observation on the short-term health of the economy.

69 . *Contingent and Alternative Employment Arrangements, February 1997 Technical Note*, *at* http://stats.bls.gov/news.release/conemp.tn.htm (Dec. 21, 1999) [hereinafter *Technical Note*]; *see also* Steven Hipple, *Contingent Work: Results from the Second Survey*, MONTHLY LAB. REV., Nov. 1998, at 22 app.

70 . The three different estimates differ in regard to whether self-employed and independent contractors were included, and whether or not workers who were on their current jobs for more than a year were included. *See Contingent Employment*, *supra* note 59. Thus, Estimate 1 comprises "[w]age and salary workers who expect their jobs will last for an additional year or less. Self-employed workers and independent contractors are excluded." *Id.* Estimate 2 comprises "self-employed and independent contractors who expect their employment to last for an additional year or less and who had worked at their jobs . . . for 1 year or less." *Id.* Estimate 3 comprises

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Table 1: Percent of Workforce in Contingent Employment[71]

	1995	1997	1999
Estimate 1	2.2	1.9	1.9
Estimate 2	2.8	2.4	2.3
Estimate 3	4.9	4.4	4.3

These results suggest that under any of the three definitions, the extent of contingent employment—defined in all cases as workers employed without an explicit or implicit contract for long-term employment—is a small and decreasing share of the workforce.

There is, however, a serious problem with using this data to refute the claim that workers no longer have implicit contracts for long-term employment. The Technical Note that accompanies the data explains that "[t]he key factor used to determine if a worker's job fit the conceptual definition was whether the job was temporary or not expected to continue."[72] It goes on to explain:

> [Respondents were] asked a series of questions to distinguish persons who were in temporary jobs from those who, for personal reasons, were temporarily holding jobs that offered the opportunity of ongoing employment. For example, students holding part-time jobs in fast-food restaurants while in school might view those jobs as temporary if they intend to leave them at the end of the school year. The jobs themselves, however, would be filled by other workers once the students leave.

"[w]orkers [including self-employed and independent contractors] who do not expect their jobs to last. . . . even if they already had held the job for more than 1 year and expect to hold the job for at least an additional year." *Id.*

71. *Id.* Compiled from the U.S. Dep't of Labor, BLS, *Contingent and Alternate Employment Arrangements*, Aug., 1995 (1995 data); U.S. Dep't of Labor, BLS, *Contingent and Alternative Employment Arrangements*, Feb., 1997 (1977 data); and U.S. Dep't of Labor, BLS, *Contingent and Alternate Employment Arrangements*, Dec., 1999 (1999 data).

72. *Technical Note*, *supra* note 69.

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> Jobs were defined as being short term or temporary if the person was working only until the completion of a specific project, temporarily replacing another worker, being hired for a fixed time period, filling a seasonal job that is available only during certain times of the year, or if other business conditions dictated that the job was short term.[73]

In other words, the CPS surveyors only counted as "contingent" those workers who believed their job would end in a relatively short time, namely, only people whose jobs had a clear and imminent sunset provision. They did not count people who believed the job would continue, but might continue with someone else doing it. Thus, workers for large corporations who believe or are told that they can be fired at any time, but who also know the position will continue, would not be "contingent" under this definition. Yet, those full-time workers for large and stable corporations are the ones whose psychological contracts have undergone a change.

The Technical Note in the CPS survey on contingent work further explains:

> Workers were also asked how long they expected to stay in their current job and how long they had been with their current employer. The rationale for asking how long an individual expects to remain in his or her current job was that being able to hold a job for a year or more could be taken as evidence of at least an implicit contract for ongoing employment.[74]

This question also does not address the existence vel non of an implicit contract for long-term employment. Long-term employment in the scientific management sense meant career-long employment. Job tenure of one year, or the expectancy of employment for a year, does not reflect an implicit contract in that sense. Thus, the Current

73. *Id.*; *see also* Hipple, *supra* note 69, at 34 app.

74. *Technical Note*, *supra* note 69.

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Population Survey on Contingent Employment neither proves nor disproves a change in the nature of long-term implicit employment contracts. It simply asks different questions.

One set of data that provides a rough measure of the extent of precarious employment is job tenure rates. Since 1983, the Department of Labor Bureau of Labor Statistics (BLS) has collected data on how long employees stay at their jobs, sorted by gender, age, type of employment, type of establishment, and industry.[75] This data is presented in Table 2 in the Appendix.

The Table shows dramatic declines in job tenure between 1983 and 1998, among all men over the age of twenty, with the most significant declines among men in the age groups over age forty-five. For men ages fifty-five to sixty-four, the median years in their current job declined from 15.3 years in 1983 to 11.2 years in 1998. For men ages forty-five to fifty-four, the decline was from 12.8 years to 9.4 years. This is precisely the group that was the beneficiary of the old psychological contract for long-term employment.

Table 2 also shows that for women, there was a slight gain in job tenure until age fifty-five, and a decline after age fifty-five. However, women's job tenure remains far below that of their male counterparts at every step over age twenty. The gains for women reflect their increasing attachment to the work force—an historical trend since the 1960s.[76] It does not negate the proposition that long-term jobs are declining because women were not, by and large, the beneficiaries of the implicit promises of the internal labor market job structures.[77]

In addition, Table 3 in the Appendix shows the percent of workers who have been with their current employer for ten years or more. The

75 . BLS News Releases, *Employee Tenure in 2000*, *at* http//146.142.4.23/pub/news.release/tenure.txt (Aug. 9, 2000) [hereinafter *Employee Tenure*].

76 . *See* FRANCINE D. BLAU ET AL., THE ECONOMICS OF WOMEN, MEN AND WORK 113–15 (3d ed. 1998).

77 . The impact of the old and the new psychological contract on women's labor market prospects is discussed *infra* Part VI.

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table shows that between 1983 and 1998, there was a significant decline in the number of men who had been with their current employer for ten years or more. For men ages forty to forty-four, the percentage declined from 51 percent in 1983 down to 39 percent in 1998.

Similar large declines occurred for men in every age group over forty-five. These are dramatic changes. 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 percentages of women working for ten years or more is significantly lower than men at every stage.

Another striking finding of the BLS data is shown in Table 4 in the Appendix, in which changes in job tenure rates are broken down by industry. The table shows that workers in certain key industries experienced a much greater decline in job tenure than their counterparts in other industries. The largest declines occurred in those industries that are most heavily unionized and most characterized by internal labor markets. For example declines took place in those industries like motor vehicle manufacturing, including the automobile industry, in which median tenure was down from 13.0 years in 1983 to 6.4 years in 1998; primary metals, including the steel industry, in which median job tenure down was from 10.0 years in 1983 to 8.0 years in 1998; and fabricated metal products, in which median job tenure was down from 5.7 years in 1983 to 4.0 years in 1999.[78]

Labor economist Henry Farber conducted an econometric analysis of the BLS job tenure data from 1973–1993[79] and concluded that "no evidence presented [in the BLS data] supports to [sic] popular view that long-term jobs are becoming less common in the United States."[80] However, Farber's conclusion is an assessment of overall job tenure data for men and women combined. However, Farber found a

78. *Id.* at tbl.5 ("Median Years of Tenure with Current Employer for Employed Wage and Salary Workers by Industry, Selected Years 1983–2000").

79. *See* Farber, *supra* note 66, at 1–2.

80. *Id.* at 25.

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"substantial decline in the population-based median [job tenure] for males . . . . The large decrease in the median for males seems to be due almost entirely to individuals with at most a high school education."[81] Farber also found a "large increase in the short-job probability for men with no more than a high-school education."[82] Farber characterizes the decline in job duration for the least educated male workers as a "striking change[]."[83] He goes on to say, "It is true that long-term jobs are now allocated somewhat differently across the population than they were twenty years ago. Long-term jobs have become more scarce for the least educated (particularly men)."[84] The members of this group, blue-collar men, were the dominant participants in the Taylorist employment system of the past century.

In quantitative terms, Farber found extreme changes in the job tenure of male blue-collar workers. He found that the probability of a male worker with less than a high-school education being in a short-term job is about 16 percent higher in 1993 than in 1973, and about 10 percent higher for men with only a high school education.[85] He also found that for the least educated men, twenty-year job duration probabilities have declined by about 8 percent.[86] In assessing the impact of these findings, it is important to note that in the period of Farber's study, a full 54.8 percent of all adults in the United States fell into the group with an educational level of high school or less.[87] This

81. *Id.* at 16–17.

82. *Id.* at 20.

83. *Id.* at 17.

84. *Id.* at 25.

85. *See id*. at 24.

86. *See id*. at 22. Given these findings, it is puzzling that in his conclusion, he states categorically that there is "no evidence presented here supports to [sic] popular view that long-term jobs are becoming less common in the United States." *Id*. at 25.

87.

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includes men and women, so it can be estimated that more than 25 percent of the population falls into the group Farber found to have experienced a significant decline in their job tenure rates.

As dramatic as Farber's evidence is, it no doubt understates changes in job tenure. This understatement results from the fact that Farber's data ends in 1993. A more recent review of the available survey data found a significant decline in job tenure in the 1990s.[88] Thus, by looking at the data until only 1993, Farber did not see the full extent of the trends.[89]

While job tenure and job loss data are suggestive of an increase in precarious employment and a decline in implicit promises of long-term employment, it is not a perfect measure of the trend. Job tenure data reflect how long a worker holds a particular job. They are relevant for determining whether jobs are of shorter duration today than they were in the past. They do not show whether the worker has an ex ante expectation that the job will be long-term. One can have a casual job, such as making hamburgers at McDonald's for twenty-five years, always knowing that one can be terminated at the end of each week. The fast food type of labor market is a far cry from the automobile workers' expectations in bygone years that they, and their sons and grandsons, would spend their lives with General Motors.

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88. *See* U.S. BUREAU OF THE CENSUS, 1990 CENSUS OF THE POPULATION: SOCIAL AND ECONOMIC CHARACTERISTICS, CPH-L-96 (1993).

89. *See* David A. Jaeger & Ann Huff Stevens, *Is Job Stability in the United States Falling? Reconciling Trends in the Current Population Survey and Panel Study of Income Dynamics*, 17 J. LAB. ECON. S1, S24–S25 (1999).

. Henry Farber revisited the issue in 1998, using a different data set. He examined the Displaced Worker Surveys supplements to the Current Population Survey between 1981 and 1996. *See* Henry S. Farber, *Has the Rate of Job Loss Increased in the Nineties?*, PROC. 50th ANN. MEETING INDUS. REL. RES. ASS'N 88 (1998). Farber found that the rate of overall job loss increased in the 1990s despite the sustained expansion. He reported that:

> What is most striking is that the job loss rate increased dramatically in the 1993–95 period despite the sustained economic expansion accompanied by a further decline in the unemployment rate to 5.6% in 1995. *This is evidence consistent with the view that there has been a secular decline in job security*.

Id. at 92 (emphasis added).

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It is difficult to find data that address the extent to which the expectations of employees in full-time steady jobs have changed. As a result, we know more about the contemporary labor market from accounts of industrial sociologists and industrial relations practitioners than we know from the macrolevel empirical data. For example, sociologist Richard Sennett interviewed a number of younger employees about their experiences in the labor market, and reported:

> 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; so is the deployment of a single set of skills through the course of a working life. 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.[90]

Sennett then quoted an executive of AT&T, who told him, "'In AT&T we have to promote the whole concept of the work force being contingent, though most of the contingent workers are inside our walls. 'Jobs' are being replaced by 'projects' and 'fields of work.'"[91]

Industrial sociologists, management consultants, organizational theorists, and corporate executives report with near unanimity that there is a fundamental change in the implicit psychological contract under which most Americans are now employed. This evidence is presented and analyzed in the next part.

Before examining the new psychological contract, however, it is necessary to consider why employers are making this change. It has been suggested that the dismantling of the internal labor market is a reaction to legal developments in the at-will rule, in which employers who made promises for job security in their employment handbooks or their corporate culture found themselves bound by them when they

90. SENNETT, *supra* note 64, at 22.

91. *Id.*

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tried to dismiss long-term workers.[92] Rather than risk having to honor such promises in the future, employers decided to affirmatively disavow them. This explanation suffers from the fact that not all jurisdictions have adopted modifications of the at-will rule. Furthermore, employers can and do avoid exposure in just-cause jurisdictions by establishing in-house arbitration systems.[93] By using arbitration, they can continue to make the old implicit promises while limiting any damages that can be assessed when they breach.

A better explanation for the change in the psychological contract and the recasualization of work is that work practices are being adjusted to production requirements. As firms are forced into a more competitive environment through increased 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 changes in revenues and demand. Part of this responsiveness involves just-in-time production, just-in-time product design, and just-in-time workers.

I.

92 . *See* David H. Autor, *Outsourcing at Will: Unjust Dismissed Doctrine and the Growth of Temporary Help Employment* (Nat'l Bureau of Econ. Research, Working Paper No. 7557, 1999); *see, e.g.*, Fletcher v. Wesley Med. Ctr., 585 F. Supp. 1260, 1263–64 (D. Kan. 1984); Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 316–19 (1981), *overruled in part on other grounds by* Guz v. Bechtel Nat'l, 24 Cal. 4th 317 (2000); Salimi v. Farmers Ins. Group, 684 P.2d 264, 265 (Colo. Ct. App. 1984); Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 892 (Mich. 1980); Woolley v. Hoffman-La Roche, Inc., 491 A.2d 1257, 1268 (N.J. 1985); Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1089 (Wash. 1984).

93 . *See* Katherine V.W. Stone, *Employment Arbitration Under the Federal Arbitration Act*, *in* EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE 27 (Adrienne E. Eaton & Jeffrey H. Keefe eds., 2000) [hereinafter EMPLOYMENT DISPUTE RESOLUTION].

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THE NEW PSYCHOLOGICAL CONTRACT

A. Imagining the New Workplace

1. The Notion of a Psychological Contract

The term "psychological contract" has attracted considerable attention in the past ten years in the field of organizational behavior.[94] According to Sandra Robinson and Denise Rousseau, a psychological contract is "an individual's beliefs regarding the terms and conditions of a reciprocal exchange agreement."[95] It is not the same as expectations, but rather "beliefs in paid-for-promises or reciprocal obligations," a "belief that some form of a promise has been made and that the terms and conditions of the contract have been accepted by both parties."[96] As one scholar explains, most employees have a psychological bond with their employer based on a pattern of mutual obligation. Some are written and formalized, but "for the most part, [they are] implicit, covertly held and only infrequently discussed."[97]

The term "psychological contract" refers to an individual's beliefs about the terms of his or her employment contract. It is a subjective concept, expressing an individual's belief in the existence of a bilateral relationship with his or her employer.[98] As one theorist writes, "[A]

94. Neil Anderson & René Schalk, *The Psychological Contract in Retrospect and Prospect*, 19 J. ORGANIZATIONAL BEHAV. 637, 638 (1998).

95. Sandra L. Robinson & Denise M. Rousseau, *Violating the Psychological Contract: Not the Exception But the Norm*, 15 J. ORGANIZATIONAL BEHAV. 245, 246 (1994).

96. *Id.*

97. Anderson & Schalk, *supra* note 94, at 637.

98. Initially there was some ambiguity as to whether the term referred to an exchange within an organization, or merely the individual's perception of an exchange. *See id.* at 638–39; *see also* David E. Guest, *Is the Psychological Contract Worth Taking Seriously?*, 19 J. ORGANIZATIONAL BEHAV. 649, 649–58 (1998). However, in recent writings, a subjective definition has prevailed. *See, e.g.*, Anderson & Schalk, *supra* note 94, at 639; Denise M. Rousseau & Snehal A. Tijoriwala,

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psychological contract represents the employee's and employer's beliefs or perceptions regarding the terms of the employment relationship. The psychological contract may include beliefs or perceptions regarding performance requirements, job security, training, compensation and career management issues."[99]

The term psychological contract refers to an employee's perceptions of the terms of a bilateral, reciprocal exchange.[100] The reciprocal nature of the belief distinguishes a psychological contract from mere expectations, which reflect an employee's hopes and aspirations but not beliefs in the existence of mutual obligation. When expectations are not met, an employee is disappointed; when a psychological contract is breached, an employee feels wronged.[101] Researchers find that "[f]ailure to honor a [psychological] contract creates a sense of wrongdoing, deception and betrayal with pervasive implications for the employment relationship."[102] For example, Robinson and Rousseau examined the reaction of recent MBA graduates to employers who promised but failed to provide adequate training, compensation, prospects for promotion, job security, feedback, responsibility, and other desirable attributes of the jobs. They found that those who believe their employer has breached such a contract experience heightened levels of distrust of their employers and

Assessing Psychological Contracts: Issues, Alternatives and Measures, 19 J. ORGANIZATIONAL BEHAV. 679, 679–80 (1998).

99. Marcie A. Cavanaugh & Raymond A. Noe, *Antecedents and Consequences of Relational Components of the New Psychological Contract*, 20 J. ORGANIZATIONAL BEHAV. 323, 323 (1999).

100. For terminological clarity, Denise Rousseau contrasts the term psychological contract to the term implicit contract, in which the former describes the employees' subjective beliefs about the terms of the employment relationship and the latter describes a third party's assessment of the relationship. *See* Denise M. Rousseau, *The 'Problem' of the Psychological Contract Considered*, 19 J. ORGANIZATIONAL BEHAV. 665, 665–68 (1998). They can both refer to the same contract, but from a different perspective. *See id.*

101. *See* Robinson & Rousseau, *supra* note 95, at 247.

102. *Id.*

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job dissatisfaction, and are more likely to leave.[103] Another study of 800 managers found that psychological contract violations increased exit, voice, and neglect behaviors and decreased loyalty to the organization.[104] Yet another study of postgraduation MBAs found that psychological contract violations lead employees to reevaluate, and downgrade, their view of their obligations to their employers.[105] The authors concluded that "[organizational] citizenship may, in fact, result from the employees' perceptions of their obligations to organizations and the degree to which they are reciprocated rather than from attachment, loyalty, or satisfaction, as has been most frequently suggested."[106]

While many of the early studies on psychological contracts looked at management employees, subsequent studies of lower level employees have also found that such contracts exist. Indeed, some scholars have hypothesized that even contingent and temporary workers have a psychological contract with their employers, albeit a different one than do full-time, long-term employees.[107]

Academic interest in the notion of psychological contracts developed during the period in which middle management employees in large American corporations were the victims of large-scale downsizing and corporate restructuring. In studying those left standing after massive layoffs in their firms—a group referred to by the evocative term, "layoff survivors"—as well as those who lost their jobs

103. *See id*. at 248.

104. William H. Turnley & Daniel C. Feldman, *The Impact of Psychological Contract Violations on Exit, Voice, Loyalty, and Neglect*, 52 HUM. REL. 895, 908, 917 (1999).

105. *See* Sandra L. Robinson et al., *Changing Obligations and the Psychological Contract: A Longitudinal Study*, 37 ACAD. MGMT. J. 137, 149–50 (1994).

106. *Id.* at 149.

107. *See, e.g.*, Judi McLean Parks et al., *Fitting Square Pegs Into Round Holes: Mapping the Domain of Contingent Work Arrangements onto the Psychological Contract*, 19 J. ORGANIZATIONAL BEHAV. 697 (1998).

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but were later reemployed at new firms—termed "expatriate managers"—organizational sociologists theorized that found both groups experienced an intense sense of unfairness and anger. They hypothesized that their reactions resulted from the fact that the changes in their employment were inconsistent with their tacit assumptions about the terms of their employment contracts.[108]

The term psychological contract is useful to theorists of organizational behavior because it both captures the fact that parties bring expectations of reciprocal obligation to the employment relationship, and it accounts for the intense sense of injustice that can result when these expectations are not met. Thus, for example, it helps to explain the oft-observed fact that most employees, even when told they are at-will employees, believe that it is unfair, and illegal, for an employer to fire them without good cause.[109] Despite their formal at-will status, such employees have a psychological contrast for job security. The concept of a psychological contract is consistent with the developments in some state courts, in which judges have modified the at-will rule in cases when employers have given employees reason to believe that their jobs are secure.[110]

The research on psychological contracts is related to research on employee motivation, loyalty, and commitment.[111] Because employee attitude, morale, and trust are powerfully correlated with the

108. *See generally* Anderson & Schalk, *supra* note 94, at 643–44 (summarizing studies on the impact on employees of employer breach of psychological contracts).

109. *See* Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 133–40 (finding in an empirical study that employees regularly overstate their degree of job security).

110. *See, e.g.*, Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 324–30 (1981), *overruled in part on other grounds by* Guz v. Bechtel Nat'l, 24 Cal. 4th 317 (2000); Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 892 (Mich. 1980); Woolley v. Hoffman-La Roche, Inc., 491 A.2d 1257, 1268 (N.J. 1985); Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1089 (Wash. 1984).

111. *See, e.g.*, Robinson et al., *supra* note 105, at 149 (reporting on an empirical study that found compliance with psychological contracts to be linked to employee commitment and citizenship behavior).

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profit-linked factors of productivity, turnover, and organizational effectiveness, the concept of a psychological contract has received considerable attention in the organizational behavior and human resource fields.

For present purposes, the most important aspect of the psychological contract is that it is undergoing a profound transformation. According to one scholar,

> Recently, both the academic and practitioner literature has suggested that the psychological contract in United States business has changed. . . . According to the old psychological contract, the employer was seen as a caretaker for the employee. . . . Employees who were good performers were virtually guaranteed a job by their employer until retirement . . . . [Under the old psychological contract], the employer gave career development and promotions and the employee gave loyalty and commitment to the job and the organization. In the new psychological contract, both employees and employers have lower expectations for long-term employment, employees are responsible for their own career development, and commitment to the work has replaced commitment to the job and organization.[112]

Rousseau and Snehal Tijoriwala report that employees no longer assume that the employment contract offers job security and promotional opportunity within a single employer's internal labor market, but rather offers job opportunities with other employers and marketability in the external labor market.[113] Other scholars have similarly reported profound changes in the terms of the psychological contract from both employers' and employees' perspectives.[114] These

112. Cavanaugh & Noe, *supra* note 99, at 324.

113. *See* Rousseau & Tijoriwala, *supra* note 98, at 683.

114.

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changes are also reflected in the writings of management consultants. Thomas Davenport of Towers Perrin, a major human resource consulting firm, writes, "Has the psychic contract evolved since 1983? You bet it has."[115]

The changes in the psychological contract are related to the current trends among managers to abandon Taylorist production techniques and dismantle internal labor markets. The new psychological contract literature reflects a new set of expectations that managers impart to their employees—expectations not of long-term job security and continuous promotion along a job ladder, but of something else. While initially, there was some ambiguity in the early psychological contract literature as to whether the old contract had been breached or whether a new contract had taken its place,[116] there is now a consensus that a new contract is emerging.[117] Its terms can be found in the literature about competency-based organizations, total quality management, and other high-involvement work practices that define the new workplace as it is imagined, and currently being constructed, by management scholars and management consultants. In order to explore this new contract, it is first necessary to introduce two other concepts in organizational theory—the concept of the boundaryless career and the concept of organizational citizenship behavior.

. *See, e.g.*, Anderson & Schalk, *supra* note 94, at 641 ("[I]t is generally agreed amongst researchers and practitioners alike that the content of the psychological contract has changed in recent years.").

115 . THOMAS O. DAVENPORT, HUMAN CAPITAL: WHAT IT IS AND WHY PEOPLE INVEST IN IT 26 (1999).

116 . *See* Guest, *supra* note 98, at 654–55, 660–61.

117 . *See infra* Part III.B.–C; *see also*, MARK ROEHLING ET AL., THE NATURE OF THE NEW EMPLOYMENT RELATIONSHIP(S): A CONTENT ANALYSIS OF THE PRACTITIONER AND ACADEMIC LITERATURES 2 (Ctr. for Advanced Human Res. Studies, Working Paper No. 98-18, 1998). *But see* Anderson & Schalk, *supra* note 94, at 641 (observing that despite general agreement that the psychological contract has changed, there is no universal agreement about the terms of the new psychological contract).

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2. The Notion of the Boundaryless Career

The concept of the boundaryless career is a creation of the past decade. Ever since General Electric's Jack Welch mused about "the boundaryless organization" in the early 1990s, the notion of the "boundaryless career" has been a subject of academic symposia and writings. For example, it was a leading theme of the 1993 annual meeting of the American Management Association.[118] For example, Fortune magazine editor Thomas Stewart urges companies to transcend the boundaries of the firm and to foster "communities of practice." He advises, "Learning communities cannot be contiguous with the boundaries of the corporation, business unit, or department, nor should they be." Stewart quotes Jim Euchner of Nynex to say, "'Boundaries don't just keep information in. They keep it out, too.'"[119]

A boundaryless career is a career that does not depend upon traditional notions of advancement within a single hierarchical organization. It includes an employee who moves frequently across the borders of different employers, such as a Silicon Valley technician, or one whose career draws its validation and marketability from sources outside the present employer, such as professional and extraorganizational networks. It also refers to changes within organizations, in which individuals are expected to move laterally, without constraint from traditional hierarchical career lattices.[120] It has been defined as "a career which unfolds unconstrained by clear boundaries around job activities, by fixed sequences of such activities, or by attachment to one organization."[121]

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118. *See* Michael B. Arthur, *The Boundaryless Career: A New Perspective for Organizational Inquiry*, 15 J. ORGANIZATIONAL BEHAV. 295, 296 n.1 (1994).

119. THOMAS A. STEWART, INTELLECTUAL CAPITAL: THE NEW WEALTH OF ORGANIZATIONS 102 (1997) (quoting Jim Euchner).

120. *See* Arthur, *supra* note 118, at 296.

121.

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The development of boundaryless careers corresponds to the growth in joint ventures, outsourcing, and other forms of network production that permit and sometimes even encourage mobility between related enterprises. It is also related to change within firms in which departmental boundaries and job definitions are becoming blurred.[122] As one theorist, writing in 1994, reported, "The old picture of stable employment and associated organizational careers is fading. A new picture of dynamic employment and boundaryless careers calls for our attention."[123] Whereas previously, careers were understood to unfold in structured ways, by moving up job ladders in internal labor markets or along fixed lattices on organizational flow-charts, recent research on careers has found organizational fluidity. "Inside firms in the United States, decentralization, increasing emphasis on cross-functional coordination and teams have blurred previously rigid departmental boundaries. Many American employers have moved to more general job descriptions, emphasizing key values, rather than precise, predetermined duties."[124]

Professor Charles Heckscher documents the advent of the boundaryless career. In an essay entitled Defining the Post-Bureaucratic Type, Heckscher writes about the growth of postbureaucratic organizational forms, organizations that are open at the boundaries. He writes, "Unlike the situation in large bureaucracies, [in today's organizations] there is no expectation that employees will spend their entire careers in one organization. There is far more tolerance for outsiders coming in and for insiders going out."[125]

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122. Anne S. Miner & David F. Robinson, *Organizational and Population Level Learning As Engines for Career Transitions*, 15 J. ORGANIZATIONAL BEHAV. 345, 347 (1994).

123. *See id.* at 345; *see also* DAVENPORT, *supra* note 115, at 152–56 (urging firms to create "communities of practice").

124. Arthur, *supra* note 118, at 297.

125. Miner & Robinson, *supra* note 121, at 347 (citation omitted).

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Heckscher dates the change in career patterns from the 1980s, when there were widespread managerial layoffs. Also, at about that time, firms experienced pressures to innovate their processes and products. This lead them to look for employees who had the requisite technical skills and hire them laterally. Thus firms departed from the job ladder arrangements that had previously defined the shape of careers within organizations.[126]

The popular writer, Peter Drucker, notes an historical shift throughout the twentieth century in career patterns. In Managing in a Time of Great Change, Drucker points out that in 1913, less than 20 percent of the workforce were "employees" as we use the term. The large majority of people worked in small family enterprises. By the 1950s, Drucker claims, "Employees of large organizations dominated every developed economy." And today, most adults still work for large organizations, but "increasingly they are not employees of that organization. They are contractors, part-timers, temporaries."[127] In addition to the rise of temporary work and outsourcing, Drucker notes that there has been a dramatic increase in alliances between firms, joint ventures, and partnerships.[128] Thus, he predicts that within twenty years, a sizeable minority of managers and professionals will not be employees of the firms with whom they do business. "For the organization and their top management," he counsels, "they better stop talking about 'loyalty.' They will have to earn the trust of the people who work for them, whether these people are their own employees or not."[129]

. Charles Heckscher, *Defining the Post-Bureaucratic Type*, *in* THE POST-BUREAUCRATIC ORGANIZATION: NEW PERSPECTIVES ON ORGANIZATONAL CHANGE 14, 27 (Charles Heckscher & Anne Donnellon eds., 1994) [hereinafter THE POST-BUREAUCRATIC ORGANIZATION].

126 . *See id.*

127 . DRUCKER, *supra* note 58, at 66.

128 . *See id.* at 69.

129 . *Id.* at 71.

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The concept of a boundaryless career, like that of the new psychological contract, reflects the shift in job structures away from Taylorist, internal labor markets. Instead of job ladders along which employees advance within stable, long-term employment settings, there are possibilities for lateral mobility between and within firms, with no set path, no established expectations, and no tacit promises of job security. As Drucker says, "there is no such thing as 'lifetime employment' anymore—such as was the rule in big U.S. or European companies only a few years ago."[130] The old psychological contract is no longer dominant, but the new psychological contract is yet to be defined.

3. Commitment and Organizational Citizenship Behavior

Another set of concepts that is important to the new workplace involves employee commitment and organizational citizenship behavior. Firms need to motivate employees to provide quality, productivity, and efficiency. In the past, internal labor markets were adopted by firms to provide employee motivation, encourage skill acquisition, and discourage employee resistance. Today, without implicit promises of job security, management's concern for motivation and commitment is more acute than ever. Firms can no longer succeed if employees simply perform their tasks in a reliable but routine manner. They need not merely predictable or even excellent role performance; they need "spontaneous and innovative activity that goes beyond role requirements."[131] They need employees to commit their imagination, energies, and intelligence on behalf of the firm. They want employees to innovate, to pitch in, to have an entrepreneurial attitude toward their jobs, to behave like owners.[132] Current management theories dictate that firms give employees discretion, but they want to ensure that the discretion is exercised on behalf of the firm. Thus managers want to elicit behavior that goes beyond specific rules and job demands, and gives the firm something

130 . *Id.*

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extra. Organizational theorists characterize this something extra as organizational citizenship behavior (OCB), which results from affective commitment.[133]

Commitment is defined as a willingness to exert effort on behalf of an organization, an internalized acceptance of the organization's goals, and an intent to remain part of the organization.[134] It is a term that connotes cooperativeness and a willingness to contribute. Social psychologists have found that commitment is highly correlated with employee morale, effort, and job satisfaction. They have also found that commitment is one element of organizational effectiveness.[135]

Among organizational theorists, commitment is generally divided into two types: affective commitment and continuance commitment.[136] Continuance commitment is commitment to stay with an organization. It results from human resource policies such as longevity-based benefits, long vesting periods for pensions, and seniority systems—all policies that make it worthwhile for an employee to stay and costly for her to leave. Affective commitment involves identification with the firm's goals and a desire to do what is best for the organization.[137]

131 . John R. Deckop et al., *Getting More Than You Pay For: Organizational Citizenship Behavior and Pay-for-Performance Plans*, 42 ACAD. MGMT. J. 420, 420 (1999).

132 . *See, e.g.*, DAVENPORT, *supra* note 115, at 3–8 (advocating managers view employees asinvestors in their human capital in order to elicit their "ingenuity, creativity, and initiative").

133 . Ann C. Smith et al., *Organizational Citizenship Behavior: Its Nature and Antecedents*, 68 J. OF APPLIED PSYCHOLOGY 653, 653–63 (1983).

134 . *See* DENNIS W. ORGAN, ORGANIZATIONAL CITIZENSHIP BEHAVIOR: THE GOOD SOLDIER SYNDROME 105 (1988).

135 . *See generally* RICHARD T. MOWDAY ET AL., EMPLOYEE-ORGANIZATION LINKAGES: THE PSYCHOLOGY OF COMMITMENT, ABSENTEEISM, AND TURNOVER (1982).

136 . *See, e.g.*, ORGAN, *supra* note 134, at 105–06; John P. Meyer et al., *Organizational Commitment and Job Performance: It's the Nature of the Commitment that Counts*, 74 J. APPLIED PSYCHOL. 152, 152 (1989).

137 . *See* Meyer et al., *supra* note 136, at 152.

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Employees who display affective commitment not only perform their assigned tasks, they engage in extrarole behavior on behalf of the firm.[138] Researchers have found that affective commitment is positively correlated with job performance and firm productivity, while continuance commitment is negatively correlated with those same goals.[139] For example, practices such as long vesting periods for pensions, rapid promotion, and skill-specific training—that is, traditional features of an internal labor market—may develop continuance commitment, but "may not instill . . . the desire to contribute to organizational effectiveness."[140] Thus, firms are advised to structure their human resource practices to increase affective rather than continuance commitment.[141]

The term used to describe the extrarole aspect of affective commitment is organizational citizenship behavior. OCB is defined as discretionary behavior that goes beyond the requirements of specific role definitions and that is not rewarded in the formal reward structure of the firm.[142] It does not mean excellence in in-role performance, but rather performance that goes beyond formal role requirements to further organizational goals.[143] OCB involves engaging in extra acts of helpfulness such as spontaneously rendering assistance to a

138. *See* N.J. Allen & J.P. Meyer, *The Measurement and Antecedents of Affective, Continuance and Normative Commitment to the Organization*, 63 J. OCCUPATIONAL PSYCHOL. 1, 1–18 (1990); *see also* Dennis W. Organ & Mary Konovsky, *Cognitive Versus Affective Determinants of Organizational Citizenship Behavior*, 74 J. APPLIED PSYCHOL. 157, 157 (1989).

139. *See* Meyer et al., *supra* note 136, at 153–55.

140. *Id.* at 155.

141. *See id.*

142. *See* ORGAN, *supra* note 134, at 4–5.

143. *See* Organ & Konovsky, *supra* note 138, at 157–58. A scale commonly used for measuring organizational citizenship behavior (OCB) asks supervisors to rate their employees on the basis of several factors that address the employee's altruistic willingness to assist others and the conscientiousness that she brings to her tasks. *See* ORGAN, *supra* note 134, at app. at 115–17.

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coworker, taking on extra duties when a colleague is out sick, or demonstrating a technique to a novice. OCB can also involve extra conscientiousness, such as coming in during a snowstorm or meeting deadlines under adverse circumstances when performance would be excused.[144]

Researchers have found that the presence of OCB is crucial for organizational effectiveness.[145] Indeed, it has been suggested that OCB is the defining feature of those companies rated as "excellent" in their managerial practices.[146] The challenge for today's human resource policymakers is to encourage employees to give organizational citizenship behavior without promising them job security. That is, the goal of today's management is, in the words of one management theorist, to engender "commitment without loyalty."[147]

In an effort to instill affective commitment and organizational citizenship behavior, some firms encourage employees to take an entrepreneurial approach toward their jobs. Thomas Davenport, a principal in the management consulting firm, Towers-Perrin, writes that corporations should "think of workers not as human capital but rather as human capital owners and investors."[148] Another advisor to the CEO of a large corporation explained that the goal is to encourage each employee, at every level, to feel that they are in control and making decisions about profitability. He used an example of a supermarket cashier to illustrate. He said a cashier should view himself as a "cash register professional." He should be given

144. *See* ORGAN, *supra* note 134, at 9–10.

145. *See id.* at 6–7. Organizational effectiveness is comprised of features such as efficiency, ability to attract valuable resources, good will, external image, reputation, innovativeness, and adaptability. *See id.*

146. *See id*. at 24.

147. **[Au: Fill in Cite]**

148. DAVENPORT, *supra* note 115, at 7.

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discretion over decisions about which magazines to place on the top of the display and which sundry items—flashlights, razor blades, car air fresheners, key chains, and candies—to feature. The cashier's performance should then be monitored by the sales of sundries to see if he has devised the best way to market these high profit, impulse purchases. Those that do well should be encouraged to stay on the job and their ideas transmitted to others around the country.[149]

Another prescription for fostering OCB is to create mechanisms to ensure employees on-the-job fairness. Researchers have found that OCB depends in part upon employees' subjective appraisal of an employer's fairness.[150] 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.[151]

Recently, studies on justice in the workplace have found that procedural justice is at least as important as distributive justice for engendering affective commitment, OCB, and motivation.[152] As a result, in the past decade, employers have instituted a wide range of dispute resolution procedures designed to address employee complaints and thus foster high commitment. They have implemented open door policies, ombudsmen, management appeals boards, peer review, mediation, and arbitration.[153] A common

149. Jeremy Paul recounted this example from his experience as Special Advisor to the CEO of a major insurance company.

150. *See* Organ & Konovsky, *supra* note 138, at 162.

151. *See id*. at 76–77; *see also* Robinson et al., *supra* note 105, at 149 (finding that citizenship may result from employees' perceptions of the company's performance of its obligations under the psychological contract).

152. *See generally* JERALD GREENBERG, THE QUEST FOR JUSTICE ON THE JOB 32–39 (1996).

153. *See* Lisa B. Bingham & Denise R. Chachere, *Dispute Resolution in Employment: The Need for Research*, *in* EMPLOYMENT DISPUTE RESOLUTION, *supra* note 93, at 103–13 (discussing the growth of ombuds, mediation, and arbitration programs amongst nonunion firms); Alexander

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characteristic of these dispute resolution techniques is that they utilize decision makers who are outside the employees' normal chains of command. For example, peer review, in which employees' discipline complaints are heard not by managers but by a panel of the complainant's peers, is one of the fastest growing forms of nonunion dispute resolution.[154] The new wave of in-house dispute resolution systems is designed to promote procedural justice without reinforcing hierarchy.

B. Converting Theory into Practice: The Terms of the New Psychological Contract

The terms of the new psychological contract can be found in the current literature about the internal organization of firms. Contemporary management theorists and practitioners have developed an explicit critique of the Taylorist organizational forms of the past, and advocate something different. Their critique of Taylorism is that the system's emphasis on hierarchy and rigid job ladders stifles teamwork, creativity, and other attributes of organizational citizenship behavior that are necessary to succeed in today's competitive

James Colvin, Citizens and Citadels: Dispute Resolution and the Governance of Employment Relations 126–44 (1999) (unpublished Ph.D. dissertation, Cornell School of Industrial and Labor Relations) (on file with author) (discussing the development of peer review, open door policies, management appeal boards, mediation, and arbitration at TRW in the 1990s). Open door policies are programs that encourage an employee to bring a problem or grievance to a high level manager outside the chain of command. Ombudsmen are specialized corporate officers who are independent of management whose job it is to hear complaints, conflicts, and disputes and reach across status and departmental lines to seek resolution. Management appeals boards are procedures that permit an employee to appeal an objectionable decision of an immediate supervisor to managers in other departments or divisions. Peer review procedures involves dispute resolution by panels of employees who hear and decide specific employee grievances. *See* Colvin, *supra*, at 21–26.

154. A recent survey of over 300 firms in the telecommunications industry found peer review procedures in place in 14.4 percent of the firms in the sample, a surprisingly high incidence. *See id.* at 189. At the TRW Corporation, for example, peer review can be invoked by an employee who wants to challenge a termination or other disciplinary measures. A panel consisting of two managers and three peer employees, under the guidance of a "facilitator" from the human resource department, holds a hearing and decides whether the supervisor correctly applied company policy. *See id.* at 129–33. In one plant studied, Colvin found that between 1992 and 1997, 160 employees took cases to peer review, but only 10 were successful in overturning a supervisory decision. *See id.* at 189, 213.

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markets.[155] Contemporary organizational theorists attempt to create organizations that embody flexibility, promote skill development, and foster organizational citizenship behavior.

Contemporary theorists are addressing a world in which many middle-managers, technicians, and professionals, have been down-sized and restructured. These employees, who believed they had long-term job security, have been left with a thick residue of distrust. Rather than simply permit the distrust to decay into cynicism, the new organizational theorists have hypothesized a new psychological contract, one that gives employees something to replace the job security they enjoyed, or thought they enjoyed, in the past.

To understand the terms of the new psychological contract, I examine two of the most comprehensive proposals for restructuring the workplace—the competency-based organization and total quality management. These two theories have different starting points and different foci, but are remarkably similar in their prescriptions and implications.

1. Competency-Based Organizations

Edward Lawler, Jr. of the University of Southern California, advocates a shift away from job-based organizations to competency-based organizations. Lawler points out that ever since Frederick Winslow Taylor and the era of scientific management, organizations have had job-based approaches to employment. Job definition and job evaluation, he claims, has served as the heart of the employment systems for almost a hundred years. The emphasis on jobs is based on the assumption that jobs can be studied, tasks can be rationalized, and human performance can be measured. As large scale bureaucratic forms of organization developed, scholars devised various

155 . Today's management literature is replete with critiques of Taylorism. *See, e.g.*, ERIC E. ANSCHUTZ, TQM AMERICA: HOW AMERICA'S MOST SUCCESSFUL COMPANIES PROFIT FROM TOTAL QUALITY MANAGEMENT 48–49 (1995); EDWARD E. LAWLER III, HIGH-INVOLVEMENT MANAGEMENT 5–11 (1986); STEWART, *supra* note 119, at 48; JAMES C. WORTHY, LEAN BUT NOT MEAN: STUDIES IN ORGANIZATION STRUCTURE 93–116 (1994).

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approaches toward designing job hierarchies and evaluating the performances within them. The job paradigm, Lawler claims, has been central to human resource theorists' approaches to employee selection, training, performance management, and compensation—tasks designed to ensure that employees are motivated and capable of performing their jobs.[156]

Lawler is one of a number of organizational behavior scholars who contend that the jobs-focus is no longer a fruitful or appropriate way to organize employment. He writes:

> There is good reason to believe that the concept of an individual holding a job is no longer the best way to think about organizing and managing individuals. Instead of thinking of people as having a job with a particular set of activities that can be captured in a relatively permanent and fixed job description, it may be more appropriate and more effective to think of them as human resources that work for an organization.[157]

Lawler argues that the scientific management and bureaucratic approaches of the past emphasized selection tests and training programs designed to fit the individuals to a preset job within a predetermined organizational structure. "The implicit assumption is that the best way to optimize organizational performance is to fill jobs with appropriately skilled individuals and motivate them to perform effectively through pay and other rewards."[158] This in turn assumes a hierarchy of duties and responsibilities within a command and control form of organization. Such forms of work organization were

156. *See* Edward E. Lawler III, *From Job-Based to Competency-Based Organizations*, 15 J. ORGANIZATIONAL BEHAV. 3, 3–4 (1994).

157. *Id.* at 4.

158. *Id.*

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dominant throughout most of the twentieth century but, Lawler contends, are no longer appropriate.[159]

According to Lawler, for many types of organizations globalization has meant that many production and assembly tasks are done by lower-wage workers in developing countries. Workers in developed countries are increasingly performing knowledge and service work. Also, global competition between producers has forced companies to focus on quality, speed, and adaptability to customer desire. Because there is increased instability in the product market, companies need the flexibility to alter their products quickly in anticipation of changes in demand. To survive, companies must become "learning organizations." They must also constantly change their structure. In this environment, according to Lawler,

> [individuals] become a key competitive asset. Their knowledge and skills become critical to the ability of the organization to perform. . . . [S]kills, capabilities, and learning become an important part of the organization's ability to compete and are at the heart of an organization's adaptability and ability to learn.[160]

Lawler argues that organizations that rely on capabilities as a source of competitive advantage have had to abandon the idea of using jobs and job definitions as the basis for managing individuals within them. In today's environment, earlier models of routine work in mass production settings run the danger of underutilizing employees and failing to develop the capabilities necessary to perform successfully. Individuals have moved "front and center as the key resource of an organization," so it is necessary to motivate individuals and develop their capabilities.[161]

159. *See id.*

160. *Id.* at 5 (citations omitted).

161. *Id.* at 6.

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What do these competency-based organizations look like, and how do they differ from job-based organizations? First and foremost, Lawler maintains, an effective competency-based organization should not use a functionally based structure. Rather, it should emphasize cross-functional teams that facilitate lateral operation. However, it must do so without sacrificing functional excellence. For a competency-based approach to maintain excellence while capturing the benefits of flexibility and cross-utilization, it must attend to work design, selection, career movement, and pay systems. Lawler makes the following programmatic recommendations:

a. Work Design: Organizations should base human resource policy not on the job but on the individual. They should use skill and person descriptions rather than job descriptions. Organizations need to "focus on what individuals need to be able to do in order to make the work processes operate effectively."[162]

b. Selection: Organizations should select individuals for membership in the organization rather than for specific jobs. The challenge is to find individuals who "fit the learning environment that is provided by the organization."[163] When general skills are required, an organization can use a "realistic job preview" as a selection device. When individuals with specific skills are required, it can use assessments by existing workers.[164]

c. Pay the Person: Lawler urges organizations to adopt a skill-based approach to payment, in which they pay individuals according to the skills they have. Traditional pay systems rely heavily on the practice of job evaluation. In job evaluation, each job is broken down into factors, which include working conditions, knowledge required, accountability, and so forth. The factors are assessed and assigned weights. Each job is given a total point score based upon the specific factors it involves, and each point score is translated into a

162. *Id.* at 7–8.

163. *Id.* at 9.

164. *See id.* at 9.

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level of pay.[165] Lawler is critical of job evaluation because it relies upon fixed job descriptions. He maintains,

> Inherent in any job description system is a message to an individual about what is not included in his or her job responsibilities . . . . It does not fit well . . . with an orientation that says that an individual should do what is right in the situation rather than what is called for by a job description.[166]

Also, he points out that job evaluation tends to measure jobs according to their hierarchical power and control, so that it tends to reinforce hierarchical relations that are dysfunctional for professional or high-technology organizations.[167]

In place of a job-evaluation approach to compensation, Lawler advocates skill-based pay. Skill-based pay systems were initially attempts by firms utilizing blue-collar workers to break out of narrow job definitions. More recently, these systems have become a prominent feature in the pay of white collar and professional workers as well.[168] As Lawler describes it,

> In simple skill-based pay systems, employees may be rewarded for learning what in essence are multiple jobs. For example, members of a factory work team may be given a pay increase for each machine they learn to operate as well as for each support job they learn, such as inspection, maintenance, and material handling. In complex work systems individuals may be rewarded for learning more abstract collections of skills. For example,

165. *See* EDWARD E. LAWLER III, THE ULTIMATE ADVANTAGE: CREATING THE HIGH-INVOLVEMENT ORGANIZATION 144–45 (1992).

166. *Id.* at 148.

167. *See id.* at 148–49.

168. *See* Mary Rowland, *It's What You Can Do That Counts*, N.Y. TIMES, June 6, 1993, at F17.

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> in information services organizations employees may be rewarded for learning hardware-related skills, programming (software) skills, and skills in consulting to line managers, rather than for performing a single job within one of these areas. Skill blocks in skill-based pay systems become analogous to jobs in job-evaluation systems.[169]

Skill-based pay, Lawler argues, leads firms to focus on people and their value to the firm. It can also motivate employees to acquire skills, particularly skills that the organization needs. It encourages employees to develop a variety of skills, making them available for cross-utilization and horizontal career tracks typical of competency-based organizations.[170]

d. Assessment: To use skill-based pay, it is necessary to assess each person's skills and capabilities. Lawler suggests using peer-review, technical experts, and tests, rather than simply relying upon a supervisor's opinion. Once an employee's skills are assessed, he says, they should be priced to the market.[171]

e. Pay for Performance: While pay for performance has become a popular means to increase productivity, it does not fit easily within competency-based organizations. In such settings, it is often difficult to identify each individual's contribution, especially when the individual is part of a team effort. Lawler suggests the use of peer ratings to appraise an individuals contribution to a team. Alternatively, he advocates that team performance, business unit performance, or organizational performance be used as a factor in pay.[172]

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169. Lawler, *supra* note 156, at 9–10.

170. *See* LAWLER, *supra* note 165, at 156.

171. *See* Lawler, *supra* note 156, at 10.

172. *See id.* at 11. Edward Lawler acknowledges that studies in job-based systems find that group incentive plans like profit-sharing and gain sharing are less effective motivators than

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f. Training and Career Development: Skill-based pay systems have the virtue of providing an incentive for individuals to acquire new skills. "[W]hen individuals are paid for skill acquisition, they place a great emphasis on being able to learn and develop their abilities."[173] Thus, organizations need well-developed training programs and arrangements to give individuals the time to attend.[174]

g. Career Systems: Rather than promoting hierarchical mobility within an organization, the organization should see careers as

> involving multiple skill acquisition tracks. For example, a producer's career track might involve someone becoming more and more expert in a limited set of skills while a managerial career track might involve the acquisition of a broad understanding of how the organization operates and training in various types of managerial activities.[175]

Lawler's competency-based organization emphasizes employee skill development and skill deployment. After detailing the conception in all its parts, Lawler raises but does not answer the crucial question—whether the opportunity for skill acquisition could provide the same motivational effects as hierarchical promotion opportunity formerly provided in jobs-based organizations.[176] He acknowledges that the shift to a competency-based organization can be difficult for some employees.

Other contemporary theorists and practitioners echo Lawler's emphasis on the need to design organizations that generate knowledge and adapt to change. The notion of a Learning Company has become an organizational mantra. For example, the influential management

individual pay for performance systems, but he suggests that the result of group-based performance measures may be more effective within a competency-based organization.

173. *Id.* at 11.

174. *See id.*

175. *Id.* at 11–12.

176. *See id.* at 12.

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theorist, Rosabeth Moss Kanter writes, "'The learning organization' promises to become a 1990s business buzzword as companies seek to learn more systematically from their experience and to encourage continuous learning for their people."[177] To become "learning organizations," she counsels firms to invest in learning and to recognize and reward knowledge that is generated at all levels of the firm. Rather than foster hierarchy, organizations should build social networks that exchange knowledge across divisions. "Change-adept organizations make competence an organizational asset, rather than just an individual attribute, by stressing the need to make tacit knowledge explicit."[178] She advocates that organizations create opportunities for knowledge exchanges, such as informal lunch seminars, conferences, internal trade fairs, education benefits, and training programs.[179]

2. Total Quality Management

Just as the competency-based organization tries to enhance competitiveness by harnessing employees' abilities and imagination, the Total Quality Management (TQM) approach does so by enhancing the quality of the product. Each approach aims to design an organization that can compete effectively in a global marketplace.[180]

TQM has become a central aspect of managerial ideology since the early 1990s. TQM was invented by W. Edwards Deming, an American accountant who consulted with Japanese managers in the

177. ROSABETH MOSS KANTER, ON THE FRONTIERS OF MANAGEMENT 53 (1997).

178. *Id.* at ___.

179. *See id.* at 16–19.

180. *See, e.g.*, Geoff Mason, *Product Strategies, Work Force Skills, and "High-Involvement" Work Practices*, *in* EMPLOYMENT PRACTICES AND BUSINESS STRATEGY 193, 193 (Peter Cappelli ed., 1999) (finding that those firms that move to high involvement practices, increased employee training, and Total Quality Management (TQM) work practices are those that are faced with foreign competition for their products).

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postwar era about how to achieve industrial success. Deming urged the Japanese to focus on product quality. He claimed that quality could be achieved by stressing customer focus, workforce empowerment, and planning. Deming's teachings were widely adopted in postwar Japan, and Deming himself became an important public figure.[181] The Japanese labeled Deming's ideas Total Quality Control, and established the annual Deming Prize for the company that most successfully embodied his ideas.[182] It was not until the 1980s that Deming's ideas took hold in the United States.

Deming developed a management philosophy based on Fourteen Points. The Fourteen Points sound like slogans for bumper stickers or advertising banners, but they tell a story. Several of Deming's points stress the importance of maintaining a high level of product and service quality. For example, point number 1 is: "Create constancy of purpose toward improvement of product and service, with the aim to become competitive, stay in business, and provide jobs."[183] Point number 2 is: "Adopt the new quality philosophy."[184] Point number 5 is: "Improve constantly and forever."[185] Several other points advocate enhancing worker skills. For example, Point number 6 is: "Institute training on the job."[186] Point number 13 is: "Institute a program of education and self-improvement."[187]

Perhaps the most interesting of Deming's points is the last one. Point number 14 is: "Put everybody to work to accomplish the

181. *See* JAMES P. WOMACK ET AL., THE MACHINE THAT CHANGED THE WORLD 277 (1990).

182. *See* ANSCHUTZ, *supra* note 155, at 16–17.

183. *Id.* at 17.

184. *Id.* at 18.

185. *Id.* at 22.

186. *Id.* at 23.

187. *Id.* at 27.

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transformation."[188] This expresses the goal of moving concerns about product quality, customer satisfaction, and organizational effectiveness down the structure away from top management to employees at all levels. As a leading TQM consultant writes, "At successful TQM organizations, everyone is involved in the corporate transformation. Partnership breeds involvement, and involvement breeds partnership."[189]

In practice, TQM has many similarities with the competency-based organization discussed above. TQM involves a flattening of management positions and a shift in authority to cross-functional work teams. It advocates widening jobs and instituting "horizontal management" practices,[190] in which managers focus on broadly defined tasks rather than narrowly-defined departments. TQM also advocates giving ordinary workers most of the responsibility for the core functions of the firm.[191] For example, TQM advocates that workers have direct contact with customers. "[M]anagement should seek to create conditions whereby every worker, at least from time to time, sees and talks with real customers, with actual users of the company's product or service."[192] In addition, workers should be provided with the results of customer satisfaction surveys and focus groups. Workers should also have direct contact with external suppliers and should be involved in the selection of new employees.[193]

188. *Id.* at 28.

189. *Id.*

190. *Id.* at 50.

191. *See* JOSHUA G. ROSETT & RICHARD N. ROSETT, CHARACTERISTICS OF TQM: EVIDENCE FROM THE RIT/USA TODAY QUALITY CUP COMPETITION 4–5 (Nat'l Bureau of Econ. Research, Working Paper No. 7241, 1999).

192. Anschutz, *supra* note 155, at 53.

193. *See id.*

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Another aspect of TQM is an emphasis on training. Training makes employees available for horizontally defined tasks. Training employees in their organization's products, techniques, markets, goals, and competitive environment is necessary if employees are to interact with customers and be involved with core organizational decisions. One TQM consultant describes the role of training as follows:

> [Training] "creates a covenant between the organization and the person by conveying a bonding message: 'The company is investing in your professional growth because your future is with us, as a partner; the organization's well-being depends on the collective ability and effort of its people.'"[194]

Two industrial relations scholars described TQM as "an unparalleled symbiosis between R & D and continuous improvement in the production process, premised on the active mobilization of the knowledge and intelligence of all employees."[195]

Related to its emphasis on training, TQM advocates the Japanese concept of Kaizen which means improvement. TQM encourages constant small incremental improvements rather than splashy one-shot innovations. Some TQM companies give prizes or other formal ceremonies of recognition for teams of workers who devise improvements.

TQM is also associated with reengineering, including the consolidation of managerial functions and elimination of redundant positions. As one TQM consultant writes,

> Organizations across the country have taken note that there is a cadre of mid-level (and even senior) managers that neither lead nor decide, whose sole function is to collect information from performers, analyze it, provide it to

194 . *Id.* at 95.

195 . Tony Elger and Chris Smith, *Introduction*, *in* GLOBAL JAPANIZATION? THE TRANSNATONAL TRANSFORMATION OF THE LABOUR PROCESS 1, 3–4 (Tony Elger & Chris Smith eds., 1994) (summarizing and adopting conclusion of MARTIN KENNEY & RICHARD FLORIDA, BEYOND MASS PRODUCTION: THE JAPANESE SYSTEM AND ITS TRANSFER TO THE U.S. (1993)).

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> decision makers, and convey decisions back to performers. . . .
>
> In TQM organizations, these non-managing managers have become redundant and excessive. Workers are now empowered to collect data about their jobs and to make job-related decisions; they also deal directly with corporate decision makers, and even with suppliers and customers as necessary. There is no longer a need for many of the mid-management people formerly "required." They can be, and are being, assigned to more productive work.[196]

Deming was critical of conventional and human resource practices such as setting numerical goals, using performance-based pay, or using annual performance appraisal. He said these techniques tended to encourage employees to compete with each other rather than build teamwork and mutual support. Furthermore, he believed that these techniques encouraged employees to work to meet the specific goals set and then relax.[197] They do not encourage "discretionary effort,"[198] or what has been called organizational citizenship behavior.

The ideas embodied in TQM have had a major impact on American companies. By 1995, it was estimated that 67 percent of American organizations were focused on product quality.[199] Considerable research on the results have found that TQM improves quality and efficiency.[200]

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196. Anschulz, *supra* note 153, at 132.

197. *See id*. at 17–28.

198. *Id.* at 46–48.

199. *See id*. at Foreword.

200. *See* Rosett & Rosett, *supra* note 191, at 3. George S. Easton & Sherry L. Jarrell, *The Effects of Total Quality Management on Corporate Performance: An Empirical Investigation*, 71 J. BUSINESS 253, 298 (1998).

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3. Identifying the Terms of the New Psychological Contract

The preceding examination of some of the dominant trends in organizational theory helps to illuminate the terms of the new psychological contract. These theories attempt to resolve a fundamental paradox: How can firms motivate employees to provide commitment to quality, productivity, economy, and efficiency, and firm goals while dismantling the job security and job ladders that characterized large organizations twenty years ago? To the extent that Taylorist hierarchies and job ladders were adopted by firms to solve problems of employee motivation, encourage skill acquisition, and discourage employee oppositional behavior, it is important to determine what in the new employment systems will accomplish these goals.

Rosabeth Moss Kanter acknowledges that the new high-commitment management models are colliding with "the job-insecurity reality" found in American corporations.[201] She resolves the paradox by advocating that firms offer "employability security" instead of employment security. She says firms should provide lifetime training and retraining opportunities in order to enable them to attract high-caliber talent and to give those employees who are downsized other opportunities.[202] She proposes a model employability contract, by which the firm promises to upgrade worker skills and to help provide new job opportunities should those at the firm disappear.[203] Kanter also urges firms across industries and across

201. KANTER, *supra* note 177, at 190.

202. *Id.* at 192.

203. *Id.* at 194. In her model employability security "contract," Kanter recommends that companies make a written pledge that states, inter alia:

> Although we cannot guarantee tenure in any particular job or even future employment, we will work to ensure that all our people are fully employable. . . . We promise to:
> -Recruit for the potential to increase in competence, not simply for narrow skills to fill today's slots.

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countries industries to develop standard human resources policies on items like fringe benefits, vacations, bonuses, and licensing policies, and to ensure portability of benefits and skills so as to enable workers to function in the new employment setting.[204]

Peter Drucker also tries to confront the problem of eliciting employee motivation in the world of no long-term job security.[205] Drucker recommends that employees market themselves for their knowledge and their human capital. They should plan to work in networks—for corporations, but not as employees of corporations. He says top management needs to stop emphasizing loyalty and instead needs to learn how to instill trust.[206]

Janice Klein, a former GE executive turned M.I.T. Sloan School professor, also attempts to provide an answer to the paradox.[207] While she acknowledges that promises of job security are a powerful means to inculcate loyalty, she maintains that loyalty can also be fostered in other ways as well. The task, according to Klein, is for managers to "find other means to convince employees that they are in the same boat together."[208] She suggests that commitment can come through the

> -Offer ample learning opportunities, from formal training to lunchtime seminars—the equivalent of a month a year.
> -Provide challenging jobs and rotating assignments that allow growth in skill even without promotion to "higher" jobs. . . .
> -Retrain employees as soon as jobs become obsolete. . . .
> -Provide three-month educational sabbaticals or external interships every five years.
> -Find job opportunities in our network of suppliers, customers, and venture partners.

Id. at 194.

204. *See id.* at 195.

205. *See* DRUCKER, *supra* note 58, at 71–72.

206. *See id.*

207. *See* Janice Klein, *The Paradox of Quality Management: Commitment, Ownership, and Control*, *in* THE POST-BUREAUCRATIC ORGANIZATION, *supra* note 125, at 178.

208. *Id.* at 179.

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personal relationship between a supervisor and a worker, or between peers—especially in self-managed teams.[209] Also, the work itself can be designed to be intrinsically rewarding and thus foster commitment. She claims that management can also obtain commitment by providing employees with some ownership-like experiences, such as autonomy, voice, and profit-sharing.[210] She advocates a flattening of hierarchies, the elimination of executive dining rooms and parking spaces, and a visible commitment to equity of sacrifice in times of workforce reductions. She also advocates narrowing wage differentials between top management and low-level employees, increasing the use of employee stock ownership plans (ESOPs) and profit-sharing. She also counsels firms to emphasize manager-subordinate loyalty through techniques like enabling employees to follow managers to new assignments, both within and outside the firm. And she urges that jobs be designed to provide an avenue for educating employees.

It becomes clear from an examination of the writings of prominent management theorists that corporations are searching to find a way to make the change away from long-term career employment not only acceptable, but also desirable. By promising employees the opportunity to develop their human capital, the new psychological contract tries to do this. Employers promise employability and training so that, in return, employees will see themselves as entrepreneurs marketing their own human capital in a market place.[211] Rosabeth Kanter observes that "[t]he chance to learn new skills or apply them in new arenas is an important motivator in a turbulent environment."[212] Towers Perrin counseled employers in its November 1999 newsletter: "[T]o attract the right people,

209. *See id.* at 178–79.

210. *See id.* at 182.

211. *See* DAVENPORT, *supra* note 115, at 7–16 (touting the importance of encouraging workers to see themselves as investors in human capital).

212. KANTER, *supra* note 177, at 53.

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organizations are adopting total reward strategies that include learning and development opportunities and the creation of better work environments, in addition to the traditional pay and benefits."[213]

Another feature of the new psychological contract involves the promise of networks. Not only can employees raise their human capital, they can raise their social capital by meeting and interacting with others in different departments within the firm, with customers and suppliers of the firm, and with competitors. When jobs are redefined in competency terms, each employee is a professional in his or her particular area. They are sent to trade meetings or other professional gatherings to network and keep up to date.

The new psychological contract also involves compensation systems that peg salaries and wages to market rates rather than relying upon internal institutional wage-setting factors. The emphasis is on differential pay to reflect differential talents and contributions.[214] Thus, for example, Towers Perrin urges its clients to "reward[] results, not tenure, even at the hourly level."[215] It also advocates allocating "[s]ignificantly disproportionate share of all pay programs for high-performing employees," and giving "[d]ifferen[t] deals based on employee contribution."[216] Towers Perrin acknowledges that these recommendations will create dissatisfaction among lower-performing employees, and says:

> Top companies also plan for and achieve higher turnover rates. This strategy is based on the hypothesis that

213 . *Global Survey Highlights Growth in Variable Pay*, TOWERS PERRIN MONITOR (Feb. 1999), *at* http://www.towers.com/towers/publications/publications_frame.asp?target=pubs_date.htm.

214 . *See, e.g.*, KANTER, *supra* note 177, at 175 (reporting that the tide is moving "toward more varied individual compensation based on people's own efforts").

215 . *Pay Attention! How to Reward Your Top Employees; Sleep Well Last Night?*, *in* PERSP. ON TOTAL REWARDS (Jan. 2000), *at* http://www.towers.com/publications/publications_frame.asp?target=pubs_date.htm.

216 . *Id.*

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> significant pay differentiation provides more motivation for the average and poor contributors to leave as they can get a better deal at other companies which tend to offer higher levels of base pay.[217]

Other features of the new psychological contract that have been discussed involve flattening hierarchy, providing prospects for lateral as well as vertical movement within and between organizations, and the use of company-specific dispute resolution devices to redress perceived instances of unfairness.[218] We can thus make a table comparing the new psychological contract to the old.

Table 1
The Old Psychological Contract vs. the New Contract

Old Psychological Contract	New Psychological Contract
job security	employability security
firm-specific training	general training
deskilling	upskilling
promotion opportunities	networking opportunities
command supervision	microlevel job control
longevity-linked pay and benefits	market-based pay
collective bargaining and grievance arbitration	dispute resolution procedures for individual fairness claims

I.

217 . *Id.*

218 . *See* Colvin, *supra* note 152, at ___.

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IMPLICATIONS OF THE NEW WORKPLACE FOR LABOR AND EMPLOYMENT REGULATION

The new employment system described in Part II has implications for labor and employment regulation. Many aspects of the present system of labor and employment law assume the existence of strong firm-worker attachment, long-term jobs, and promotion ladders to define progress throughout a career. For most of the twentieth century, the law and the institutions governing work in America were based on the assumption that workers are employed by corporations that have stable work forces and value long-term attachment between the corporation and the worker. In that world of work, labor law had three distinct regulatory roles.

First, the collective bargaining laws were designed to promote the self-organization of workers so that they could constitute a countervailing power that could bargain with employers about the operation of internal labor markets. Unions negotiated agreements that contained seniority and just-cause-for discharge clauses that enabled them to enforce the firms' promises of lifetime employment security. Unions also negotiated other terms that were consistent with a lifetime employment commitment, such as wages, vacation and sick leave policies based on length of service. Long vesting periods for pensions also assumed and reinforced the norm of long-term employment. At the same time, the New Deal social security and unemployment programs tied those crucial social insurance protections to employment, thereby reinforcing the bond between the employee and the firm. Thus there evolved an employment system comprised of rising longevity-based wages, employer-based health insurance, and retirement security. For many American workers, the employment system embodied the promise of a good life.[219] The promises were not given freely or gratuitously workers fought hard to secure them. Nonetheless, once in place, the lifetime employment system, with its

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. *See, e.g.*, MILKMAN, *supra* note 29, at 1 (describing the labor system at a unionized auto plant pre-1980s as "the best America had to offer to unskilled, uneducated industrial workers").

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multiple forms of job and livelihood security, was beneficial to both management and labor.

The collective bargaining system gave unions little input into strategic corporate decision making.[220] 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.[221] 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.

While the old employment system provided job security and relative prosperity to many, it also created an invidious form of labor market dualism—a sharp division between insiders and outsiders that strongly fell along racial and gender lines. The primary sector—the unionized work force within large firms—was the privileged core. As a core, it generated a periphery comprised of women, minorities, migrant workers, and rural Americans, groups that were largely left outside. The labor laws and the employment practices of large firms reinforced a sharp divide between those inside and those outside of the corporate family. The insiders benefitted from the collective bargaining laws; the outsiders were covered by two other types of labor

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

221 . *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 Sararimen*, ECONOMIST, Nov. 20, 1999, at 71.

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laws—minimal employment standards and employment discrimination laws.

Federal and state employment laws provide a safety net and set a floor of benefits for those workers who remained outside the bilateral collective bargaining system. Thus, employment law—rights and benefits for individual workers—began as a safety valve to take up the slack in the collective bargaining system. However, over time, the employment laws have expanded in number and scope, while the bargaining system has contracted. As union density has declined in the private sector, statutory protections have become the main source of worker rights.[222]

The other type of labor regulation is found in the antidiscrimination laws. Since 1962, employment discrimination laws have significantly reshaped the American workplace. Title VII of the Civil Rights Act of 1964, the Equal Pay Act,[223] and other related statutes have helped women and minorities remove barriers to employment and promotion. Both as a result of enforcement of these laws and as a result of other cultural and market factors, the position of women and minorities in the labor market has improved in recent decades. The gender pay gap narrowed from the 1970s to 1996, and the difference between women's and men's unemployment rates has virtually disappeared.[224] Also, the segregation of jobs along gender lines has diminished,[225] and women's job tenure rates have increased while men's have declined.[226] The wage gap between minorities and white workers has also declined since the 1970s, but not as

222. *See* Stone, *supra* note 40, at 591–93.

223. Pub. L. No. 88-38, 77 Stat. 56 (1963) (codified as amended at 29 U.S.C. §§ 201, 206 (1994)).

224. *See* BLAU ET AL., *supra* note 76, at 239–42, 247–48 (discussing the pay and unemployment gap).

225. **[auth: please provide cite]**

226. *See supra* Part II.

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dramatically.[227] However, there remain many pernicious incidents of the exclusionary policies of the past, such as continuing pay gaps, differential unemployment rates, and glass ceiling limits on women's and minorities' upward progress within firms.

The changes in workplace practices detailed in Part III have rendered many features of existing labor regulation obsolete. The former regulatory structure is ill-suited to the newly emerging employment system comprised of implicit promises of employability security, human capital development, lateral employment mobility, and networking opportunities. Thus, as internal labor markets decline in importance, many features of the regulatory framework need to be reconsidered. These are briefly stated below and are addressed at length in the remainder of the Article.

First, one of the most pressing legal issues in the workplace today is who owns an employee's human capital. Because the new psychological contract entails employability, human capital development, and ease of movement to new employers in return for diminished job security, ownership of human capital has become a central issue. The issue typically arises when an employee leaves one employer and goes to work for a competitor. With increased frequency, 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 the valuable knowledge. Disputes about employees' use of intellectual property in the posttermination setting have increased because firms recognize that their employees' human capital is one of their most valuable assets.

Second, employment discrimination law needs to be reassessed in light of the changing workplace. Discrimination in employment has proven to be one of the most difficult types of racial and gender discrimination to eradicate. The new employment system has important implications for women and minorities, posing not only new

227. *See* Alan Hyde, *Classification of U.S. Working People and Its Impact on Workers Protection*, Report to the International Labour Office, January, 2000, at 2–3. (citing ECONOMIC REPORT OF THE PRESIDENT ch.4 (1998)).

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possibilities but also new obstacles in achieving equality in the workplace. In order to make further strides toward equality, there must be an antidiscrimination strategy that is appropriate to the new workplace.

Third, the new psychological contract and its attendant job structures were initially constructed in nonunion environments and have proven resistant to unionization efforts. Indeed, many of the core features of unionism, such as narrowly defined bargaining units and seniority systems, are not suited to boundaryless careers. If we want to preserve institutions for employee representation, a new model of unionism and a new legal structure to support it need to be devised.

Fourth, 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.[228] The pay gap between the top quintile and the bottom quintile of the work force is the greatest it has been at any time since 1947 when the U.S. Department of Labor first collected such statistics. In addition, there have been widening pay disparities within firms.[229] There is evidence that the rising pay gap and the deteriorating income distribution are related to the new work practices described in Part III. Thus, the impact of the new psychological contract on income distribution needs to be addressed.[230] The remainder of this Article addresses these issues.

228. *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).

229. *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)).

230. The widening income inequality is a powerful argument for redistributive measures. Whether those redistributive measures should take the form of social welfare benefits like national health insurance and publically funded child care, whether they should take the form of tax credits and incentives, or whether there should be more effective encouragement and protection of collective worker organization, is itself an important question to reconsider.

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II.

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DISPUTES OVER OWNERSHIP OF HUMAN CAPITAL

According to Thomas Stewart, editor of Fortune, "Information and knowledge are the thermonuclear competitive weapons of our time."[231] Today, the knowledge possessed by a firm's employees is a major asset and a primary source of competitive advantage.[232] Firms value not merely technical knowledge, such as computer code or biotechnical discoveries, but also more mundane types of knowledge, such as how the business operates, how the goods are produced, how paperwork flows occur, and how files are organized.[233] Employees have valuable knowledge about the firm's product, the context in which it is produced, and the environment in which the firm competes, including knowledge of business plans, upcoming projects, past projects, and past experience. There is also enormous value in employees' knowledge about customers, markets, and competitors. One particularly valuable type of knowledge is called "negative knowledge"—knowledge of products tested or systems tried that proved to be unproductive. Such knowledge in the hands of a competitor could save huge expenditures in duplicative and wasteful efforts in pursuit of dead ends.[234]

Because of the importance of employees' knowledge, a growing number of disputes have arisen when employees leave their jobs and

231. STEWART, *supra* note 119, at ix.

232. Bruce A. Lehman, *Intellectual Property: America's Competitive Advantage in the Twenty-First Century*, 31 COLUM. J. WORLD BUS. 6, 10 (1996).

233. *See* STEWART, *supra* note 119, at 71–78 (describing the importance of tacit knowledge and other informal forms of intellectual capital to organizations).

234. *See* Brunswick Corp. v. Jones, 784 F.2d 271, 275 (7th Cir. 1986) ("Access to such [negative] information could enable a competitor to cut the time and costs required to develop a new product by avoiding engineering blind alleys."); *see also* Thomas J. Methvin, *Business Torts from a Plaintiff's Perspective*, 60 ALA. LAW. 415, 415 (1999). Courts vary as to whether they consider negative knowledge to qualify as a trade secret. *Compare* Novell Inc. v. Timpanogos Res. Group, Inc., 46 U.S.P.Q.2d (BNA) 1197, 1216–17 (D. Utah 1998) (using negative knowledge to justify applying inevitable disclosure doctrine) *with* EarthWeb v. Schlack, 71 F. Supp. 2d 299, 315 (S.D.N.Y. 1999) (rejecting the argument that "gaps or holes" in knowledge is a trade secret).

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try to take their human capital with them. Increasingly, employers are requiring employees to accept covenants not to compete or covenants not to disclose confidential information at the outset of an employment relationship.[235] And increasingly, employers are suing their former employees at the end of an employment relationship, seeking to enjoin them from taking knowledge acquired on the job with them to use on behalf of a competitor. Employers use a multitude of theories, including misappropriation of trade secrets, breach of a duty of loyalty, industrial espionage, conversion, and when applicable, breach of nondisclosure agreements and covenants not to compete. All of these doctrines address the question: Who owns the employee's human capital?

The analysis presented in Part III suggests an approach to the employee human capital cases that should inform judicial decision making in this area. It suggests that when confronted with questions of ownership of human capital, courts should take the tacit understandings of the new psychological contract into account. The terms of this contract bear directly on issues of employee human capital. As we have seen, one of the most important terms of the new psychological contract is that employers will provide employees with training, skill development, networking opportunities, and general human capital. In situations in which such assurances have been given by an employer, subsequent efforts of the employer to place restrictions on the portability of the employee's general human capital should be regarded as suspect.

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. *See* Phillip J. Closius & Henry M. Schaffer, *Involuntary Nonservitude: The Current Judicial Enforcement of Employee Covenants Not to Compete—A Proposal for Reform*, 57 S. CAL. L. REV. 531, 532 (1984) (noting an increased use of covenants not to compete in employment contracts); Tracy L. Staidl, *The Enforceability of Noncompetition Agreements When Employment Is At-Will: Reformulating the Analysis*, 2 EMPLOYEE RTS. & EMP. POL'Y J. 95, 118 (1998) (describing how post-employment noncompetition agreements have become typical additions to employment contracts and an increasingly frequent basis for litigation); Peter J. Whitmore, *A Statistical Analysis of Noncompetition Clauses in Employment Contracts*, 15 J. CORP. L. 483, 489 (1990) (noting that "noncompetition covenants continue to be used with ever-increasing frequency").

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A. Covenants not to Compete

The sheer volume of litigated cases between employers and former employees involving trade secrets, covenants not to compete, and duty of loyalty has mushroomed in the past ten years.[236] Courts have become increasingly receptive to employer efforts to limit employee use of human capital by adopting expansive theories of trade secrets and of employees' duty of loyalty, and by expanding the circumstances under which they will enforce covenants not to

236. *See* Suellen Lowry, *Inevitable Disclosure Trade Secret Disputes: Dissolutions of Concurrent Property Interests*, 40 STAN. L. REV. 519, 519 (1988) (commenting on the dramatic increase in trade secret litigation); Staidl, *supra* note 235, at 95 (same).

A search by the author on Westlaw for cases involving covenants not to compete and trade secrets revealed the number of reported cases to be:

All states file:	1970–1974	1975–1979	1980–1984	1985–1989	1990–1994	1995–1999
covenants not to compete	127	235	314	47	512	509
non-compete covenants	40	68	123	178	171	193
trade secrets	156	233	367	510	312	719
All federal file:						
covenants not to compete	125	135	185	264	340	368
non-compete covenants	29	33	45	66	99	161
trade secrets	258	328	546	779	1011	1256

While this data hardly represents a scientific survey—Westlaw does not contain all decisions, the search terms do not capture all the cases, and there is no doubt substantial overlap in the cases and hence double-counting—the trend appears to be unequivocal. *See generally* ABA SECTION OF LABOR & EMPLOYMENT LAW, COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY *passim* (Brian M. Malsberger et al. eds., 2d ed. 1996); ABA SECTION OF LABOR & EMPLOYMENT LAW, EMPLOYEE DUTY OF LOYALTY: A STATE-BY-STATE SURVEY *passim* (Brian M. Malsberger et al., eds. 2d ed. 1998); ABA SECTION OF LABOR & EMPLOYMENT LAW, TRADE SECRETS: A STATE-BY-STATE SURVEY *passim* (Arnold H. Pedowitz et al. eds., 1997) [hereinafter TRADE SECRETS].

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compete.[237] The different doctrines offer different types of protection for valuable information. Trade secret protection prevents an employee from disclosing knowledge that qualifies as a "trade secret"—a vague and uncertain standard at best. Covenants not to compete have the potential to prevent an employee from using any of her knowledge for a competitor. Similarly, a covenant not to disclose confidential information can protect the particular information that is the subject of the agreement. Noncompetition and nondisclosure covenants have become prevalent in employment contracts, even for at-will relationships.[238] The enforcement of covenants not to compete, however, occupies a peculiar legal never-never land, somewhere between contract and tort, in which party consent and externally imposed obligation are intimately but complexly intertwined.

When employees are subject to covenants not to compete or not to disclose specific information, arguably they have consented to restrictions on their postemployment activities. Thus, there is a strong argument for courts to enforce the covenant so long as the agreement was the result of actual consent and the terms were disclosed. A consent-based approach to noncompete and nondisclsoure covenants would permit courts to ensure that a covenant was not buried in fine print in an employment handbook or otherwise hidden from view. It might also be legitimate for a court to require an employer to identify the confidential information that is subject to a nondisclosure agreement with particularity at the outset, so that employers cannot use such agreements to impose far-reaching restrictions on employees ex post. A consent-based approach would impose no further scrutiny in determining whether a noncompete and nondisclosure covenant is enforceable.[239] However, with covenants not to compete, the existence of the agreement is only the beginning of a court's analysis.

237. *See* Closius & Schaffer, *supra* note 235, at 547 (reporting recent change in the courts' willingness to enforce covenants that impose an occupational ban on employees).

238. *See id.* at 532; Staidl, *supra* note 235, at 95–96; Whitmore, *supra* note 235, at 484.

239.

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Historically, courts were suspicious of noncompete covenants in the employment setting.[240] They believed such covenants suppressed employee mobility, interfered with the labor market, and restrained trade.[241] They were seen as inconsistent with the right of every individual to earn a living In addition, some courts often believed such covenants were the result of vastly unequal bargaining power and thus were contracts of adhesion.[242] As a result, courts have not enforced noncompete convenants as a matter of course. Rather for a long time, many courts held that they were presumptively void.[243] But over time, most state courts became more receptive to enforcing covenants not to compete, but with a "rule of reason" approach.[244]

The rule of reason approach says that to be enforceable, an employment covenant not to compete must be reasonable. Reasonableness has been defined to mean it must be no broader than necessary to protect a legitimate interest of the employer, and reasonable in duration and geographic scope.[245] In addition to these

. A strict consent-based approach is advocated by Judge Richard Posner in his dissenting opinion in *Outsource International, Inc. v. Barton*, 192 F.3d 662, 669–75 (7th Cir. 1999), Judge Posner said: "I can see no reason in today's America for judicial hostility to covenants not to compete. It is possible to imagine situations in which the device might be abused . . . but the doctrines of fraud, duress, and unconscionability are available to deal with such situations." *Id.* at 670 (Posner, J., dissenting) (citations omitted).

240

. They are more lenient in their enforcement of nondisclosure agreements for reasons discussed *infra* at __.

241

. In one case of obvious employer over-reaching, a court held that a ten year covenant restricting a janitorial employee from working in eight counties was unreasonable. *See* Frederick v. Prof'l Bldg. Maint. Indus., Inc., 344 N.E.2d 299, 302 (Ind. Ct. App. 1976).

242

. *See, e.g.*, Insulation Corp. of Am. v. Brobston, 667 A.2d 729, 733 (Pa. Super. Ct. 1995). *See generally* Closius & Schaffer, *supra* note 235.

243

. *See, e.g.*, Purchasing Assocs., Inc. v. Weitz, 196 N.E.2d 245, 248 (N.Y. 1963); Arthur Murray Dance Studios v. Witter, 105 N.E.2d 685, 693 (Ohio 1952).

244

. *See* Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. Rev. 575, 603–04 (1999) (describing the origin of the rule of reason approach).

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reasonableness factors, courts traditionally required that the covenant not unduly burden the employee or unduly harm the public.[246]

What a court considers reasonable duration and geographic scope varies from state to state and from case to case. Some courts have upheld extremely broad covenants, and some have struck down very narrow ones.[247] Recently some courts have upheld covenants that are wider in geographic scope than they would have in the past on the grounds that the firm seeking to enforce the covenant competes in a nationwide or worldwide market.[248] Yet, some courts have restricted the time of an allowable covenant on the grounds that in today's fast-moving and competitive environment, an employee's knowledge loses its value quickly.[249]

Some courts have also imposed stricter requirements for enforcing noncompete covenants against at-will employees than against

. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 188(1)(a) (1981) (stating that a covenant not to compete is only enforceable if "the restraint is [no] greater than is needed to protect the promisee's *legitimate* interest") (emphasis added); *see also* Edward T. Ellis et al., *Protection for an Employer's Investment in its Key Employees: Recent Caselaw on Covenants Not to Compete and Trade Secrets*, *in* 3 CURRENT DEVELOPMENTS IN EMPLOYMENT LAW, ALI-ABA COURSE OF STUDY 1324 (1998).

246

. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §188(1)(b) (1981) (listing hardship to promisor and "injury to the public" as factors to be considered in determining reasonableness).

247

. *Compare* Shipley Co. v. Clark, 728 F. Supp. 818, 828 (D. Mass. 1990) (upholding one year covenant for salesman's dealings with former customers); Superior Gearbox Corp. v. Edwards, 869 S.W.2d 239, 248 (Mo. Ct. App. 1993) (upholding five-year restriction); Karlin v. Weinberg, 372 A.2d 616, 619 (N.J. Super. Ct. App. Div. 1977) (stating that a five year restriction on a doctor was reasonable); and Loranger Constr. Co. v. C. Franklin Corp., 247 N.E.2d 391, 393 (Mass. 1969) (upholding a three-year restriction on natural gas service employee); *with* Blalock v. Perfect Subscription Co., 458 F. Supp. 123, 127–28 (S.D. Ala. 1978) (finding a 120-day covenant against a magazine salesman unreasonable); *and* Birmingham Television Corp. v. DeRamus, 502 So. 2d 761, 764 (Ala. Civ. App. 1986) (finding a six-month restriction of an at-will employee unreasonable).

248

. *See, e.g.*, Ackerman v. Kimball Int'l, Inc., 652 N.E.2d 507, 510 (Ind. 1995) (upholding a world-wide covenant not to compete).

249

. *See, e.g.*, EarthWeb v. Schlack, 71 F. Supp. 2d 299, 313 (S.D.N.Y. 1999) (holding that a covenant not to compete of one year's duration was unreasonably long due to the "dynamic nature of the industry, its lack of geographical borders" and the fact that the employees' knowledge would lose its value quickly if he did not keep abreast of constant changes).

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employees on fixed term contracts. Such courts maintain that to be enforceable, a covenant must be "ancillary to an otherwise valid transaction or relationship"[250] or supported by valid consideration.[251] Like consideration, the "ancillary to an otherwise valid transition" requirement is intended to ensure the presence of a real bargain. Such courts require there to be a larger contractual framework defining the parties' relationship because they fear that in an at-will employment context, the employer might be getting something for nothing.[252]

Recently, many courts have either abandoned the ancillary to a valid transaction requirement, or modified it to permit enforcement of noncompete covenants against at-will employees.[253] The courts do so by defining an initial offer of employment, even at-will employment, as valid consideration for the covenant.[254] For a time, some courts refused to enforce a noncompete covenant that was presented to an at-will employee after employment had commenced on the grounds that consideration was lacking. But most courts now believe that the postemployment situation should not be treated any differently than the

250. *See, e.g.*, Loewen Group Int'l, Inc. v. Haberichter, 912 F. Supp. 388, 392 (N.D. Ill. 1996); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 188(1).

251. *See* Applied Micro, Inc. v. SJI Fulfillment, Inc., 941 F. Supp. 750, 753 (N.D. Ill. 1996); Creative Entm't, Inc. v. Lorenz, 638 N.E.2d 217, 219 (Ill. App. Ct. 1994); Insulation Corp. v. Brobston, 667 A.2d 729, 733 (Pa. Super. Ct. 1995); *see also* Staidl, *supra* note 235, at 97–98.

252. *See* Ellis et al, *supra* note 245, at 1327–28; Staidl, *supra* note 235, at 97–98; *see, e.g.*, *Creative Entm't*, 638 N.E.2d at 220–21 (refusing to enforce a noncompete covenant in an at-will employment relationship because the employment could be terminated by the employer at any time, so that the covenant was a "naked agreement" and because it was "not ancillary to an employment contract," the sole purpose "was to restrain trade").

253. *See, e.g.*, Woodfield Group, Inc. v. DeLisle, 693 N.E.2d 464, 466 (Ill. App. Ct. 1998); s*ee, e.g.*, Abel v. Fox, 654 N.E.2d 591, 597 (Ill. App. Ct. 1995) (repudiating *Creative Entertainment* and finding a covenant in an at-will contract enforceable); *see also* Widemaier, *Covenants Not to Compete*, in ANTITRUST AND UNFAIR COMPETITION (Ill. Inst. for Continuing Educ., 1998) (stating that the *Creative Entertainment* decision has been "roundly criticized" in Illinois).

254. *See* Staidl, *supra* note 235, at 102; Widmaier, *supra* note 253, at __.

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initial hiring.[255] Thus, for example, an Ohio court of Appeals recently noted that "'[a]s a practical matter every day is a new day for both employer and employee in an at-will relationship. [Thus] we see no substantive difference between the promise of employment upon initial hire and the promise of continued employment subsequent to "day one."'"[256]

The recent trend of relaxing the requirement for a valid superordinate contract or other consideration can lead to harsh results for an individual at-will employee. An employee who is subject to a restrictive covenant and is then fired unfairly is left without a job and unable to take another one.[257] To avoid this regrettable outcome, some states will not enforce a covenant against an at-will employee who has been fired unfairly,[258] although some will, notwithstanding the circumstances of the dismissal.[259] One scholar has proposed that if courts enforce noncompete clauses for at-will employees, they should impose upon the employer a reciprocal obligation not to discharge the employee except for just cause.[260] To date, this proposal has not been adopted.

As discussed, the expanded enforcement of restrictive covenants in employment contracts has occurred through judicial reinterpretation

255 . *See* Fin. Dimensions, Inc. v. Zifer, Nos. C-980960, C-980993, 1999 WL 1127292, at *3 (Ohio Ct. App. Dec. 10, 1999) (stating that since 1985, the majority of courts have rejected the distinction between covenants presented at the time of commencing at-will employment and those presented after employment has begun, and "hold that the employer's continued employment of the employee after the employee signs or agrees to the restrictive covenant is sufficient consideration to support the employer's later enforcement of the agreement").

256 . *Id.* at *4 (quoting Copeco, Inc. v. Caley, 632 N.E.2d 1299, 1301 (Ohio Ct. App. 1992)).

257 . *See, e.g.*, Aero Kool Corp. v. Oosthuizen, 736 So. 2d 25, 27 (Fla. Dist. Ct. App. 1999).

258 . *See, e.g.*, Cent. Adjustment Bureau, Inc. v. Ingram, 678 S.W.2d 28, 37 (Tenn. 1984); Insulation Corp. v. Brobston, 667 A.2d 729, 738 (Pa. Super. Ct. 1995).

259 . **[auth: please provide cite]**

260 . *See* Staidl, *supra* note 235, at 118.

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of the meaning of reasonableness in time and space, as well as through a relaxation of the requirement of consideration in the at-will context. In addition, expanded enforcement has occurred through a change in judicial attitudes toward revision. In the past, courts usually refused to enforce a covenant not to compete if any part of it was invalid. The current approach of a majority of courts is either to rewrite an invalid covenant and enforce it as rewritten or to delete the invalid portions and enforce the remainder.[261]

One example of the changing attitudes toward enforcement of employment noncompete covenants can be found in the sharply drawn battle in the late 1980s and early 1990s in Texas.[262] In the late 1980s, the Texas Supreme Court handed down four decisions in which it refused to enforce restrictive covenants, and in which the court articulated a narrow approach to such covenants. In response, in 1989, the Texas legislature enacted a statute on covenants not to compete that was designed to reject the state court's approach and to expand the situations in which such covenants would be enforced. Senator John Whitmire, who introduced the legislation, argued that the enforcement of such covenants was necessary to encourage investment in the state.[263] He criticized the Texas Supreme Court for pursuing a policy "'of [putting] free movement of workers above . . . the increased investment in business.'"[264] The Texas Business Bar Foundation was one of only two groups that testified about the bill, and they argued that enforcement of noncomplete covenants was necessary because, by

261. *See* Ellis et al., *supra* note 245, at 1330–32.

262. The recent history of noncompete clauses in Texas is recounted in detail in Jeffrey W. Tayon, *Covenants Not to Compete in Texas: Shifting Sands from Hill to Light*, 3 TEX. INTELL. PROP. L.J. 143 *passim* (1995). *See also* Light v. Centel Cellular Co., 883 S.W.2d 642, 643–44 (Tex. 1994) (recounting the history of the statute).

263. *See* Tayon, *supra* note 262, at 179.

264. *See id.* at 180 (quoting Senator John Whitmire).

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protecting confidential information, they encouraged firms to engage in research and development.[265]

The 1989 statute was passed, but almost immediately, the Texas Supreme Court restricted its application to at-will employees. In response, the legislature amended the statute in 1993 to state explicitly that restrictive covenants involving at-will employees were enforceable.[266] The amended statute provided that courts should enforce covenants if they are reasonable with regard to time, geographic area, and scope of activity, and narrowly tailored to protect the good will or other business interest of the promisee.[267] And notably, the statute stated that when a covenant is unreasonable under the terms of the statute,

> the court shall reform the covenant to the extent necessary to cause the limitations contained in the covenant as to time, geographic area, and scope of activity to be restrained to be reasonable and to impose a restraint that is not greater than necessary to protect the goodwill or other business interest of the promisee and enforce the covenant as reformed.[268]

In 1994, for the first time, the Texas Supreme Court applied the new statute, but gave it an exceedingly narrow interpretation and did not enforce a covenant.[269]

265. *See id.*

266. *Id.* at 147–48.

267. *See* TEX. BUS. & COM. CODE ANN. § 15.50 (Vernon Supp. 2001).

268. Tayon, *supra* note 262, at 148 (quoting TEX. BUS. & COM. CODE ANN. § 15.50–52 (West Supp. 1995).

269. *See* Light v. Centel Cellular Co., 883 S.W.2d 642, 647 (Tex. 1994). *Light v. Centel Cellular Co.* involved a salesperson who had agreed to a noncompete agreement after working under an oral agreement for two years. After the company changed hands, she quit and the company attempted to enforce the covenant. When the case first came before the Texas Supreme Court, it refused to enforce the covenant on the grounds that the employee was at-will. *See id.* The opinion was later withdrawn and the case reheard. In 1994, the court applied the 1993 statute, but gave it an

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Another area in which judicial enforcement of noncompete covenants has changed is in the conception of what constitutes a legitimate protectable employer interest. A court will not enforce a covenant if it is solely a means to restrain train. The long-standing view has been that to be enforceable, a covenant not to compete must protect an employer's legitimate instrest in a trade secret or confidential information.[270] This view creates a paradox, however, because if a court requires a trade secret or confidential information in order to enforce a covenant, the existence of the covenant becomes, at least theoretically, irrelevant. Disclosure of trade secrets and confidential information can be restrained in the absence of such a covenant.[271]

If the law of noncompete covenants merely restates or incorporates the law of trade secrets and confidential relationships, then there is little independent role for the covenant.[272] Some commentators have attempted to resolve the paradox by identifying an independent role that the covenant plays in what would otherwise be a straight-forward trade secret case. Ronald Gilson, for example, suggests that an employer gains procedural and remedial advantages by suing on a covenant rather than bringing an action for misappropriation

exceedingly narrow reading. The court held that because Light's at-will employment agreement contained several terms, there was an "otherwise enforceable agreement." *See id.* at 647. However, the court also concluded that the covenant not to compete was not ancillary to the enforceable aspects of the agreement, so, it did not enforce the noncompete covenant. *See id*. at 648.

270. Edmund W. Kitch, *The Expansion of Trade Secrecy Protection and the Mobility of Management Employees: A New Problem for the Law*, 47 S.C. L. REV. 659, 667 (1996); Lowry, *supra* note 236, at 524–25.

271. *See* Kitch, *supra* note 270, at 667 (noting "circular[ity] when the scope of trade secrecy is defined by the scope of the confidentiality obligation, and the permissible scope of the confidentiality obligation is defined by the scope of trade secrecy protection"); see also Closius & Schaffer, *supra* note 235, at 547–48 (arguing that the only circumstance in which courts should enforce a covenant is when there is a trade secret or confidential information, and that in such a case, the existence of the covenant is "superfluous").

272. *See* Lowry, *supra* note 236, at 526 (discussing fiduciary theories used to protect the employer's confidential information).

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of a trade secret. In particular, he asserts that even though many courts require that there be a trade secret before they will enforce a covenant not to compete, the existence of a covenant makes it easier for an employer to obtain injunctive relief before the secret is disclosed.[273] While Gilson's observation may be correct as a practical matter, it is not necessarily true.[274] After all, the Uniform Trade Secrets Act, in effect in forty-two states, provides that "actual or threatened misappropriation may be enjoined."[275] Therefore, a preliminary injunction should be equally available in trade secret or covenant enforcement actions.

If it is true that courts are more likely to order preliminary relief against the misappropriation of a trade secret in the presence of a noncompete covenant than they are with a naked trade secret claim, the reason for the difference needs to be examined. In theory, the standard of proof for finding a trade secret in the two cases should be no different, unless the court is sub rosa imposing a different test for finding a trade secret where there is a contractual obligation.

Some scholars have suggested that a court is more likely to enforce a trade secret when there is a noncompete covenant because the existence of the covenant permits the court to avoid the difficult legal issue of determining what constitutes a trade secret or confidential information. A case in point is Comprehensive Technologies International, Inc. v. Software Artisans, Inc.,[276] in which the Fourth

273 . *See* Gilson, *supra* note 244, at 605–06.

274 . Ronald Gilson supports his claim by stating, "the availability of preliminary injunctive relief with respect to covenants not to compete contrasts sharply with the unavailability of summary judgment in the case of misappropriation of trade secrets." *Id.* at 606. Yet Gilson fails to make an appropriate comparison: The standard for summary judgment a final judgment on the *merits* of a suit; it is always more exacting than the standard for obtaining *preliminary* relief.

275 . UNIF. TRADE SECRETS ACT (UTSA) § 3, 14 U.L.A. 449 (1990). While the adopting states have made modifications to the UTSA, all have retained the provision for injunctive relief. *See* TRADE SECRETS, *supra* note 236, at app. at B-2 to B-42. The states that have not adopted the UTSA also enforce common law trade secret protection with injunctive relief. *See id.*

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Circuit overturned a district court and enforced a very broad covenant, one that would prevent a former executive employee from working in any capacity for a competitor, even as a janitor. While the court did not find that the knowledge the employee possessed was a trade secret,[277] it justified its decision on the ground that the employee had access to confidential information concerning both the products and customers of the former employer, so that "it will often be difficult . . . to prove that a competing employee has misappropriated trade secret information belonging to his former employer."[278] This rationale suggests that the court acted to protect the trade secret, not to enforce the parties' agreement, but the existence of the covenant enabled it to side-step the difficult trade secret issue.[279]

When a court requires that there be a trade secret or confidential information in order to enforce a noncompete covenant, employee consent plays only a minor role in the case. In Gilsons' view, the covenant permits the court to enlarge remedies for trade secret misappropriation; in the view of some courts, the covenant permits it to cut corners in its analysis of what constitutes a trade secret. In either event, the covenant is enforced to protect an employer's interest in a trade secret or confidential information, not to implement employee consent.[280]

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277. 3 F.3d 730, *vacated by* No. 92-1837, 1993 U.S. App. LEXIS 28601 (4th Cir. Sept. 30, 1993).

278. *See id.* at 737.

279. *Id.* at 739.

280. *See also* Water Servs., Inc. v. Tesco Chems., Inc., 410 F.2d 163, 170–71 (5th Cir. 1969) ("[S]ince it may be difficult to determine, as a matter of law, what is a trade secret, the covenant not to compete is a pragmatic solution to the problem of protecting confidential information."). It has also been suggested that the reason a trade secret is easier to enforce in the presence of a covenant is that the covenant identifies what information the parties believe to be a trade secret and demonstrates an intent by the employer to keep it secret. *See, e.g.*, Dearborn Process Serv., Inc. v. Storner (*In re* Dearborn Process Serv., Inc.), 149 B.R. 872 (Bankr. N.D. Ill. 1993). *See generally* Ellis et al., *supra* note 245, at 1345. This argument can explain judicial enforcement of trade secrets in the presence of covenants not to disclose specific information an employer wants to keep confidential, but it cannot explain enforcement of covenants not to compete.

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B. Reconciling Restrictive Covenants and the New Psychological Contract

Courts have recently expanded the types of employer interests that they consider legitimate subjects of noncompete covenants.[281] Many courts no longer require that there be a trade secret involved at all. Rather, some courts have enforced covenants when a manicurist left to work for another nail salon,[282] a carpet salesman took a job with another carpet retailer,[283] and a liquor deliveryman went to work for another distributor.[284] In doing so, the courts have not abandoned the legitimate interest test altogether. Rather, they have expanded the set of interests they consider legitimate to protect with a noncompete covenant. Two factors that are cited with increasing frequency as legitimate employer interests are (1) contact with customers[285] and (2) employer provision of training.[286] Courts use the presence of either factor as evidence from which to infer that a covenant has a legitimate, rather than an anticompetitive, purpose. However, each of these factors must be reconsidered in light of the new psychological contract.

Firms operating in competitive markets place great value on relationships with customers. The identities and preferences of their customers are seen as one of the most important assets of the firm. Yet it is a vulnerable asset because departing employees who have

281. *See* Fin. Dimensions, Inc. v. Zifer, Nos. C-980960, C-980993, 1999 WL 1127292, at *5–*11 (Ohio Ct. App. Dec. 10, 1999).

282. *See* Nail Boutique, Inc. v. Church, 758 S.W.2d 206, 210–11 (Mo. Ct. App. 1988).

283. *See* Reardigan v. Shaw Indus., 518 S.E.2d 144, 148 (Ga. Ct. App. 1999).

284. E. Distributing Co. v. Flynn, 222 Kan. 666 (1977).

285. *See* Closius & Schaffer, *supra* note 235, at 547–48.

286. *See, e.g.*, Aero Kool Corp. v. Oosthuizen, 736 So. 2d 25, 26 (Fla. Dist. Ct. App. 1999); *see also* Freund v. E.D.&F. Man Int'l, Inc., 199 F.3d 382, 385 (7th Cir. 1999) (Posner, C.J.) (suggesting, in dicta, that under Illinois law, an employer's investment in its employees' training is grounds to enforce a covenant not to compete).

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dealt with a firm's customers have an ability to steal them away. Companies often use noncompete covenants to try to protect customer information from falling into the hands of competitors through the agency of a departing employee. As a result, customer information is the most commonly litigated trade secret issue.[287]

Courts have increasingly ruled that customer contact provides a basis for enforcing a covenant not to compete.[288] Some courts treat customer lists as trade secrets, at least when the lists are difficult to compile and there has been some effort to maintain their secrecy.[289] However, some do not.[290] When a customer list is a trade secret, enforcing a noncompete covenant to prevent the use of a customer list would fall within the trade secret rationale for enforcement of covenants. However, even courts that do not consider a customer list to be a trade secret will usually enforce a noncompete covenant against an employee who has knowledge of a customer list, or knowledge of

287. *See* Henry J. Silberberg & Eric G. Lardiere, *Eroding Protection of Customer Lists and Customer Information Under the Uniform Trade Secrets Act*, 42 BUS. LAW. 487, 487 (1987).

288. *See, e.g.*, Nail Boutique Inc. v. Church, 758 S.W.2d 206, 210–11 (Mo. Ct. App. 1988). *See generally* Whitmore, *supra* note 235, at 503–06 (surveying 105 cases involving noncompete covenants from 1966 through 1988 from 27 states showing that an employee's relationship with customers is a very important factor given by courts as a reason for enforcing or not enforcing covenants).

289. *See, e.g.*, N. Atl. Instruments, Inc. v. Haber, 188 F.3d 38 (2d Cir. 1999); Merrill Lynch, Pierce, Fenner & Smith Inc. v. Ran, 67 F. Supp. 2d 764, 775 (E.D. Mich. 1999); Suncoast Tours, Inc. v. Lambert Group, Inc., No. CIV. A. 98-5627 (JEI), 1999 WL 1034683, at *8 (D.N.J. Nov. 10, 1999); Wright v. Power Indus. Consultants, Inc., 508 S.E.2d 191, 196 (Ga. Ct. App. 1998); Nobel Biocare USA, Inc. v. Lynch, No. 99 C 5774, 1999 WL 958501, at *1 (N.D. Ill. Sept. 15, 1999).

290. On occasion courts do not give such lists trade secret protection, such as when a list is publically available information. *See, e.g.*, Ability Search, Inc., v. Lawson, 556 F. Supp. 9, 15 (S.D.N.Y. 1981); Templeton v. Creative Loafing Tampa, Inc., 552 So. 2d 288, 290 (Fla. Dist. Ct. App. 1989); Hamer Holding Group, Inc. v. Elmore, 560 N.E.2d 907, 918–19 (Ill. App. Ct. 1990). *See generally* Lowry, *supra* note 236, at 522–23 (noting that states vary as to whether or not they treat customer lists as a trade secret). Some courts find that a customer list is a trade secret when it was compiled from information that was difficult to obtain and had been kept strictly confidential. *See, e.g.*, Alagold Corp. v. Freeman, 20 F. Supp. 2d 1305, 1315–16 (M.D. Ala. 1998); AmeriGas Propane, L.P. v. T-Bo Propane, Inc., 972 F. Supp. 685, 698 (S.D. Ga. 1997); Trans-Clean Corp. v. Terrell, No. CV 9703480395, 1998 WL 142436, *8 (Conn. Super. Ct. Mar. 17, 1998).

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unique features and requirements of customers, and is likely to use the knowledge on a new job.[291] Thus, while trade secret law alone does not always protect customer lists, noncompete covenants usually do.[292]

Judicial discussions in customer list cases generally assume that a firm's customers and business contacts are property of the firm and an essential element of the firm's good will.[293] But the prevailing view that the employer has an exclusive property interest in customer contacts is in tension with the terms of the new psychological contract. That contract promises to provide employees with networking opportunities—opportunities to interact and build contacts among suppliers and customers of the firm. In today's workplace, employees are expected to become knowledgeable about, and interact with, a firm's customers in order to facilitate horizontal flexibility and boundaryless work practices. Thus, employees are encouraged to meet customers and become familiar with their needs. By treating customer lists and knowledge of customer needs as a basis for enforcing restrictive covenants, or as a trade secret, courts are unwittingly permitting employers to breach one of the fundamental terms of today's employment contract.

291. *See, e.g.*, Standard Register Co. v. Cleaver, 30 F. Supp. 2d 1084, 1094 (N.D. Ind. 1998); Roto-Die Co. v. Lesser, 899 F. Supp. 1515, 1522 (W.D. Va. 1995); Chem-Trend Inc. v. McCarthy, 780 F. Supp. 458, 461 (E.D. Mich. 1991); Osage Glass, Inc. v. Donovan, 693 S.W.2d 71, 74 (Mo. 1985) (en banc); Cont'l Res. Corp. v. Schloz, 595 S.W.2d 396, 401 (Mo. Ct. App. 1980).

292. In a review of cases seeking trade secret protection for customer lists under the Uniform Trade Secrets Act as of 1987, Henry J. Silberberg and Eric G. Lardiere, attorneys with Stroock, Stroock & Lavan, concluded that the UTSA provides less trade secret protection for customer contacts than the pre-existing common law. As a result, they advised "people-oriented businesses" to impose covenants not to compete on employees who have significant contact with customers on the assumption that courts will enforce these clauses even though the information so protected is not a trade secret. *See* Silberberg & Lardiere, *supra* note 287, at 505.

293. *See* Edmondson v. Am. Motorcycle Ass'n, 54 F. Supp. 2d 544, 550 (W.D.N.Y. 1999); Carriage Hill Health Care, Inc. v. Hayden, No. CIV.96-101-SD, 1997 WL 833131, at *5 (D.N.H. Apr. 30, 1997); Morlife, Inc. v. Perry, 56 Cal. App. 4th 1514, 1526 (1997); *see also Standard Register Co.*, 30 F. Supp. 2d at 1094–97 (refusing to protect customer list as a trade secret, but enjoining competition because of employer's good will).

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Courts also justify enforcement of covenants not to compete when an employer has provided training. The "who pays" factor in covenant cases is relatively new.[294] It is a rationale for enforcing noncompete covenants that is in even greater tension with the new psychological contract than the customer contact rationale discussed above. Under the traditional common law approach, if an employee's knowledge is general, that is, not a trade secret, and if it is not confidential, the knowledge belongs to the employee and its use cannot be restrained regardless of who paid for its acquisition.[295] But recently, courts have justified enforcing covenants on the ground that the employer paid for an employee's training to acquire skills and is thus entitled to prevent the employee from utilizing those skills on behalf of a competitor, even when there is no trade secret involved.[296] The argument that by paying for an employee's knowledge, an employer is entitled to restrain its use, does not comport with traditional analysis of noncompete covenant cases.

Gary Becker's model of employee training and human capital can help explain the who-pays-for-training factor in noncompete cases.[297] Becker distinguishes two types of training—specific training, which

294. In a 1990 survey by Peter Whitmore conducted in 1990 of 105 cases involving employment covenants not to compete, the author did not find the presence of an employer's investment in training to be sufficiently significant to warrant separate treatment in the discussion of results. *See* Whitmore, *supra* note 235, at 524–25 n.243. Rather, that factor was one of 15 variables clustered along with trade secrets, exposure to customer information, and geographic restriction under the general heading, "hardship to the employer." *Id.*

295. *See* Robert Unikel, *Bridging the Trade Secret Gap: Protecting "Confidential Information" Not Rising to the Level of Trade Secrets*, 29 LOY. U. CHI. L.J. 841, 867–75 (1998) (describing the current two-tiered approach, in which an employee's knowledge is classified either as general and thus not subject to judicial protection, or as a trade secret and entitled to judicial protection).

296. *See, e.g.*, Aero Kool Corp. v. Oosthuizen, 736 So. 2d 25, 26 (Fla. Dis. Ct. App. 1999). Even in Texas, where the state supreme court has been disinclined to enforce covenants not to compete, they do enforce covenants where the employer has provided the employee with training. *See* Hill v. Mobile Auto Trim, Inc., 725 S.W.2d 168, 171 (1987), *superseded by* TEX. BUS. & COM. CODE ANN. §§ 15.50–15.51 (Vernon Supp. 2001).

297. *See* BECKER, *supra* note 48, at __.

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has value only to the specific firm, and general training, which has value to other firms either in the industry or in the economy more generally.[298] Becker predicts that employers will pay for most of the costs of specific training, but that employees will pay for general training. He reaches this conclusion by reasoning that employers benefit from specific training, because by definition specific training is of value to them but not to other firms. Thus, they will be willing to pay, at least in part, for its acquisition. Once they do, they will encourage employees to stay on the job long enough to make the employer's investment in the training worthwhile. On the other hand, general training enhances the labor market power of the employee because it makes her more valuable to other firms. The employer will not be willing to pay for general training because it has no way to ensure that the employee will remain on the job and use the training on the employer's behalf.[299] Instead, the employee finances general training by accepting lower wages.

Paul Rubin and Peter Shedd have applied Becker's human capital model to restrictive covenants.[300] They modify the Becker model, however, by contending that there are actually two types of generally training. Some general human capital consists both of general skills and knowledge that an employee is willing to finance through lower wages, but some consists of specialized trade secret information that is far too valuable, and costly, for an employee to self-finance.[301] Robin and Shedd posit that an employer will be willing to finance the acquisition of general human capital that comprises a trade secret, so long as the employer can protect it with a covenant not to complete. The covenant protects the employer from employee opportunism by

298 . *See id.* at ___.

299 . *See id.* at ___.

300 . *See* Paul H. Rubin & Peter Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93, 94 (1981).

301 . *See id.* at 96–97.

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preventing her from obtaining the valuable knowledge and then leaving and using it for a competitor. If courts do not enforce such covenants, they will discourage employers from developing this type of information or force them to utilize it in an efficiently costly manner.[302]

However, Rubin and Shedd also acknowledge that most employees obtain both types of human capital—self-finance general training and employer-financed trade secrets. Thus, they often are also vulnerable to opportunistic behavior by employers. Employers could use a covenant to restrain the employee from using the general training that she self-financed.[303] Rubin and Shedd also argue that, as a practical matter, it is impossible to draft a covenant that distinguishes between two types of general human capital.[304] Therefore, they conclude, it is appropriate for courts to limit enforcement of covenants to information that comprises a trade secret. They contend that to enforce all covenants would be inefficient, just as it would be inefficient to enforce none of them. Instead, courts should determine what information is within the covenant on a case-by-case basis, and only enforce covenants involving training in trade secrets of the employer.[305]

Rubin and Shedd's application of Becker's human capital model argues that restrictive covenants should be enforced when the employer has paid for the acquisition of knowledge and the knowledge involves a trade secret. They claim that their analysis explains why noncompete covenants are found primarily in industries and occupations where specialized training is important.[306] They also use their analysis to

302. *See id.* at 97–98.

303. *See id.* at 98.

304. *See id.*

305. *See id.* at 98–99.

306. *See id.* at 99.

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explain customer list cases.[307] When a customer list involves specialized knowledge that was expensive to obtain, Rubin and Shedd argue, it is a type of general human capital that is a legitimate subject of a covenant

Under Rubin and Shedd's analysis, the court's role in a covenant case is to ensure that a covenant is limited to protecting knowledge that an employer paid for, and to prevent an employee from appropriating general knowledge that the employer did not intend to impart for the employees' own use. They show that by limiting enforcement of such covenants to trade secrets or specialized knowledge, they approximate this result.[308]

However, the new psychological contract changes the outcome of the analysis. As seen in Part III, employers in today's workplace often promise to provide general training as part of the new psychological contract. One of the most important terms of the new psychological contract is employer's promise of general training and employability security in exchange for employee motivation, commitment, and organizational citizenship behavior. Employers also promise to provide general training in order to attract applicants. Thus, many firms offer to pay for some types of employee education as inducement for recruitment. There is a great deal of empirical evidence to support the claim that in today's labor market, many employers pay for general training and skill development for at-will employees.[309]

When an employer has promised to given an employee skill development and general knowledge as part of the employment deal,

307 . *See id.* at 102–04.

308 . *See id.* at 110.

309 . *See* John M. Barron et al., *Do Workers Pay for On-the-Job Training?*, 34 J. HUM. RESOURCES 235, 250 (1999); Mark A. Loewenstein & James R. Spletzer, *General and Specific Training*, 34 J. HUM. RESOURCES 710, 729–31 (1999); DARON ACEMOGLU & JORN-STEFFEN PISCHKE, BEYOND BECKER: TRAINING IN IMPERFECT LABOR MARKETS 4–5 (Nat'l Bureau of Econ. Research, Working Paper No. 6740, 1998) (giving examples of firms bearing the full costs of general training). *See generally* RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 162–66 (6th ed. 1997) (presenting empirical studies that suggest employers bear much of the costs of on-the-job training, including training that is general).

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then it cannot be said that the employer has paid for its acquisition. Nor can it be assumed that the employer intended to preclude the employee from using knowledge for her own advantage. Rather, the employee's right to obtain and use the knowledge is often part of the overall employment package.

If employers do in fact provide general training, and if it is done as part of the new psychological contract, then courts should take that factor into account when deciding whether to enforce noncompetition covenants. When employers argue for enforcement of noncompete covenants on the grounds that the employer paid for the training, courts should inquire as to whether the promise of general training was expressly or tacitly part of the employment deal. If it was, then they should restrain employees from subsequently using the knowledge so obtain.

The implicit suggestion that courts refer to the new psychological contract in deciding how broadly to enforce covenants not to compete is consistent with judicial developments in the at-will area. In the 1980s, courts began to recognize that despite a formal at-will relationship, employers often gave employees an implicit promise of long-term job security in exchange for commitment and loyalty. If an employer subsequently breached the implicit promise by firing an employee without good cause, some courts enforced the implicit contract by imposing a just cause restriction on the employer's power to dismiss.[310]

Just as the courts in the 1980s enforced implicit promises for job security that were part of the old psychological contract, so too should they enforce the implicit promises that comprise the new psychological contract. Courts should reassess the trend toward giving ever wider scope to covenants not to compete by recognizing that under the new

310

. *See, e.g.*, Fletcher v. Wesley Med. Ctr., 585 F. Supp. 1260, 1263–64 (D. Kan. 1984);Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 316–19 (1981), *overruled in part on other grounds by* Guz v. Bechtel Nat'l, 24 Cal. 4th 317 (2000); Salimi v. Farmers Ins. Group, 684 P.2d 264, 265 (Colo. Ct. App. 1984); Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 892 (Mich. 1980); Woolley v. Hoffman-La Roche, Inc., 491 A.2d 1257, 1268 (N.J. 1985); Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1089 (Wash. 1984).

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employment contract, employees have been promised not only training, upskilling, and networking, but also the ability to use their newly acquired skills in subsequent employment. Networking, training, and lateral mobility are a fundamental aspect of today's employment system. While individual employers have an incentive to offer these benefits and then renege, there is no reason courts should support them in doing so.

C. Trade Secrets and Inevitable Disclosure

Employers can often get trade secret protection for specialized knowledge that they want to keep out of the hands of competitors. Until the late 1980s, trade secrets were protected under the common law with guidance from section 757 of the Restatement of Torts, which defined a trade secret as "any formula, pattern, device or compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it."[311] Under this approach, trade secret protection was limited to protecting specific inventions, formulas, devices, and other technical information that was only known to a firm but that would be valuable in the hands of a competitor. The definition of a trade secret, however, did not extend to general business information, market plans, or customer contacts.[312]

In the past fifteen years, the definition of trade secret has expanded. In 1985, the National Conference of Commissioners on Uniform State Law amended its Uniform Trade Secrets Act (UTSA)[313]

311 . RESTATEMENT OF TORTS § 757 (1934). This section was not included in the RESTATEMENT (SECOND) OF TORTS, published in 1979.

312 . *See, e.g.*, AMP Inc. v. Fleischhacker, 823 F.2d 1199, 1203–04 (7th Cir. 1987) (stating that there is no trade secret protection for general confidential business information, including information about business and strategic planning, new product development, manufacturing processes, cost and capacity, financial information, budget information, or marketing and customer information).

313 . UNIF. TRADE SECRETS ACT § 1(4)(i)–(ii), 14 U.L.A. 463 (1990).

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to include a broader definition of trade secrets. Under the UTSA, a trade secret is defined as information that (1) "derives independent economic value, actual or potential, from not being generally known . . . or not being readily ascertainable" and that (2) an employer uses reasonable efforts to keep secret.[314] This definition extends trade secret protection beyond technical information to all commercially valuable information.[315] By focusing on economic value rather than specific concrete technical innovations, the UTSA approach makes the definition of trade secret almost infinitely expandable.[316] The modern trend has also generated great uncertainty in practice.[317]

As courts expand the types of information they call trade secrets, it becomes increasingly difficult for an employee to avoid learning them. Even an employee who does not want exposure to trade secrets has no way to know which information that he learns on a job may later be the subject of a successful claim of protected trade secret status.[318] When such an employee changes jobs, he is at risk of a suit for misappropriation.

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314. *Id.*

315. Also, in 1995, the HIRD RESTATEMENT OF UNFAIR COMPETITION adopted an even more expansive view, defining trade secrets as "any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others." RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (1995). This goes even farther than the UTSA in expanding the range of protection because it "eliminates the distinction between information that is a trade secret and other confidential information." Kitch, *supra* note 270, at 662. The Third Restatement of Unfair Competition also "confirms a significant expansion of the remedies available to protect confidential information in private hands." *Id.* at 663.

316. *See* Kitch, *supra* note 270, at 661; Lowry, *supra* note 236, at 519.

317. Many commentators have noted the inconsistency and unpredictability of trade secret cases given the open-ended and imprecise nature of the definitions of trade secrets in use. *See, e.g.*, Lowry, *supra* note 236, at 528–31.

318. *See* Kitch, *supra* note 270, at 665 (stating that the expansion of trade secrecy law "brings a new class of employees within the ambit of its prohibitions").

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The broadening of the definition of trade secrets is closely linked to the growth of the controversial doctrine of inevitable disclosure.[319] The doctrine of inevitable disclosure became prominent in Pepsico, Inc. v. Redmond,[320] in which the Seventh Circuit enjoined William Redmond, a Pepsico, Inc. employee, from working for a competitor. While there was no covenant not to compete and no trade secrets at risk, the court reasoned that Redmond had valuable knowledge about the Pepsico operations, including knowledge about its business and marketing plans, that he would inevitably disclose in the course of doing his new job. Pepsico has been widely criticized, yet it remains good law in many jurisdictions.[321]

The doctrine of inevitable disclosure is a natural outgrowth of employers' aggressive efforts to restrict employees' use of knowledge. Yet, there is conflict between the new psychological contract and the inevitable disclosure doctrine. Courts have expanded their definitions of trade secrets and restricted disclosure of knowledge that does not rise to the level of a trade secret, just as employees are expected to participate in many aspects of the firm, develop knowledge about the firm's overall operation, create cross-departmental links, and engage in a wide variety of tasks. Flexibility and cross-utilization are essential elements of the new work practices. Further, employees are expected to interact with networks and to develop knowledge about business practices, customers, competitors, and the larger context of the firm. Indeed, as discussed in Part III, compensation practices often reward

319. *See* Jay L. Koh, *From Hoops to Hard Drives: An Accession Law Approach to the Inevitable Misappropriation of Trade Secrets*, 48 AM. U. L. REV. 271, 281–84 (1998) (summarizing positions in debates over inevitable disclosure doctrine).

320. 54 F.3d 1262 (7th Cir. 1995).

321. *See* Lumex, Inc. v. Highsmith, 919 F. Supp. 624, 631 (E.D.N.Y. 1996); Cardinal Freight Carriers, Inc. v. J.B. Hunt Transport Servs., Inc., 987 S.W.2d 642, 643–44 (Ark. 1999). *But see* Bayer Corp. v. Roche Molecular Sys., 72 F. Supp. 2d 1111, 1120 (N.D. Cal. 1999) (noting that California does not recognize the doctrine of inevitable disclosure because to do so would create a "de facto covenant not to compete," which is unenforceable in California).

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such knowledge. Yet, the more an employee knows, the more she might "inevitably disclose."

In addition, the new psychological contract requires employees to construct their own boundaryless career. Rather than promising job security, employers encourage them to depart and to seek employment in related firms. If employers expect employees to network beyond the boundary of the firm, then employees should be free to enjoy the benefits of the contacts and opportunities that such networks provide. They should not find themselves unemployed and unemployable when they set out to construct their careers.

Under current trends, the successful employee in the new workplace is the one who is most at risk from the inevitable disclosure doctrine. The more successful she is on the employer's own terms, the more likely she is to be penalized for obtaining information when she departs. In this area, the law is clearly out of step with social practice.

D. Concluding Observations About the Ownership of Human Capital

The current disputes about ownership of human capital are analogous to disputes in the eighteenth century about employee training and mobility. At that time, courts strictly scrutinized covenants not to compete to discern whether the covenants were employer's attempts to breach customary understandings. According to Harlan M. Blake, the refusal of the English courts to enforce employment covenants not to compete arose from the courts' desire to enforce the unwritten, customary terms of guild apprenticeship rules and prevent masters from circumventing them.[322]

According to Blake, the early modern craft guilds had apprenticeship systems that provided master craftsmen with a small labor force, while at the same time served as a system of technical training for young men. Some of the obligations of both master and apprentice were provided by a contract, termed an indenture, but most

322. *See* Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 631–37 (1960).

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were based on custom. Later, statutes were enacted to set some apprenticeship terms. For example, the Statute of Apprentices in 1563 set the duration of apprenticeships at seven years.[323] In the fifteenth and sixteenth centuries, there were numerous efforts by masters to take on more apprentices and bind them for longer periods of time. This lead to a large increase in the number of journeymen seeking to become craftsmen, something the established craftsmen wanted to prevent. The master craftsmen tried to do so by making entrance examinations more difficult and charging exorbitant entrance fees. Some craftsmen also "extracted obligations from their apprentices and journeymen which made it difficult or impossible for them to become full-fledged members of the guild upon expiration of their traditional term."[324]

Because the guild system was a deep part of the social and moral fabric of society, there was general outrage against unethical masters who tried to subvert the customary rules of apprenticeship by restricting apprentices' ability to practice their craft. Statutes were enacted to protect apprentices.[325] There were also lawsuits. In the sixteenth and seventeenth centuries, some apprentices challenged post-apprenticeship restraints contained in the indentures, and the courts held that such restraints were void. Blake concluded that "these cases represent reactions by the judges against erosions in the customs of the guilds by aggressive craftsmen, [and] . . . [t]hey show judicial support of the customary concepts of 'fair' commercial activity of the late medieval period."[326]

Just as the courts in the seventeenth century enforced customary and tacit understandings, courts today should develop an approach to human capital cases that prevents employers from violating the tacit understandings of the employment contract. That is, courts should

323. *See id.* at 633.

324. *Id.* at 634.

325. *See id.* at 634–35.

326. *Id.* at 637.

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carefully scrutinize employers' efforts to restrict employees from taking their human capital with them upon departure. When forced to decide who owns the employees' general human capital, the new psychological contract should be a factor in the court's determination. When an employer has expressly or implicitly promised to give an employee training, the employee should be free to take the resulting skills and knowledge with her. In addition, courts should adopt a narrow definition of trade secrets, limit enforcement of noncompete covenants to the protection of trade secrets as narrowly defined, reject the doctrine of inevitable disclosure, and thereby give employees broad rights to acquire, retain, and deploy their human capital.

The argument presented here is consistent with an argument recently put forward by Ronald Gilson[327] and Alan Hyde.[328] Both Gilson and Hyde argue that the success of Silicon Valley as a high-growth agglomeration economy is the result of California's refusal to enforce covenants not to compete.[329] They contend that it is in the public interest for employees to move freely between firms, taking their knowledge with them, and therefore courts should adopt a permissive attitude toward employee mobility and a restrictive approach to both noncompete covenants and trade secrets.

The argument presented here also concerns the public interest in ensuring that employees control their human capital. The new psychological contract defines the reasonable expectations of the parties and the terms of the employment contract. Its promise of human capital development through the acquisition of knowledge is essential if there is to be reciprocity and fairness in the new workplace.

327. *See* Gilson, *supra* note 244, at 607–09.

328. *See* Alan Hyde, The Wealth of Shared Information: Silicon Valley's High-Velocity Labor Market, Endogenous Economic Growth, and the Law of Trade Secrets (Sept., 1998) (unpublished manuscript, on file with author).

329. Both Gilson and Alan Hyde rely heavily on the empirical research of ANNALEE SAXENIAN, REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128 (1994) (comparing the industrial districts of Silicon Valley and Route 128 in Boston, Massachusetts).

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For firms to remain dynamic, they need to promote citizenship, commitment, creativity, and effort in their workforce. And to do that, they need to honor the psychological contracts they offer. Yet, it is often in the interest of individual employers to breach the new psychological contracts, just as it was at times in the interest of employers to breach the old psychological contracts through unjust dismissals. It is therefore incumbent upon courts to enforce the new psychological contract, or at the very least, stem employers' efforts to breach.

Employers' inclination to breach their implicit promises finds an instructive parallel in the history of piece rates in the early twentieth century. At that time, employers adopted piece rates to motivate workers to increase the pace of work. But once workers increased their pace enough to earn a substantial wage, employers often cut the piece rates, thereby breaching the psychological contract that the piece rate system embodied. This resulted in many bitter and violent strikes. Indeed, most of the major strikes in the early years of the twentieth century were precipitated by cuts in the piece rates.[330] These examples from labor history demonstrate the serious social costs that occur when individual employers renege on their psychological contracts. Thus, courts should insist that employers honor their psychological contracts and perform their part of their bargains. Otherwise, the promise of reciprocity in the new psychological contract will be discredited and serious labor relations problems will result.

III.

330. *See, e.g.*, STEVEN FRASER, LABOR WILL RULE: SIDNEY HILLMAN AND THE RISE OF AMERICAN LABOR 41 (1991) (noting sudden cuts in piece rates and changes in production quotas precipitated numerous strikes in the needle trades between 1880–1920, making it the third most strike-prone industry in the country at that time); Roger Waldinger, *Another Look at the International Ladies' Garment Workers' Union: Women, Industry Structure and Collective Action*, *in* WOMEN, WORK, AND PROTEST: A CENTURY OF WOMEN'S LABOR HISTORY 86, 96 (Ruth Milkman ed., 1985) (describing how changes in piece rate calculations reduced earnings and thereby triggered the "uprising of the 20,000" in New York in 1909).

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THE CHANGING FACE OF EMPLOYMENT DISCRIMINATION

Part V discusses the implications of the new psychological contract for determining who owns an employee's human capital. This part addresses the impact of the new workplace practices on the issue of employment discrimination. Much of the civil rights legislation and enforcement efforts of the past three decades have been directed toward eliminating discrimination in employment. Those efforts addressed employment discrimination as it was manifest in the old workplace under the old psychological contract. The new psychological contract does not eliminate the problem of employment discrimination, but it does change the nature of discrimination and renders many of the older civil rights strategies ineffective. This part describes the new manifestations of employment discrimination that are emerging as workplace norms and practices undergo transformation, and suggests new approaches to combat them.

Historically, employment discrimination has taken the form not merely of pay differentials between men or women, and blacks and whites, but it also, and more significantly, of job segregation along gender and racial lines.[331] Jobs occupied primarily by women or minorities have lower pay, benefits, and status than jobs ocupied by white males.[332] The civil rights legislation of the 1960s was aimed at eliminating both disparate pay and job segregation. The Equal Pay Act of 1962 addressed the problem of disparities in compensation between women and men doing the same job, and Title VII of the Civil Rights Act of 1964[333] addressed the issue of equal employment

331 . *See* Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1894–95 & n.40 (2000) (summarizing data on sex segregation and pay differentials).

332 . *See* COMMITTEE ON WOMEN'S EMPLOYMENT AND RELATED SOCIAL ISSUES, WOMEN'S WORK, MEN'S WORK: SEX SEGREGRATION ON THE JOB 49–50 (Barbara F. Reskin & Heidi I. Hartmann eds., 1986) [hereinafter WOMEN'S WORK]; JERRY A. JACOBS, REVOLVING DOORS: SEX SEGREGATION AND WOMEN'S CAREERS 28–30 (1989) (finding significant gender segregation of workplaces throughout the 1980s). *See generally* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1756–57 (1998).

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opportunities for women and minorities. Title VII provided a means for women and minorities to challenge discrimination in hiring, testing, promotion, training, remuneration, benefits, and other aspects of the employment relationship. As a result, it became the primary weapon in the battle to achieve equality in the workplace.

Civil rights enforcement efforts were initially directed at corporate hiring and compensation practices with the aim of obtaining equal pay and equal access to jobs for women and minorities. But it quickly became apparent that women and minorities needed not simply jobs, but good jobs. They needed access to jobs in the primary sector that offered promotional opportunities, training, job security, and benefits—that is, jobs that were part of internal labor markets.[334] Hence, Title VII plaintiffs sought not only hiring mandates, but also affirmative action to help women and minorities enter the primary labor market and move up the advancement ladders.

In an era of promotional ladders within firms, it was logical and appropriate for Title VII plaintiffs to seek remedies that gave women and minorities access to the upper rungs of the promotion ladders. Hence, many lawsuits challenged employers' use of discriminatory tests and other selection devices as well as supervisory subjective assessment measures in promotion decisions.[335] These antidiscrimination strategies assumed that there were identifiable job ladders to define advancement opportunities within firms, and sought to move women and minorities up within them.[336]

. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified at 42 U.S.C. §§ 2000e to 2000h (1994)).
334

. *See* DOERINGER & PIORE, *supra* note 47, at 133–37.
335

. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (upholding a challenge to the denial of partnership to a woman on the basis of sex stereotyping); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (upholding a challenge to racially discriminatory testing and selection devices).
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. They were, however, strategies that triggered conflict between more senior white employees and the new comers who were seeking to jump rungs on the ladder, and crystallized conflicts over affirmative action.

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Title VII remedies for employment discrimination were tailored to redressing discrimination within firms utilizing internal labor markets. The link between Title VII and internal labor markets becomes apparent once we examine the role of internal labor markets in creating and perpetuating employment discrimination. This examination will make it apparent that existing Title VII remedies, although effective in the old workplace are not well-suited to the new one.

A. Employment Discrimination and Internal Labor Markets

Long ago, Gary Becker explained employment discrimination as a product of employers' "taste for discrimination."[337] He hypothesized that some employers had an irrational taste for an all-white or an all-male work force, and that taste factored into their utility function when making profit-maximizing employment decisions. Those employers, he posited, are willing to pay higher wages for their "taste" preference.[338] In this view, discrimination is both irrational and inefficient.

A number of economists have since pointed out that if discrimination was merely a product of irrational employer behavior, namely, the result of employers exercising a nonmarket preference, then over time, competition would eliminate it.[339] Employers of white men would find that they could operate just as well with minorities or women who would cost them less. They would therefore lay off white men and hire minorities and women. Eventually wages of white males would fall and those of minorities and women would rise until parity was achieved. However, this has not occurred.[340] Therefore,

337. GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION 14–15 (1957).

338. *Id.*

339. *See* Kenneth J. Arrow, *What Has Economics to Say About Racial Discrimination?*, 12 J. ECON. PERSP. 91, 94 (1998).

340. *See id.* at 92–93; William A. Darity Jr. & Patrick L. Mason, *Evidence of Discrimination in Employment: Codes of Color, Codes of Gender*, 12 J. ECON. PERSP. 63, 63–76 (1998).

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various modifications of Becker's theory have been offered to explain the tractable nature of discrimination in the labor market.[341]

One concept that has been used to explain the persistence of employment discrimination is the concept of statistical discrimination. Statistical discrimination occurs when two groups vary on average in terms of some relevant characteristic, and an employer treats all members of each group as if they all possess that average characteristic.[342] For example, if employers assume all women will have short job tenure and treat all women on the basis of that belief, then employers will avoid hiring women for jobs for which they value longevity.[343] In particular, they will not hire women for jobs that require on-the-job training or that are organized into job ladders.[344]

As discussed in Part I, internal labor markets came to dominate American industry in the early twentieth century. Under the internal labor market employment system, employers valued longevity; they wanted to hire employees who would stay on the job a long time. Yet, for most of this century, women as a group have had a pattern of short job tenure relative to men.[345] According to economic historian Claudia Goldin, "firms often used sex as a signal of shorter expected job tenure."[346] Thus, by operation of statistical discrimination,

341. *See* Arrow, *supra* note 339, at 94–98; Darity & Mason, *supra* note 340, at 84–87.

342. For a concise account of statistical discrimination, see Arrow, *supra* note 339, at 96–97.

343. *See* Francine D. Blau, *Occupational Segregation and Labor Market Discrimination*, *in* SEX SEGREGATION IN THE WORKPLACE 117, 122–23 (Barbara F. Reskin ed., 1984); Karen Oppenheim Mason, *Commentary: Strober's Theory of Occupational Sex Segregation*, *in* SEX SEGREGATION IN THE WORKPLACE, *supra*, at 157, 165.

344. *See* Blau, *supra* note 343. Historically, women tended to be placed in jobs that required few skills and were provided little or no on-the-job training. *See* CLAUDIA D. GOLDIN, UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN 100–03 (1990).

345. Claudia Goldin found, on the basis of available data, that around 1900, males had almost three times the duration in current occupation, and one and one-half times the years with their current employer than women. GOLDIN, *supra* note 344, at 101.

346.

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employers avoided hiring women for jobs in internal labor markets.[347] In this way, the system of job ladders, internal promotion, and limited ports of entry has operated to keep women out of the best jobs.

The interaction between statistical discrimination and internal labor markets is explained by sociologists Patricia Roos and Barbara Reskin.

> With respect to women [statistical discrimination] is most often manifest in employers' reluctance to hire any woman for jobs that require appreciable on-the-job training, because they believe many young women leave the labor force to have children. As a result, newly hired females are often assigned to low-skilled dead-end jobs. Because transferring across internal labor markets is very difficult, if not impossible, . . . statistical discrimination has long-lasting implications for women's occupational outcomes.[348]

Internal labor markets not only limited women's entry level job prospects, they limited women's later employment prospects as well. This is because internal labor markets required that employers only hire at the bottom rung of the job ladder and then promote from within existing employment ranks.[349] Thus when women were excluded from entry-level jobs within internal labor markets, they were excluded from the best jobs forever.[350]

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347. *Id.* at 116.

348. *See* Jeremy I. Bulow & Lawrence H. Summers, *A Theory of Dual Labor Markets with Application to Industrial Policy, Discrimination, and Keynesian Unemployment*, 4 J. LAB. ECON. 376, 401 (1986); *see also* LESTER C. THUROW, GENERATING INEQUALITY: MECHANISMS OF DISTRIBUTION IN THE U.S. ECONOMY 178 (1975).

349. Patricia A. Roos & Barbara F. Reskin, *Institutional Factors Contributing to Sex Segregation in the Workplace*, *in* Reskin, *supra* note 343, at 235, 241 (citations omitted).

350. *See* Stone, *supra* note 1, at 45–49.

351. *See* DOERINGER & PIORE, *supra* note 47, at 2.

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Thus a great deal of contemporary employment discrimination has its roots in the internal labor market job structures of the past. Employers that utilized promotion ladders did not hire women because they wanted workers who would learn skills as they went along. Those that utilized Fordist-style assembly lines, in which job ladders were flat, did not hire women because their early twentieth century human resource practices were designed to discourage turnover and encourage longevity.[351]

One can see evidence of women's exclusion from internal labor markets jobs in the pattern of women's employment.[352] In the past, women's employment has tended to cluster into two types of jobs. First, women were heavily concentrated in jobs for which they could obtain the necessary training outside the workplace. Thus, women were overwhelmingly found in occupations such as child care, nursing, cooking, and sewing—all of which involved skills learned in the traditional gendered home. In other workplaces, women were hired for jobs for which they received training through the public school system, such as teaching or book-keeping.

Second, women have historically been hired for jobs for which employers do not value longevity. Indeed, in some jobs, employers had policies that prevented women from remaining on the job for long. For example, airlines hired women as flight attendants from the early days of commercial air flight, but until the early 1970s, the carriers required women to quit as soon as they reached age thirty or were married.[353]

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351. *See* SANFORD M. JACOBY, MODERN MANORS: WELFARE CAPITALISM SINCE THE NEW DEAL __ (1997).

352. *See* Blau, *supra* note 343, at 134 (writing on the clustering of women's jobs throughout the twentieth century).

353. *See* GEORGIA PANTER NIELSEN, FROM SKY GIRL TO FLIGHT ATTENDANT: WOMEN AND THE MAKING OF A UNION 83–89 (1982) (writing on the pervasiveness of the no-marriage rule and the protracted struggle by the flight attendants union to eliminate it). Other women's occupations also had no-marriage policies, including teaching, nursing, and secretarial work. *See* JACOBS, *supra* note 332, at __; *see also* Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 388 (discussing

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Throughout most of the twentieth century, then, women were not hired into large corporate internal labor market jobs. Rather, the dominant labor relations practices, based on the theories of scientific management, kept women out of the good jobs in manufacturing. The use of internal labor markets and the operation of statistical discrimination led employers to hire men for the primary labor market jobs. When women finally were permitted in, union-negotiated promotion rights and job ladders dictated that they come in at the bottom.[354]

Some economists have argued that the operation of statistical discrimination might explain short-term employment discrimination, but it cannot explain long-term employment discrimination because hiring on the basis of average group characteristics is inefficient for employers if there are better methods of assessment available. Thus, some economists have claimed, employers have an incentive to improve their assessment methods rather than rely upon statistically average characteristics.[355] However, even if better assessment methods were available, statistical discrimination can explain the initial exclusion of women and minorities from internal labor markets on the basis of hiring decisions made before improved assessment techniques became available, or exclusionary hiring decisions made as a rough first-cut in a time of rapid expansion. Once that first-cut occurs, a vicious cycle develops. Women learn they are not eligible for primary labor market jobs and do not invest in the necessary training to get them. Because women underinvest in education and training, employers come to believe, sometimes correctly, that women lack the necessary human capital for the primary labor market jobs.[356]

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airline's no-children rule); United Airlines, Inc. v. McDonald, 432 U.S. 385, 387 (1977) (discussing airline's no-marriage rule).

354. *See, e.g.*, MILKMAN, *supra* note 29, at 37 (noting that women in General Motors' auto plants do not get the highly desirable jobs because their average seniority is considerably less than that of men).

355. *See, e.g.*, Darity & Mason, *supra* note 340, at 83.

356. *See id.* at 84.

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At that point, even improved, individualized assessment techniques do not lead to equal labor market opportunities.[357]

Labor economist Francine Blau suggests an additional dynamic. She agrees that it might be true that women, knowing that certain better jobs are not available to them, do not invest in the training necessary to perform them, but she contends it is also possible that

> employers' view of female job instability leads them to give women less training and to assign [women] to jobs where the cost of turnover is minimized. [As a result,] women may respond by exhibiting the unstable behavior employers expect. This in turn confirms employer perceptions. . . . Viewing the matter somewhat differently, the employers' ex post "correct" assessment of sex differences in average productivity may be seen to result from their own discriminatory actions.[358]

Under either scenario, employers' initial perceptions that women's labor market characteristics are unsuitable to internal labor market job structures sets in motion a feedback loop that leads employers to refuse to hire women for primary labor market jobs.

There is another respect in which the old psychological contract and internal labor market job structures have played a role in sustaining job segregation. Sociologist Jerry Jacobs has posited that the implicit contract between employers and employees under the Taylorist labor system involved not only a promise of job security, but also a promise that existing working conditions and status and pay differentials, would

357 . William Darity and Patrick Mason term this a "self fulfilling prophecy" that operates as follows: Suppose employers believe, for whatever reason, that Group A is more productive, on average, than Group B. They therefore hire Group A workers for the more challenging and lucrative jobs. Seeing this pattern, members of Group B become less motivated to acquire additional human capital through schooling or training. *See id.* These effects would be passed along within Group B from generation to generation. *See id.* at 84–85. Thus, the group-typed beliefs held by employers can have a strong and enduring effect on the human capital of the disadvantaged group. *See id.* at 176–77.

358 . Blau, *supra* note 343, at 117, 123.

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be maintained.[359] Jacobs maintains that male workers derived both tangible and symbolic benefits from sex-segregated workplaces, including status rewards, camaraderie, and the job and income security that resulted from not having to compete with lower paid women workers.[360] These implicit contracts were used to instill morale, motivation, and trust. They operated within internal labor markets to induce employees to invest in firm-specific human capital and to expend effort on behalf of the firm.[361] Thus, if an employer were to integrate a formerly all-male workplace, he ran the risk that the existing work force would see it as a violation of these implicit contracts, with a resulting cost in terms of morale, productivity, and labor peace.[362]

A similar dynamic of discrimination that has curtailed women's employment opportunities operates with respect to minorities. Minority employment opportunities have been curtailed by the same pernicious combination of internal labor markets, implicit contracts, and statistical discrimination that engendered the exclusion of women. In addition, minorities were excluded from internal labor markets by the overtly racist policies of American employers and unions. Many unions either excluded minorities altogether or kept them in low-wage, low-skill job categories until well past the middle of the century.[363] In the building trades, for example, unions kept minorities and women out

359. *See* JACOBS, *supra* note 332, at 179.

360. *See id.* at 153–55. For a description of male workers' reaction to the presence of women auto workers, see MILKMAN, *supra* note 29, at 37.

361. *See* JACOBS, *supra* note 332, at 179–80.

362. *See id.* at 181.

363. *See* Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 195 (1944) (holding that whites-only railroad union that negotiated collective agreement designed to exclude blacks from desirable jobs violated the duty of fair representation). *See generally* WILLIAM B. GOULD, BLACK WORKERS IN WHITE UNIONS: JOB DISCRIMINATION IN THE UNITED STATES (1977); THE NEGRO AND THE AMERICAN LABOR MOVEMENT (Julius Jacobson ed., 1968); JOSEPH F. WILSON, TEARING DOWN THE COLOR BAR: A DOCUMENTARY HISTORY AND ANALYSIS OF THE BROTHERHOOD OF SLEEPING CAR PORTERS (1989).

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of apprenticeship programs and out of union hiring halls. Thus minorities, like women, were kept out of the core good jobs and relegated to the secondary labor market periphery in which the pay was low, the jobs were dirty, and job security did not exist.

In the 1970s and 1980s, employment patterns began to change. First, women became more attached to the labor market,[364] so that employers had less reason to practice statistical discrimination.[365] Also, equal employment opportunity laws forced many firms to hire women and blacks for previously all-white-male jobs.[366] Overt discrimination in hiring became unlawful unless it was pursuant to a "bona fide occupational qualification," which was narrowly defined.[367] Early on, the Equal Employment Opportunity Commission (EEOC) took the position that Title VII prohibited statistical discrimination by declaring that it was unlawful for employers to make hiring decisions based upon real or perceived group characteristics.[368] For all of these reasons, the sex segregation of jobs as well as the pay gap between men and women, declined.[369] Minorities also made strides under the civil rights laws, at least in the early years.[370] In particular, the pay gap

364. *See* Blau, *supra* note 343, at 125 (summarizing studies).

365. *See* BLAU ET AL., *supra* note 76, at 207–08.

366. *See* WOMEN'S WORK, *supra* note 332, at 128–29 (1986) (reporting on the effectiveness of enforcement of equal employment laws in reducing employment discrimination on the basis of gender); Darity & Mason, *supra* note 340, at 63–90 (summarizing studies that demonstrate that the change in the black-white earnings differential is due to the enactment of the Civil Rights Act of 1964).

367. 8703(a) of Title VII, 42 U.S.C. § 2000e–2(e) (1994). The bona fide occupational qualification (BFOQ) exception permits employers to make hiring decisions based on otherwise prohibited reasons, if such decisions are necessary to the "essence of the business." International Union, UAW v. Johnson Controls, Inc. 499 U.S. 187, 203 (1991).

368. EEOC Guidelines, 29 C.F.R. § 1604.2(a)(1) (1968).

369. *See* BLAU ET AL., *supra* note 76, at 127–29 (noting decline in job segregation and pay gap).

370.

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between black and white women narrowed substantially, so that by 1981 black women were earning 90 percent of what white women earned—a dramatic increase from the mere 69 percent of 1964. In the same period, the gap between the earnings of black men and white men narrowed from 66 percent in 1964 to 71 percent in 1981.[371] Occupational segregation, which has not been as extreme for minorities as it has been for women also declined.[372]

Even after the most blatant pay differentials and explicit barriers to hiring women and minorities were broken, those groups continued to be disadvantaged within major corporations. Because jobs were arranged in hierarchical progression, late-comers came in at the bottom and had the farthest to rise. Thus they did not have access to the higher rungs of the internal labor markets.[373] Also, because they were at the bottom, the late-comers were the first to be laid off in times of cut-backs. Efforts by women and minorities to jump over established arrangements for hierarchical progression generated intense and bitter disputes about affirmative action. White male workers resisted because they felt that their psychological contract gave them an entitlement to a certain sequence of advancement and that affirmative action was thus a violation of their rights.

B. The Dynamics of Discrimination in the Boundaryless Workplace

Because many aspects of employment discrimination originated in or were perpetuated by the old employment system, there is hope for

. Minorities experienced a significant narrowing of the pay gap between 1965 and 1975, but it flattened after that. *See* John Donahue & James Heckman, *Continuous vs. Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 J. ECON. LITERATURE 1603, 1604 (1991).
371

. *See* Blau, *supra* note 343, at 126.
372

. *See id.* at 135–36.
373

. *See* BLAU ET AL., *supra* note 76, at 126 (noting that even when women gain access to an occupation, they are often at the bottom of a hierarchy).

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the future. The new workplace, with its deemphasis on long term employment and its rejection of job ladders, offers the possibility of creating new opportunities for women and minorities. To the extent that the old labor system locked them out, the demise of that system could be a major improvement. The new psychological contract could spell the end of labor market dualism and the beginning of more egalitarian job structures. However, there are new impediments to the achievement of equal opportunity for women and minorities in the new workplace.

1. The Problem of Training

Success under the new psychological contract requires employees to manage their own careers and constantly develop new skills. Workers can only succeed in this system if they have an opportunity to develop skills. Yet, there is evidence that women are not receiving equal access to employer-sponsored training programs.[374] When training is offered after hours, women's nonparticipation can be explained by the time squeeze that many women experience due to family obligations. But when training is offered during the work day, women are still not gaining as much training as men. It is important to identify gender differences in participation in training programs, as well as aspects of employer training programs that discourage female participation.[375] It is also important to determine whether there are differences between the propensity of minority and white employees to take advantage of employer-sponsored training.

To attain equality in the new workplace, women and minorities need access to improved job-related training. Civil rights litigation needs to focus on ensuring equal access to training and skills.

374 . *See* David Knoke & Yoshito Ishio, *The Gender Gap in Company Job Training*, 25 WORK & OCCUPATIONS 141, 161 (1998).

375 . Rosemary Batt et al., *Net Working: Work Patterns and Workforce Policies for the New Media Industry* (Economic Institute, Working Paper, forthcoming 2000 (studying women in computer-related fields, finding that women are less interested in acquiring tehcnical skills and more interested in acquiring managerial skills.

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Minorities and women should advocate a leveling of skills training and broad access to educational opportunities. They should support expanded public adult education programs, apprenticeship systems for teenagers and young adults, local and regional job training centers, and technical courses in the summers and evenings at community colleges. If publicly funded training is not made available, there is a danger that employers will favor employees who pay for training themselves.[376] Because white males are more highly paid than the others, they would be in a better position to self-finance their training. This would reinforce and create a new kind of labor market dualism—a dualism of knowledge.

2. The Problem of Invisible Authority

In the past, much employment discrimination was rooted in the hierarchical job structures of internal labor markets. Today's workplace does not have defined job ladders and the criteria for advancement are not clearly specified, so that it is difficult for someone to claim that they have been by-passed for advancement because of their gender or race. In the boundaryless workplace, everyone makes lateral movements, but some move in circles while others spiral to the top. The diffuse authority structure of the new psychological contract makes discrimination hard to isolate.

In addition, the new nonhierarchical workplace makes lines of authority and power invisible. While ostensibly all employees may make lateral movements, increase their responsibilities, and enhance their skills, there remains a hidden core of top managers, decision makers, who allocate responsibilities and rewards. Under the new psychological contract, decision makers have no clear designation or location on the organizational chart, rendering their decisions to a great extent unaccountable. Thus it is difficult to know to whom to make appeals, with whom to lodge complaints, or how to bring about change.

376. For a description of a wide array of publicly funded and for-profit training programs, see generally Peter Cappelli, THE NEW DEAL AT WORK 202–10 (1999).

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Sociologists of organizations note that when there is no visible power structure, the invisible structures rule. In the new workplace, these invisible and secret power structures may well turn out to be more remote and impenetrable for women and minorities than the old power structures. Responsibility for discriminatory decisions has become difficult to assign and even more difficult to remedy. Title VII remedies, such as decrees requiring employers to promote women and minorities up job ladders are not appropriate in a boundaryless workplace.

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3. The Problem of Cliques

A related problem for women and minorities in the new workplace stems from the trend toward delegating major employment decisions to peers. Several sociologists of work have focused on the role of networks in perpetuating sex and racial segregation in employment. Mark Granvitter, Jerry Jacobs, and others have observed that workplaces are social organizations, in which people interact with each other to learn the tricks of the trade, share necessary information, assist in tasks, and coordinate performance.[377] The need for cooperation and teamwork in the workplace makes it difficult for employers to incorporate women and minorities when there is resistance from incumbent white males.[378] Yet when women and minorities are denied access to informal forms of training and networking, their ability to succeed is severely compromised.[379] The phenomenon of women being shunned, ignored, and frozen "out of the loop" when they enter predominately male workplaces has often been noted.[380] Many first-person accounts attest to the power of workplace cliques to exclude, disempower, demoralize, or otherwise disable those who are targeted for exclusion.[381] Clique members use the tools of ostracism, belittlement, verbal harassment, innuendo, nefarious gossip, and shunning—tools that are difficult to identify or remedy. And often the

377. *See* MARK S. GRANOVETTER, GETTING A JOB: A STUDY OF CONTRACTS AND CAREERS 45–48 (1974); JACOBS, *supra* note 332, at 182.

378. *See* JACOBS, *supra* note 332, at 181–82.

379. Susan Sturm, *Race, Gender and the Law of the Twenty-First Century Workplace*, 1 U. PA. J. LAB. EMP. L. 639, 642 (1998).

380. JACOBS, *supra*, note 332, at 181–82; *see, e.g.*, ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 207 (1977). *See generally* Roos & Reskin, *supra* note 348, at 235, 236–56 (citing studies); Schultz, *supra* note 330, at 1704 (citing examples of ways in which gender dynamics can sabotage women's ability to function on the job).

381. *See* Schultz, *supra* note 331, at 1704; *see also* Vicki Schultz, *Telling Stories About Women and Work*, 103 HARV. L. REV. 1750, 1832–39 (1990) (citing first person accounts).

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targets are newcomers, atypical employees, those who are not part of the old crowd, namely women and minorities. Reports of such conduct are becoming increasingly prevalent.[382]

The new workplace exacerbates the age-old problem of cliques because it involves empowering peer-based decision making. For example, Ed Lawler's proposed competency-based organization, described in Part III, calls upon peers to decide important issues such as hiring, evaluation, job allocation, and pay.[383] Some firms are using peer review panels to decide employees' appeals of disciplinary actions.[384] While peer-based decision making may work well in some situations, it can also promote cliquishness and lead to patronage systems, bigotry, and corruption. In such a workplace, women and minorities could again find themselves excluded. The growing popularity of peer review procedures for handling disciplinary infractions could similarly reinforce in-groups and exacerbate the exclusion of new-comers like minorities and women.

4. The Problem of Lawlessness

One of the achievements of unionism has been to facilitate the introduction of rules into industrial life. The organizing drives of the CIO were often precipitated by acts of petty tyranny and arbitrary mean-spiritedness by lower-level supervision.[385] The industrial unions created an industrial jurisprudence, a common law of the shop,

382. *See* Schultz, *supra* note 332, at 1694–95; David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 477–78 (2000).

383. *See* LAWLER, *supra* note 155, at 191–233.

384. *See, e.g.*, Masanori Hashimoto, *Employment-Based Training in Japanese Firms in Japan and the United States: Experiences of Automobile Manufacturers*, *in* TRAINING AND THE PRIVATE SECTOR 109, 140 (Lisa M. Lynch ed., 19__) (describing peer review at a Honda plant in Ohio); *id.* at 142 (describing peer review at a Toyota Motor plant in Kentucky).

385. *See, e.g.*, CLINTON GOLDEN & HAROLD RUTTENBERG, THE DYNAMICS OF INDUSTRIAL DEMOCRACY (1942).

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enforceable by outside arbitrators.[386] While this law of the shop remained invisible to outsiders, it did enable third-party neutrals—arbitrators—to erect a rule-based system for the day-to-day conduct of affairs in unionized workplaces.[387]

Later, equal employment laws also provided a mechanism for orderly, rule-based and accountable decisions about such matters as hiring, promotions, and pay rates. These rule-based systems injected an external order into the otherwise private and often anarchic domain of the workplace. In particular, the equal employment laws provided rules by which women and minorities could break into workplaces that had been white, male, privileged clubs.[388]

Currently, the systems of external rules that penetrate into the workplace are breaking down. Unionism has declined precipitously, and with it, collectively bargained arbitration systems. In addition, Title VII is losing its effectiveness in light of the Supreme Court's 1991 decision in Gilmer v. Interstate/Johnson Lane Corp.,[389] holding that an employer can compel an employee to utilize a private arbitration system to decide age discrimination complaints.[390] Since then, the lower courts have generally upheld employers' efforts to require their employees to utilize employer-crafted arbitration systems to resolve discrimination complaints instead of bringing such cases to the EEOC

386. *See* ATLESON, *supra* note 38, at 55–57.

387. *See* Archibald Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 274, 276–77 (1948); Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1001 (1955); *see also* Stone, *supra* note 39, at 1523–25, 1531–35, 1559–65. I have argued in previous work that the grievance and arbitration system did not go far enough in bringing external norms into the workplace. *See id.* at 1517; Stone, *supra* note 40, at 577. However, that is not to deny that the system did bring some modicum of external scrutiny and judgment to bear on what was otherwise an insulated and autocratic domain.

388. *See* Cynthia L. Estlund, *Working Together: The Workplace, Civil Society and the Law*, 89 GEO. L.J. 31–32 (2000) (arguing that Title VII has supplied a normative vision of equal opportunity that has helped transform discriminatory workplace practices).

389. 500 U.S. 20 (1991).

390. *Id.* at 24–35

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or to a court.[391] As the systems of external rules to govern the workplace fade, there is a danger that the workplace will become a bastion of patronage and favoritism.

C. Proposals for Redressing Discrimination in the New Workplace

Women and minorities need legal strategies to combat the dangers facing them in the new workplace. A few legal scholars have recently addressed some of these dangers and proposed solutions. Vicki Schultz has focused on the problem of workplace cliques sabotaging the work efforts of women who enter traditionally male workplaces.[392] She advocates that sexual harassment be reconceived not as a sexual affront per se, but as "conduct designed to undermine a woman's competence."[393] She proposes a legal standard by which actions by an employer or its agent that deliberately undermine the competency of a person because of his or her gender would be actionable under Title VII. In cases in which it is difficult to establish whether the challenged conduct is motivated by gender, she proposes a presumption that it is in contexts in which women work in traditionally male jobs.[394] Schultz finds support for her view in Justice Ruth Bader Ginsburg's concurring opinion in Harris v. Forklift Systems, Inc.,[395] in which Justice Ginsburg stated that to establish a hostile work environment, a plaintiff must "prove that a reasonable person subjected to the discriminatory conduct would find . . . that the harassment so

391. *See* Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1033 (1996).

392. *See* Schultz, *supra* note 332, at 1756–69.

393. *Id.* at 1769.

394. *See id.* at 1801.

395. 510 U.S. 17 (1993).

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altered working conditions as to '[make] it more difficult to do the job.'"[396]

David Yamada has focused on the problem of abusive supervisors who undermine a worker's morale and confidence.[397] His discussion is not limited to gender or race-based harassment claims, but rather applies to all types of bullying by supervisors. He proposes that there be a new cause of action called the "Intentional Infliction of a Hostile Work Environment," which would make an employer liable for "intentionally subject[ing] the plaintiff to a hostile work environment."[398] If a work environment were found to be "hostile by both the plaintiff and by a reasonable person in the plaintiff's situation," the employer would be liable unless he could show (1) that he exercised reasonable care to prevent and correct the challenged conduct and (2) that the plaintiff failed to utilize any preventive or corrective opportunities provided by the employer.[399] While Yamada's proposal is not limited to gender or racial discrimination claims, it is an attempt to address the kinds of pernicious conduct that are particularly problematic for women and minorities in the new workplace.

The proposals by Schultz and Yamada are bold and creative efforts to reach beyond existing discrimination law and address heretofore unacknowledged forms of workplace injustice. Both Schultz and Yamada have called attention to the problem of subtle, yet powerful, forms of disempowerment that in today's workplace can make the difference between an individual's success or failure. The virtue of the proposals is that they attempt to identify, name, define, and constrain some of the forms of harmful conduct that appear to be increasing in the workplace. However, neither proposal addresses all

396. *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring).

397. *See* Yamada, *supra* note 382, at 480–83.

398. *Id.* at 524.

399. *See id.* at 524–27.

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the problems women and minorities face in the boundaryless workplace. They both propose theories of liability to constrain actions by supervisors that intimidate, harass, sabotage, or otherwise bully a subordinate. But as the above discussion highlights, the most serious forms of discrimination in the new workplace are often not the result of supervisor conduct but of coworker conduct.

In addition, both of the proposals, while thought provoking, are difficult to apply. The standards they propose for liability—Schultz's competence-undermining test and Yamada's hostile work environment test—are vague. To base liability on such standards could pose difficult issues of proof, create uncertainty, foment litigation over trivial insults, and run the danger of judicial micromanagement of employee relations. For these reasons, their proposals are best understood as providing broad new conceptions of workplace justice rather than detailed proposals for legal reform.

The new types of employment discrimination that appear in the new workplace are not easily treated with the existing Title VII framework. Currently, Title VII is directed to harm caused by employers or their agents; it assumes a hierarchical authority structure. Title VII only reaches coworker harassment when the employer knew or should have known of the harassing conduct, and failed to take adequate remedial measures.[400] This is because the law prohibits those who have authority in the employment relationship from exercising their power in a discriminatory fashion.[401] It is not a generalized code of workplace civility.[402]

While there is certainly authority and power in the new workplace, it is often exercised through cliques and peer groups, defying traditional tools for assigning accountability. Therefore to redress the new forms of employment discrimination, it is necessary to combine

400. Yamaguchi v. United States Dep't of the Air Force, 109 F.3d 1475, 1483 (9th Cir. 1997).

401. Burlington Indus. v. Ellreth, 524 U.S. 752, 761–62 (1998).

402. Harris v. Forklift Sys. Inc., 510 U.S. 16, 21 (1993) (stating that Title VII does not make actionable conduct that is merely offensive).

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new concepts of substantive liability, such as Schultz's harassment as undermining competency because of gender, or Yamada's intentional creation of a hostile work environment, with new procedures and remedies.

Any new procedures to redress employment discrimination cannot delegate responsibility for identifying and remedying discriminatory conduct to the work group, because the work group is often the source of the problem. Similarly, it cannot delegate those tasks to high management officials, because they have an interest in smooth operations, which often means condoning the discriminatory conduct. It is also difficult to imagine a court imposing civil liability against a worker for ganging up on a coworker unless the conduct constitutes a crime or tort, like assault or rape. For a court to judge the subtle aspects of exclusion and marginalization that debilitate women and minorities in the workplace would involve it in micromanaging workplace etiquette. It is not likely that courts would be willing to do this, and unlikely that they could do it well. Therefore it is necessary to devise a system of workplace specific alternative dispute resolution that would use a neutral outsider to scrutinize workplace conduct and apply equal opportunity norms.

Legal rules could be structured to encourage firms to develop meaningful dispute resolution systems that could address worker-coworker as well as worker-supervisor complaints. These systems would have to utilize external decision makers, who could hear allegations of coworker- as well as supervisor-instituted bullying, exclusion, and harassment. By bringing outside neutrals to adjudicate workplace disputes, they offer the possibility of injecting an external standard of fairness that can transcend the rule of the clique. Some corporations are already designing dispute resolution systems to resolve both grievances between the employee and the firm and disputes between employees. If properly structured, internal dispute resolution systems could help counteract the development of workplace fiefdoms and cliques, redress abuses of hidden authority, and bring external norms to the workplace.

The Supreme Court has recently given an impetus to the development of such systems, in its decision in Farragher v. City of

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Boca Raton[403] and Burlington Industries v. Ellreth.[404] The court held that employers can avoid liability for sexual harassment if they have internal procedures in place to deal with harassment claims and employees unreasonably fail to utilize them. These decisions encourage employers to develop meaningful procedures to address harassment complaints. If the Court extended the reasoning to coworker claims, then employers would have a powerful incentive to utilize a neutral dispute resolution mechanism for these new types of discrimination claims.

While the use of internal dispute resolution procedures for employment discrimination complaints is growing, at present these systems are often biased toward employers and serve to evade, rather than enforce, external norms.[405] Also, under current interpretations of the Federal Arbitration Act (FAA), arbitral awards receive virtually no judicial review. Under the FAA, an arbitral award may not be vacated for an error of law or erroneous fact-finding, but only if the arbitral award displayed a "manifest disregard of the law."[406] This has been defined to mean knowledge of the law by the arbitrator and deliberate refusal to apply it.[407]

403. 524 U.S. 775 (1998).

404. 524 U.S. 742 (1998).

405. For criticisms of employer-designed arbitration systems that are imposed on nonunion employees, see generally Katherine Van Wezel Stone, *Mandatory Arbitraiton of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENVER L. REV. 1017 (1996); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of* Gilmer, 14 HOFSTRA LAB. L.J. 1 (1996); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33.

406. Wilko v. Swan, 92 U.S. 427, 436 (1953), *overruled on other grounds by* Rodriguez de Quijas v. Shearson/Am. Express Inc., 490 U.S. 477 (1989).

407. *See* Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 954–55 (1999) (citing cases that establish the narrow standard of review under the Federal Arbitration Act (FAA)).

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However, if internal disputes resolution systems were properly structured, they could help counteract the development of workplace fiefdoms and cliques, address redress abuses of hidden authority and bring external norms to the workplace. To do so, the legal framework governing employment arbitration would have to be revised to permit judicial review on issues of law and to require neutral arbitrators and minimal standards of due process in the arbitrations themselves.[408]

Arbitration originated as a form of dispute resolution for use within craft and merchant guilds to resolve disputes between members. These trade groups set their own norms of conduct and business standards, and established their own dispute resolution procedures to resolve disputes that might arise. Disputes that arose often blended allegations of a breach of contract with allegations of violation of customary norms. Arbitrators were expected to resolve them by applying both the parties own contracts and formal and informal customary norms of the trade.[409]

In the same vein, employment arbitration for workplace disputes could embrace disputes between coworkers as well as disputes between employees and employers. And liability standards could be derived from internal fairness norms generated within the workplace itself. All workplaces develop an internal "law of the shop" that defines the parameters of fair dealing in the particularized context. Yet to succeed in providing redress for subtle forms of employment discrimination, the outside arbitrator would have to not merely apply internal norms, but also serve as a check on the possibility of tyranny and capture by insider cliques. The proposal to permit de novo judicial review for arbitral rulings on issues of law would ensure that Title VII and other employment laws were applied to the workplace.

The foregoing proposal does not provide a new test for liability, but rather a new mechanism for resolving discrimination disputes. It is a mechanism that would enable each workplace to identify and

408 . *See id.* at 1024–28 (1999) (suggesting a mechanism to provide increased scrutiny and to inject external norms into private arbitration tribunals).

409 . *See id.* at 970.

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sanction competency-sabotage, bullying, shunning, harassing, and other forms of gender-based or race-based conduct that threaten to once again undermine the employment prospects of women and minorities. And by doing so, it is hoped that it would provide an approach to employment discrimination that would enable women and minorities to achieve true equality of opportunity to pursue a boundaryless career.

IV.

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EMPLOYEE REPRESENTATION IN THE BOUNDARYLESS WORKPLACE

The new psychological contract and its corresponding job structures were initially constructed in nonunion environments, and they operate almost exclusively in nonunion environments to this day. Hewlett Packard, TRW, and the nonunion divisions of GE are three leading exemplars of the new work practices described in Part III. Hewlett Packard and TRW have always been nonunion, and GE engaged in aggressive deunionization efforts first, and then instituted boundaryless workplace practices after their unions had been eliminated. The sequence of deunionization first, workplace restructuring later was commonplace in many large corporations in the 1980s.[410] Interestingly, the same sequence characterized industrial relations practices in major corporations in the late nineteenth and early twentieth centuries when internal labor markets were first established. At that time, employers first broke the unions and then instituted Taylorism and other work rationalization measures.[411] Like the implementation of scientific management in the early twentieth century, today's boundaryless workplaces are being created in the vacuum left by the deunionization drives of the previous decade.

The rapid decline of unions in the 1980s gave management a free hand to restructure work practices.[412] In the past twenty years, union density in the private sector declined from almost 16.5 percent in 1983 to less than 10 percent in 1998.[413] This decline is particularly striking in light of the fact that during the same period, workers' real wages declined, so that one might have expected aggressive organizing

410. *See* KOCHAN ET AL., *supra* note ___, at 47–80.

411. *See* Stone, *supra* note 1, at 34–36.

412. *See* Stone, *supra* note 40, at 578–79 (describing union decline in the 1980s).

413. *See* U.S. GOV'T PRINTING OFFICE, STATISTICAL ABSTRACT OF THE UNITED STATES 435 tbl. 718 (119th ed. 1999).

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activity and union growth.[414] The union decline was most pronounced in large manufacturing firms in which internal labor markets had been the most deeply entrenched.[415] While there has been some union growth since 1990, it has been primarily in public sector and service sector workplaces, such as health care and janitorial providers—fields that have been the least affected by the new work practices described above.[416] Unions have not been able to gain even a foothold in the new high-technology intensive workplaces that are expanding rapidly today.[417]

Unions have been an important institution for addressing injustices in the workplace. One of the main functions of unions in the past was to give employees a voice in their workplace and enforce psychological contracts. Union-negotiated just cause and seniority provisions and the establishment of arbitration systems have prevented employers from engaging in opportunistic behavior and breaching implicit contracts.[418] Today unions can also help ensure that employers' promises under the new psychological contract are enforced. For example, Part V describes many instances in which employers promised employees training, networking, and employability, yet later attempted to usurp their employees' human capital by claiming trade secret protection or by seeking broad enforcement of a covenant not to compete. Unions can help enforce promises for training and ensure that employers do not try to usurp the

414. *See id.* at 443 tbl. 698.

415. *See generally* Stone, *Legacy of Industrial Labor*, *supra* note 40, at 581–82.

416. *See id.* at 582 & n.18.

417. *See* William B. Gould IV, *Some Reflections on Fifty Years of the National Labor Relations Act: The Need for Labor Board and Labor Law Reform*, 38 STAN. L. REV. 937, 942–43 (1986) (discussing the unions' inability to organize in high tech industries).

418. *See* Stone, *supra* note 46, at 376–77 (discussing the unions' role in enforcing implicit contracts for job security and deferred compensation).

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human capital they promised to give their employees.[419] The fact that the boundaryless workplace is a nonunion workplace is cause for concern.

In addition to providing representation in the workplace, unions are an essential element of democracy. As Alexis de Tocqueville pointed out long ago, voluntary organizations are the vehicles by which the private concerns of citizens are shared and translated into public issues.[420] Without robust voluntary organizations, it is virtually impossible in a modern democracy for groups to articulate shared concerns and bring their interests into the public arena. Unions play an important role both in the workplace and in the political process to ensure that the concerns of working people and those of the disadvantaged are expressed and that their voices are heard. Unions represent large numbers of people who do not have any other access to the political process. They provide democratic participation and voice to a large sector of the population that might otherwise remain silent and unrepresented. Therefore, they are an essential element of our pluralistic democracy.[421] Indeed, the labor movement is the only major political institution that is dedicated to promoting the interests of working people generally. In the past, unions have been at the forefront of lobbying efforts for civil rights, welfare benefits, food stamps, environmental protection, national health insurance, and many other issues of general social welfare.

Unions could play a unique and important role in shaping the legal rules to govern the emerging regime of work. They are the only organized groups that have an interest in pressing for social legislation to regulate employment, promote protective measures, and ease

419. *See also* PETER CAPPELLI, NEW DEAL AT WORK: MANAGING THE MARKET-DRIVEN WORK FORCE 240–41 (1999) (calling for a new infrastructure to enforce training agreements and verify credentials).

420. *See* 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 106 (Henry Reeve trans., 1961); *see also* ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 20 (1971).

421. *See* DAHL, *supra* note 420, at 20; *see also* Thomas C. Kohler, *Civic Virtue at Work: Unions as Seedbeds of the Civic Virtues*, 36 B.C. L. REV. 279, 300–32 (1995).

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transitions between jobs. The new workplace threatens to exacerbate problems of income inequality and employment discrimination, and unions are the only significant organized groups that can combat these problematic tendencies. Unions can advocate income redistribution, press for social insurance, promote industrial health and safety protections, and encourage equal employment opportunity, both at the workplace and at the legislative level.

Unions also have a crucial role to play both in protecting employee benefits, particularly health insurance and old-age assistance. The old regulatory system erected a system of employer-based social insurance, which provided health insurance, old-age assistance, worker's compensation, and unemployment insurance for those employed within the primary sector. Unions, through collective bargaining, helped to create this private welfare state. But with boundaryless careers instead of job security, many of the workers who had employer-provided insurance will lose their health insurance, long-term disability insurance, unvested pension benefits, and other social insurance protection each time they move from one employing establishment to another. Furthermore, the decline of unions means that union-negotiated benefit packages are becoming rare. The disintegration of the private social welfare system imposes potentially enormous costs on individuals, families, communities, and society. As an increasingly large number of workers lose their health insurance and pensions, it becomes important for unions to devise employer-based and legislative solutions to the problems of old age assistance, health care, and income security.

This part explores the prospects for employee representation in the new boundaryless workplace. Because employee representation is a function both of union practice and labor law, this part examines both. It demonstrates that the shift from the old to the new psychological contract has rendered many aspects of conventional trade unionism and labor law obsolete. Proposals for changes both in union practice and in labor law are presented in order to begin to conceive of a new form of unionism appropriate to the new workplace.

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A. The Tension Between Unionism and the Boundaryless Workplace

Unionization in its current form cannot be easily adapted to the new workplace. Employers' aggressive and expensive antiunion campaigns suggest that employers believe traditional union practices are incompatible with the boundaryless workplace.[422] However, survey evidence shows that most employees want some form of representation in their workplace.[423] According to Charles Heckscher, "polls show that people want unions, but not the unions we have now."[424]

There are several respects in which unions as currently constituted are ill-suited to the new workplace. Many of the core practices of American labor are antithetical to the boundaryless workplace. For example, two established practices of unionism, seniority and narrow job definitions are flatly inconsistent with the new psychological contract.

Seniority was a practice that large companies such as Westinghouse Corporation, General Motors, and the Ford Motor Company initiated in order to build loyalty and encourage attachment in the early 1900s. It was part of their program to establish internal

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. RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 147 (1999) (reporting on a survey finding that 87 percent of American workers want some form of representation in their workplace).

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. WHAT'S NEXT FOR ORGANIZED LABOR, The Report of the Century Foundation Task Force on the Future of Unions (Statement of Charles Heckscher) 53, 53 (1999).

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labor markets and implement scientific management techniques.[425] The practice of seniority was subsequently embraced by industrial unions, so that by the 1930s, seniority became a central demand of unions in their efforts to counteract job insecurity. Today seniority has become so entrenched in union practice and principle that, in the words of labor historians David Montgomery and Ronald Schatz, "many workers today find it difficult to imagine any other principle as just."[426]

Like seniority, narrow job classifications originated in scientific management programs established at the end of the nineteenth century. Taylor counseled management to repudiate the notion of the standard rate and to individualize wages instead.[427] At that time, the craftworker unions resisted and called for a return to the standard rate. After World War I, when Westinghouse, GE, and other industrial establishments sought to introduce "scientific" payment schemes with disparate rates, their workers went on strike. However, unlike their craft predecessors a decade earlier, these strikers did not seek a return to a standard single rate. Rather, they sought a series of standard rates, graduated according to well-defined job definitions. For the unions, graduated rates pegged to specific job classifications had become a means to provide orderly advancement and constrain foreman favoritism.[428]

Seniority and narrow job classifications thus are union-negotiated accommodations to scientific management.[429] They are union

425. *See* MONTGOMERY, *supra* note 1, at 139, 140–41.

426. *Id.* at 143.

427. S*ee id.* at 123; Stone, *supra* note 1, at 43–44.

428. *See* David Montgomery, *Whose Standards? Workers and the Reorganization of Production in the United States, 1900–20*, *in* WORKERS' CONTROL IN AMERICA, *supra* note 1, at 113, 122–24.

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adaptations to management's creation of job ladders and internal labor markets. Seniority assumes a commitment by both employers and employees to long-term employment. A seniority system, by definition, places great value on longevity. Yet in today's workplace, employers and many employees have abandoned that value. Similarly, narrow job classifications and seniority are flatly in conflict with the flexible work practices of the new psychological contract.

Other practices of unions that are antithetical to the boundaryless workplace are job bidding systems that require employers to rely on internal promotion to fill openings, and bumping rights that establish prespecified demotion paths for employees during downsizing. Like seniority, these practices discourage cross-utilization and lateral mobility.

In addition to insisting on the use of seniority for job assignment, retention, and progression, unions bargain for compensation structures that are not suited to the new workplace. Unions usually negotiate levels of pay on the basis of three factors: job definition, hierarchical role, and length of service. These three factors are aimed at ensuring uniformity between similarly situated workers while rewarding longevity. They therefore seem fair to most workers. In the past, corporations often utilized these same three factors to determine pay rates in internal labor markets, with or without unions present.[430] However, none of these factors are compatible with the new workplace: Formal hierarchy is waning, strict job definitions are disfavored, and longevity is no longer valued. In the past, the most common method of determining compensation was job evaluation. Job evaluation utilized factors such as hierarchical role, difficulty, skill requirement, or dangers to set a pay rate for each particular job.[431] The rate then was paid to whichever worker held the job.

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430. For a detailed description of labor-management efforts to construct a scheme of job classifications and wage differentials consistent with scientific management, see Stone, *Job Structures*, *supra* note 1, at 65–70.

431. *See, e.g.*, *id.* (describing the development of the pay structure at U.S. Steel in the postwar era).

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Today's managers want to base pay on performance or productivity, not on job title or length of service.[432] They do not seek uniformity in compensation. Rather, it is not unusual for two workers doing the same work to have different pay rates because of their differential performances or differential value to the firm. Unions, insisting on uniform job-based pay rates and rejecting individual-based rates, encounter fierce employer resistance. Modern compensation theory seeks to tie compensation to the person, not to the job.

Other union bargaining goals that are antithetical to the boundaryless workplace are scope clauses, which keep work inside the bargaining unit, and no-subcontracting clauses, which keep work inside the plant. Unions also bargain for provisions that require supervisors to refrain from performing unit work and in this way attempt to draw tight jurisdictional lines around their certified bargaining unit work. These practices seek to prohibit the very blurring of departmental and firm boundaries that characterize the boundaryless workplace.

In addition, two key features of most union collective bargaining agreements are clauses requiring just cause for dismissal and establishing arbitration systems to enforce them. Such provisions have always constrained managerial discretion, but in the new workplace they are even more of a hindreance. In today's boundaryless workplace, decision makers need to move people, and to remove people, on the basis of the decision maker's assessment of the individual's current and future contribution to the firm or department. Lacking job definitions and orderly progression charts, these judgments are necessarily subjective, ad hoc, and difficult to justify to third parties. Thus union job security efforts make flexible staffing and workforce churning difficult.

In addition, unions traditionally bargain for longevity-linked pay and benefits, such as step raises, back-loaded pensions,

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432. For a discussion of job evaluation, see LAWLER, *supra* note 165, at 145–47.

. *See* CAPPELLI, *supra* note 419, at 232–33 (describing contemporary compensation practices that are not based on seniority or hierarchy premiums and reporting that they seem unfair to many workers).

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length-of-service based vacation benefits, and other means to reward long-term service. These types of union pay and benefit practices encourage longevity and are the antithesis of a just-in-time work force.

Thus, it is evident that many traditional union bargaining goals are incompatible with the essential features of the boundaryless workplace. Union-promoted measures such as seniority for promotions and down-sizing along hierarchically defined job ladders, just cause for dismissal provisions, and longevity-based pay and benefits were tailored to the old internal labor markets. They helped to ensure that the former job structures operated in a fair and even-handed fashion. But those same measures now operate to impede the flexibility that employers currently seek. As a result, employers find these features of unionism burdensome and have escalated their efforts to deunionize. In unionized workplaces, employers are increasingly bargaining for and unions are increasingly conceding flexibility in work rules,[433] but nevertheless unions remain committed to seniority, just cause, and other features of the old psychological contract.[434]

The current tension between entrenched union practice and the emerging job structures finds a parallel in the 1920s. In that decade, employers attacked the AFL craft unions in firms in which they existed and fought hard to keep them out of the mass production industries where the unions were trying to gain a foothold. As a result of the employer open shop offensive, union membership declined from 5 million in 1920 to under 3.5 million by 1930, a drop in union density from 19.4 percent of the nonagricultural work force to 10.2 percent.[435] The AFL's weakness was in part the result of employers' aggressive open shop campaigns, but it was also in part attributable to the fact that

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. *See* BNA 1999 UNION CONTRACT PROVISIONS, at 140:320 (on contract clauses).

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. *See* IRVING BERNSTEIN, THE LEAN YEARS 84 (1966).

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nineteenth century craft unions had policies and programs that were not compatible with the job structures of mass production firms. The AFL craft unions emphasized control of entry to crafts and apprenticeship, practicing what has been termed "job control unionism."[436] The craftworkers' job security, as well as their union practices, came from their knowledge of particular crafts. The craft unions' power was linked to specific production methods; they were not agile at adapting to technological change. Thus, when employers changed from craft production to mass production methods, many craftsmen found their skills obsolete and their power gone. Craftworkers therefore resisted technological change mightily, rather than seeking an alternative form of job security and power.[437]

Job control through exclusive possession of skill was not particularly important to semiskilled workers in the mass production industries. For those workers, job ladders ensured training and defined promotional opportunities. It took the vision of industrial unionism and the formation of the CIO in the 1930s for unions to organize successfully in mass production industries that utilized Taylorist and Fordist job structures.[438] Today unions again need to develop a new vision akin to, but different from, the vision of the CIO in order to understand the problems and play a meaningful role in the new workplace.

436. *See* SELIG PERLMAN, A THEORY OF THE LABOR MOVEMENT 7 (1928).

437. *See, e.g.*, David Montgomery, *The "New Unionism" and the Transformation of Workers' Consciousness in America, 1909–22*, *in* WORKERS' CONTROL IN AMERICA, *supra* note 1, at 105–07 (giving examples of craftworkers' resistance to technological change that threatened not merely their jobs, but their way of life).

438. *See* LICHTENSTEIN, *supra* note 34, at 65–83; Steve Fraser, SIDNEY HILLMAN, LABOR'S STATESMAN 63–75.

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B. The Boundaryless Workplace and the National Labor Relations Act

In addition to the mismatch between union practice and the boundaryless workplace, there is a disjuncture between the new workplace and the current labor law. In many respects, the National Labor Relations Act (NLRA or the Act)[439] is unresponsive to the workplace of today.

1. The Concept of the Bargaining Unit

Collective bargaining under the NLRA is organized around the concept of a "bargaining unit." Under the NLRA, unions exist only as representatives of a bargaining unit. If there is a sufficient showing of interest in a workplace, the National Labor Relations Board (NLRB or the Board) determines the "appropriate unit" and conducts an election among employees working in the unit to determine whether the union represents a majority.[440] If the union wins, it is certified and becomes the exclusive representative of the unit.[441] Once certified, the employer and the union have a duty to bargain for a collective agreement that will govern the terms and conditions of employment for all workers in the unit, regardless of whether the employees are union members or not.[442] Thus, any contract concluded between the union and the employer will apply to all jobs in the unit. The employees in the unit lose their right to take collective action apart from their

439. Pub. L. No. 106-274, 49 Stat. 449 (codified at 29 U.S.C. § 151 (1994)).

440. 29 U.S.C. § 159(b).

441. Under the NLRA, a union can also be designated as an exclusive representative by means of an employer grant of recognition after a showing of a card majority or other convincing evidence of majority support. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 592 (1969). But certification as a result of a Board-sponsored election is the preferred method of obtaining representative status under the National Labor Relations Act. *See id.* at 596.

442. *See* Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 200–04 (1944).

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certified representative,[443] and the union has a duty to represent fairly all employees in the unit, those that support the union and those that do not.[444]

The bargaining unit is thus an integral part of the statutory scheme of the NLRA. However, the statute does not provide a clear definition of what constitutes an appropriate unit; that question is left for determination by the NLRB in each case. Often the definition of the unit is one of the most contested aspects of an organizing campaign because a union will advocate a unit in which it has majority support and an employer will advocate a unit where it does not. Under the statute, the NLRB is prohibited from basing the unit solely on the extent to which the union has organized.[445] Instead, the Board attempts to define units of employees who share a "community of interest." Some of the factors the Board uses to determine whether there is a community of interest are: similarity in kinds of work performed, similarity in compensation, types of training and skills required, integration of job functions, and commonality of supervision.[446]

Bargaining units imply static job definitions and clear department boundaries, and thus are in tension with cross-utilization and the blurring of boundaries typical of work practices today.[447] The community of interest test assumes a functionally delineated workplace in which work tasks are continuous and well defined. In

443 . *See* Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 64, 69–70 (1975).

444 . *See* Vaca v. Sipes, 386 U.S. 171, 177, 182 (1967); *Steele*, 323 U.S. at 200–02.

445 . *See* 29 U.S.C. § 15(c)(5).

446 . *See* NLRB v. Action Automotive, 469 U.S. 490, 494 (1985); NLRB v. Purnell's Pride, Inc., 609 F.2d 1153, 1156 (5th Cir. 1980). *See generally* JULIUS G. GETMAN ET AL., LABOR MANAGEMENT RELATIONS AND THE LAW 30–31 (2d ed. 1999).

447 . 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).

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addition, the NLRB has a preference for worksite-specific bargaining units and has adopted a presumption in favor of single facility units.[448] Yet, much of today's work involves networks across multiple establishments or multiemployer tasks, thus defying traditional bargaining units.[449]

One area in which the bargaining unit focus of the NLRA has been at odds with labor market reality is the status of long-term temporary employees under the act. Since the 1980s, temporary employment has been the fastest growing portion of the labor market.[450] In 1999, the Bureau of Labor Statistics reported that nearly 2 million employees work for temporary help agencies contract labor provider firms.[451] Temporary employees who work for staffing agencies are often given long-term placement at particular user firms. There, the user firm supervises the work of the temp on a day-to-day basis, and the temp works along side its regular employees, sharing the same skills, duties, and job classifications. In this triangulated work arrangement, the NLRB has considered both the temporary agency and the user firm to be a joint employer of the temporary employee.

In 1990, the NLRB ruled that long-term temporary employees could not be included in a bargaining unit with a user-employer's

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. According to the U.S. Department of Labor, between 1982 and 1998, the number of jobs in the temporary help industry grew 577 percent, compared to a 41 percent increase in jobs in the labor force generally. *See Contingent Workers: Income and Benefits Lag Behind Those of the Rest of the Workforce*, GAO Report, Bureau of Labor Statistics, July 26, 2000, at 16; *see also*, Autor, *supra*, note 92, at 1 (reporting that the temporary help supply industry grew more than five times faster than U.S. nonfarm employment between 1979 and 1995).

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. *See Contingent and Alternative Employment Arrangements*, U.S. Dep't. of Labor, Bureau of Labor Statistics, New Release 99-362, *available at* http://stats.bls.gov/news.release.htm (Dec. 21, 1999).

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regular employees unless both the agency employer and the user-employer consented.[452] Thereafter, the Board refused to consider any unit that combined temporary and regular employees, absent consent of both employers.[453] In the fall, 2000, in the Sturgis case, the NLRB reversed its former position and held that regular employees and temporary employees could be in the same bargaining unit so long as they shared a community of interest.[454] The Board also stated that temporary employees could unionize in a bargaining unit of all the employees of a single temporary work agency.[455] Thus the NLRB now permits temporary employees to be included in bargaining units that are comprised of temporary and regular employees of a single employer or comprised of all employees of a single temporary agency. This ruling greatly expands the possibilities for temporary workers to claim the protection of the labor law. Nonetheless, it also illustrates the difficulty of applying static notions of bargaining units to the complex employment relationships that arise with today peripatetic work force.

The bargaining unit focus of the NLRA also means that terms and conditions negotiated by labor and management apply to jobs in the unit rather than to the individuals who hold the jobs. As individual workers move between departments, units, or firms, their labor contracts do not follow them. Yet, the new workplace is not job centered nor is it made up of separable, bounded departments. It involves cross-utilization, broad banding, and other features of boundarylessness. As a result, in today's world of frequent movement, union gains are increasingly ephemeral from the individual's point of view.

452. *See* Lee Hosp., 300 N.L.R.B. 947 (1990).

453. *See, e.g.*, Int'l Transfer of Fla., 305 N.L.R.B. 150 (1991).

454. *See* Sturgis & Textile Processors, 331 N.L.R.B. No. 173, at *12 (2000).

455. *See id.* at *19.

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2. The Role of Arbitration

The labor law's treatment of arbitration also reflects the premise that workplaces have well-defined boundaries. Since the mid-1950s, the Supreme Court has made the grievance and arbitration procedure a central feature of the evolving system of collective bargaining.[456] In a series of cases interpreting section 301 of the Labor Management Relations Act (LMRA),[457] the Court transformed collective bargaining into a system of labor-management self-regulation.[458] It stated that labor and management should engage in "industrial self-government" in a self-regulatory system.[459] In this self-governing world, the parties were permitted to determine their own norms, and external norms and externally imposed sanctions were kept out.[460]

In an earlier work, I have termed the legal rules that comprise the self-regulatory world of collective bargaining "industrial pluralism."[461] Industrial pluralism is based on the metaphor of collective bargaining as industrial self-government. Management and labor are analogized to political parties in a representative democracy—each represents its own constituency and, as in a legislature, engages in debate and compromise in the formation of the collective bargaining agreement.

456 . Textile Workers Union of Am. v. Lincoln Mills, 353 U.S. 448, 449–51 (1957); *see also* Boys Mkts. v. Retail Clerks, 398 U.S. 235, 242 (1970). *See generally* Stone, *supra* note 39, at 526–29.

457 . 29 U.S.C. § 185(a).

458 . *See* Stone, *supra* note __, at 1008–12, 1013–14 (describing the law of arbitration under collective bargaining as one of several examples of legally-empowered self-regulating systems).

459 . *See, e.g.*, United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960).

460 . *See* Stone, *Legacy of Industrial Pluralism*, *supra* note 40, at 622–24. *See generally* Stone, *Postwar Paradigm*, *supra* note 40, at 1511–41.

461 . Stone, *Legacy of Industrial Pluralism*, *supra* note 40, at 622–24; Stone, *Postwar Paradigm*, *supra* note 40, at 1514–15.

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In addition to the workplace legislature (collective bargaining negotiations) and the workplace executive (management) there is a workplace judiciary, which is private arbitration. The metaphor of a workplace democracy with a separation of powers that permeate postwar American labor law scholarship and judicial opinions portrays the workplace as a democratic institution, a microcosmic constitutional democracy in the private sphere.[462]

The industrial pluralist vision contains a powerful normative message about how collective bargaining should be regulated. The message is that the unionized workplace should be permitted to self-regulate without intervention from legislatures or courts. Private arbitration, rather than the outside judiciary, should be the exclusive tribunal for resolving disputes. Courts have realized this vision through the adoption of a series of legal rules that effectively insulate the unionized workplace from external law.[463] For example, once labor and management establish internal arbitration systems for resolving disputes concerning contract interpretation and enforcement, the courts accord these tribunals considerable deference.[464] To a great extent, the unionized workplace is shielded from outside scrutiny and exempt from external employment law.[465] For example, the Supreme Court has accorded an extreme amount of deference to collectively bargained arbitration systems. In 1960, it announced that courts should apply a presumption of arbitrability in deciding which disputes are within an arbitration clause, such that a court should order parties to arbitrate unless it could be said "with positive assurance that the

462. *See* Stone, *Postwar Paradigm*, *supra* note 40, at 1515.

463. *See generally* Stone, *Postwar Paradigm*, *supra* note 40, at 1529–41.

464. *See* Stone, *supra* note 40, at 622–25.

465. *See id*. at 624. There is an exception for certain external employment laws, most notably the antidiscrimination laws, which have been held to be nonwaivable by a union. Thus, when a union employee alleges unlawful racial or gender discrimination, the courts do not defer to the union's negotiated arbitration procedure. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 51–52 (1974).

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arbitration clause is not susceptible to an interpretation that covers the asserted dispute."[466] At the same time, it announced an exceedingly deferential standard of judicial review of arbitral awards.[467] These rulings shielded the arbitration process and arbitral awards from external scrutiny or accountability. In addition, the Court has applied an uncommonly broad preemption doctrine to all matters arguably covered by a collective bargaining agreement.[468] Thus, when unionized workers assert employment rights grounded in either state or federal law, they usually find that their claims are preempted by the arbitration clause.[469] Because labor arbitrators are bound to apply the collective agreement and not external law, the result of the labor law preemption doctrine is that unionized workers are left with no forum in which to assert their statutory rights.[470]

The self-government model of collective bargaining, like the bargaining unit concept, requires a strict boundary around the unionized workplace.[471] It presupposes that labor and management in a given bargaining unit will devise the rules by which they will be governed and the procedures through which allegations of breach can

466. United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582–83 (1960) (announcing presumption of arbitrability).

467. United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960) (upholding arbitral award "so long as it draws its essence from the collective bargaining agreement").

468. Allis-Chalmers Corp. v. Leuck, 471 U.S. 202, 220 (preempting employee's state law tort claim because resolution of the claim was substantially dependent upon an analysis of the collective bargaining agreement); *see also* Lingle v. Norge Division of Magic Chef, 486 U.S. 399, 413 (1988) (stating that state law claims are preempted if it its resolution involves interpretation of collective bargaining agreement); Stone, *Legacy of Industrial Pluralism*, *supra*. note 38, at 620–621 (contrasting trend toward broad scope of preemption in labor law with trend narrowing scope of preemption in other areas of law).

469. *See* Stone, *Legacy of Industrial Pluralism*, *supra* note 40, at 616–620.

470. *See id*. at 594–96.

471. *See* Stone, *supra* note 40, at 628.

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be investigated, adjudicated, and remedied. The rules so devised only apply to the particular jobs included in the bargaining unit, and the grievance and arbitration procedure keeps the rules within those bounds. Thus the collective agreement's arbitration procedure, serves to keep outsiders out and insiders in. Like the primacy of the bargaining unit concept in defining representation rights, industrial pluralist bargaining and arbitration practices embody and reflect the single employer/long-term employee model of industrial relations.

3. Secondary Boycott Prohibitions

Another feature of the NLRA that assumes the existence of bounded careers and internal labor markets is the prohibition of secondary boycotts. Since the nineteenth century, courts have been hostile to efforts by unions to utilize their economic clout against uninvolved parties.[472] Courts repeatedly enjoined, fired, and otherwise sanctioned workers who engaged in peaceful strikes and product boycotts that harmed nonparties in labor disputes.[473] These judicial actions were bitterly criticized by the labor movement and its supporters. For over fifty years, the issue of secondary boycotts generated passionate controversy and intense lobbying.[474] Congress has visited the issue of secondary boycotts several times in the twentieth century. In 1914, Congress enacted the Clayton Antitrust

472. *See, e.g.*, Plant v. Woods, 57 N.E. 1011, 1015 (Mass. 1900) (holding pressure on an employer by a rival union unlawful); Bowen v. Matheson, 96 Mass. (14 Allen) 499, 503 (1867) (holding a boycott of a shipping agency to compel shipowners to pay union's standard rate for seamen unlawful); *see also* Loewe v. Lawlor, 208 U.S. 274, 294 (1908) (holding a combination "aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes" actionable under the Sherman Antitrust Act).

473. *See e.g.*, Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n of N. Am., 274 U.S. 37 (1927); Duplex Printing Press Co. v. Deering, 254 U.S. 443, 466–68 (1921); *Loewe*, 208 U.S. at 292–94.

474. *See, e.g.*, FELIX FRANKFURTER & WILLIAM GREENE, THE LABOR INJUNCTION 161–62 (1931).

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Act,[475] which purported to legalize peaceful secondary pressure. However, in 1921 the Supreme Court effectively nullified the Clayton Act by giving it an extremely restrictive interpretation in the case of Duplex Printing Co. v. Deering.[476] Public pressure then induced Congress to enact the Norris LaGuardia Act[477] in 1932, in which Congress attempted to legalize peaceful secondary conduct by unions.[478] The Norris LaGuardia Act was upheld and broadly interpreted by the Supreme Court in the United States v. Hutchenson[479] decision in 1941, but the legality of secondary conduct remained controversial. In 1947, Congress added section 8(b)(4) in the Taft-Hartley amendments to the NLRA, which rendered secondary boycotts unlawful under the NRLA.[480] The scope of section 8(b)(4) and the larger issue of the lawfulness of peaceful secondary conduct remain controversial issues to this day.[481]

The labor law's ban on secondary activity assumes that union economic pressure and collective bargaining should take place within a discrete economic unit—the bargaining unit—and should not spill over beyond its boundaries. The effort to limit economic warfare to "primary" participants further assumes that the unionized workplace

475. Pub. L. No. 106-274, ch. 323, 38 Stat. 730 (1914) (codified as amended in scattered sections of 15 U.S.C.).

476. *See Duplex Printing*, 254 U.S. at 471–72.

477. Pub. L. No. 106-274, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101–115).

478. *See id.*

479. 312 U.S. 219 (1941). In *Hutchenson*, the Court interpreted the Norris LaGuardia Act as preventing federal courts from imposing any penalties on peaceful secondary conduct "[s]o long as a union acts in its self-interest and does not combine with non-labor groups." *Id.* at 232.

480. *See* 29 U.S.C. § 158(b)(4).

481. Courts continue to enjoin secondary activity in disregard of specific statutory and precedent to the contrary. *See, e.g.*, Burlington N.R.R. Co. v. Bhd. of Maint. of Way Employees, 481 U.S. 429, 437–40 (1987) (criticizing lower courts for enjoining secondary conduct by railroad workers who were not subject to the NLRA's secondary boycott prohibitions).

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has static borders and that disputes within the entity between the firm and its workers affect only those immediate and identifiable parties. The law attempts to confine economic warfare to the immediate parties in a bounded arena of conflict. Within the unit, economic pressure is seen as potentially effective, yet comfortably containable.

Despite the stated goal of limiting the scope of economic conflict, the secondary boycott law has generated considerable controversy over the question, who is an insider and who is an outsider to a labor dispute.[482] In today's network production and boundaryless workplace, the assumption that there can be discrete, bounded conflict with clear insiders and outsiders is no longer plausible. Rather, unions are finding with increased frequency that efforts to bring economic pressure to bear transverses traditional bargaining unit and corporate boundaries. As they seek to apply pressure on suppliers, joint venturers, coemployers, network partners, and subsidiaries, they are finding that the secondary boycott laws are a serious hindrance.[483]

4. The Definition of Employee and Employer

The labor law only provides protections for those individuals who fall within the statute's definition of an "employee." Agricultural laborers, domestic workers, supervisors, and independent contractors

482. *See, e.g.*, NLRB v. Fruit & Vegetable Packers & Warehouse Men Local 760, 377 U.S. 58, 63–70 (1964) (holding that peaceful picketing of a store that sold apples is not a violation of secondary boycott provisions). *See generally* Local 761, Int'l Union of Electrical Workers v. NLRB, 366 U.S. 667 (1961) (discussing the difficulty of distinguishing pricing from secondary activity). S*ee also* Duplex Printing Co. v. Deering, 254 U.S. 470–71 (1921) (giving a narrow reading of insiders and outsiders to dispute under the Clayton Act); Howard Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e)*, 113 U. PA. L. REV. 1000, 1004 (1965) (discussing the difficulty distinguishing between primary and secondary activities).

483. *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 non-union 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 effort by union to achieve anti-double-breasting contract language to be unlawful secondary activity).

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are explicitly excluded[484] and there are nonstatutory exclusions for managerial and confidential employees.[485] Therefore, people working for multiple employers or the wrong kind of employer fall outside the protection of the statute. Furthermore, employees who have some supervisory authority over others,[486] or who have managerial decisions delegated to them, are excluded from coverage.[487] In today's workplace, with flattened hierarchies in which decision-making authority has been delegated downward, the supervisory and managerial exclusions have the potential of excluding many low-level employees.

The exclusion for independent contractors has become particularly problematic for part-time and short-term temporary workers.[488] Such workers often work for more than one employer at a time, but are dependent upon and subject to the supervision of each employer for the time they are at work. Indeed, part-time and temporary workers are often indistinguishable from other employees other than that their work is part-time or of uncertain duration.[489] Yet, when a worker has

484. *See* 29 U.S.C. § 152(3).

485. *See* NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170, 177–85 (1981) (sustaining the Board's treatment of confidential exclusion); NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) (managerial exclusion); *In re* Ford Motor Co., 66 N.L.R.B. 1317, 1322 (1946) (confidential exclusion).

486. *See* NLRB v. Health Care & Ret. Corp., 511 U.S. 571, 578 (1994) (finding workers are "supervisors" under the statute because they assign work to nurses aides).

487. *See* NLRB v. Yeshiva Univ., 444 U.S. 672, 679–82 (1980) (holding that university professors are "managers" for purposes of exclusion because they exert collective decision-making authority in hiring, curriculum, and other matters).

488. In the 1947 amendment to Section 2(2) of the NLRA, 29 U.S.C. § 152(2), Congress rejected an "economic reality" test in favor of a common law test for determining independent contractor status. However, the Board and Courts of Appeal have often differed as to what that test requires.

489. Part-time *regular* employees are covered by the act. *See* N.Y. Univ. & Int'l Union, UAW, 332 N.L.R.B. No. 111, at *3, 165 LRRM (BNA) 1241 (2000).

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multiple employers, each employer will often claim that the worker is an independent contractor, rather than an employee. Courts often accept the employer's own definition of a temporary worker's status, thereby excluding a fast-growing portion of the workforce from unionization altogether.[490]

The act's exclusion of independent contractors is increasingly difficult to justify. All at-will employees have an employment contract of uncertain duration. As the new psychological contract displaces the old idea of steady implicit long-term employment, the distinction between temporary and permanent employees becomes arbitrary. Furthermore, as regular employees' pay is increasingly pegged to individual performance and market rates, and as lower level employees are increasingly given discretion about the performance of their own work tasks, the distinction between employee and independent contractor is quickly vanishing.

5. Successorship

Another respect in which the NLRA is not well suited to the contemporary workplace involves the act's treatment of corporate transformation. Unionism under the act is job-centered and employer-centered, not employee-centered. As discussed above, bargaining units and collective agreements pertain to the job and the worksite, not to the employee. So long as jobs are relatively stable—that is, the same jobs are performed over time in the same location with the same employees—bargaining units are stable as to membership, size, and composition, and collective agreements are stable as to the scope of their coverage. However, when businesses change hands or undergo major corporate transformations, the bargaining unit focus of the act becomes problematic. For example, when a unionized employer undergoes a change of ownership through

490. *See, e.g.*, Clark v. E.I. DuPont de Nemours & Co., 105 F.3d 646 (4th Cir. 1997) (per curiam); Abraham v. Exxon Corp., 85 F.3d 1126, 1132 (5th Cir. 1996). *But see* Vizcaino v. United States Dist. Court, 173 F.3d 713, 724–25 (9th Cir. 1999) (rejecting employer's assertion that employees are independent contractors for purposes of eligibility for stock purchase plan).

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a merger or sale of assets, the test to determine whether the bargaining unit persists in the new entity is whether a majority of the successor's employees were employed by the predecessor, and whether there is "substantial continuity" in the work.[491] "Substantial continuity" involves continuity in tasks, processes, customers, and supervision. The substantial continuity test makes the union's existence depend upon employment continuity and stability within the employing entity.[492] Thus, the successorship doctrine, like the bargaining unit concept, conditions representation on an employment relationship that is stable, bounded, and on-going.

In sum, despite the importance of unions as an institution of employee protection and representation, there are many features of current union practice under the NLRA that are in tension with the new workplace, such as narrowly defined bargaining units, seniority, and longevity-based pay and benefit structures. The labor law, with its emphasis on discrete bargaining units and a closed labor-management boundary, reinforces the conventional union practices that were effective mechanisms for employee protection under the old psychological contract. If we want to promote institutions for employee representation in the new workplace, we need to imagine a new model of unionism, and a new legal structure to support it, that can function in the evolving world of work. The remainder of Part VII suggests means by which union practice and labor law could accomplish that goal.

C. Reimagining Employee Representation in the Boundaryless Workplace

One hundred years ago, Beatrice and Sydney Webb identified three different goals of working class collective action and three

491. *See* Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 43 (1987); *see also* NLRB v. Burns Int'l Sec. Serv., Inc., 406 U.S. 272, 277–81 (1972).

492. See Katherine Van Wezel Stone, *Labor and the Corporate Structure*, 55 CHI. L. REV. 73, 105–09 (1988) (hereinafter "Corporate Structure") (describing substantial continuity requirement).

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corresponding roles for labor organizations.[493] They are: (1) to form mutual benefit associations; (2) to create organizations to engage in collective bargaining for job-related protection; and (3) to create organizations that lobbied for legislation favorable to employees. The Webbs detailed how English unions, at different times in English history, performed each of these roles.

In the twentieth century, American unions have also played all three roles, but with a heavy emphasis on the second. Both the AFL and the CIO, prior to their merger in 1955, saw their primary function as bargaining for job-related protections. And postmerger, the AFL-CIO continued to emphasize collective bargaining and contract administration as the core function of unionism. Over the past fifty years, international unions and the AFL-CIO have built high-powered research and legal departments to provide support for their bargaining programs, while relegating their legislative departments to secondary roles. The strength of the AFL-CIO unions at their postwar zenith lay in their achievements at the bargaining table, one employer at a time.

Given the transformation in the workplace, unions now need to develop new methods of operation. While there are many workers still working under the old psychological contract, evidence suggests that new workplace practices are spreading both across the corporate spectrum and through the employment hierarchy.[494] As careers become boundaryless and work becomes detached from a single employer, unions need to become boundaryless as well. They need to develop strategies, skills, and strengths that go beyond single contracts with single employers. They need to move beyond worksite-based collective bargaining, and expand into the Webbs' other domains. Unions need to expand upward into the political domain and outward into the community.

493 . *See* SIDNEY & BEATRICE WEB, THE HISTORY OF TRADE UNIONISM svii, xxii–xxiii, 1 (Longman's Green & Co. 1950) (1894).

494 . *See* Paul Osterman, *Work Reorganization in an Era of Restructuring: Trends in Diffusion and Effects on Employee Welfare*, 53 INDUS. & LAB. REL. REV. 179, 180 (2000).

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In the political domain, unions need to expand their reach so that they represent a wider sector of the workforce in the political process. They need to redefine their mission to include lobbying and political action on behalf of working people generally, to become a working person's version of the American Association of Retired Persons (AARP). Unions have long been involved in lobbying on issues of broad concern, such as civil rights and the minimum wage. In recent years, the political and legislative arenas have been ones in which union efforts have been especially effective. But an expanded role for unions in politics and the legislative process would require a major redefinition of both their mission and their membership structure. For example, they could institute a category of membership that does not involve workplace representation but rather gives individual working people a voice in the political process.[495] The labor law currently discourages union participation in politics through restrictions on the use of dues money for political campaigns and doctrines limiting the scope of protected activity.[496] Rather than discourage unions from participating in politics, the law would have to be amended to enable unions to expand in that domain.

Unions also need to expand their role in the community. In the boundaryless workplace, employees continue to need collective representatives to act as bargaining agents, but not merely on a

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. In the 1990s, the AFL-CIO instituted a program of Associate Membership. Associate members are workers in unorganized plants who want to organize, or workers in organized plants who lost their jobs. Associate members pay lower dues and are eligible for certain union-sponsored credit-card plans and other union-arranged consumer discounts. The primary goal of the Associate Membership program is to enlist the support of workers who would go on to unionize and be covered by collective bargaining, not to build a political constituency. *See* JOHN J. SWEENEY, AMERICA NEEDS A RAISE 140 (1996).

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. *See* Communications Workers of Am. v. Beck, 487 U.S. 735, 762–63 (1988) (holding that unions must give employees who so request it, a rebate for that portion of his union dues spent on political causes to which he is opposed); Cal. Saw & Knife Works, 320 N.L.R.B. 224, 231–35, 237 (1995) (mandating that all employees in a bargaining unit be given notice of their "Beck rights," and setting guidelines for calculating Beck rebates); *see also* NLRB v. Motorola, Inc., 991 F.2d 278, 285 (5th Cir. 1993); c*f.* Eastex, Inc. v. NLRB, 437 U.S. 556, 567–70 (1978) (holding that union-sponsored political literature protected under the National Labor Relations Act only so long as there is some nexus between the issue and employees' interests as employees).

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single-employer basis. Employees need organizations that can bargain with groups of employers for decent wage rates, adequate and portable benefit packages, training, employability, child care, and other features of social welfare. Thus, unions need to find ways to bargain and operate on a multiemployer basis, across worksites, localities, and regions. They need to assist workers to acquire skills, provide opportunities for retooling, ensure portability in benefits, create institutions for child care, and in other respects enabling individuals to participate in the boundaryless workplace.

In recent years, some unions and labor groups have begun to perform new roles that are responsive to the transforming workplace. Two different models of unionism have emerged as an alternative to traditional employer-centered unionism. The first, new craft unionism, is an occupation based form of unionism that bargains with industry-wide employer groups to establish minimum standards and provide training while enabling employees to move freely between employers in the particular industry. The second, citizen unionism, is a locality-based form of unionism that uses collective pressure to induce corporations to become good corporate citizens of the geographic area in which they live. While employer-centered unionism will continue to work well for employees within the internal labor market type of employment setting, these two emerging types of unionism can provide representation for employees in the emerging boundaryless workplace.

1. New Craft Unionism

Some unions have taken steps to respond to the emerging boundaryless workplace by selectively borrowing from traditional craft union practices. One of the most interesting examples can be found in the trades associated with the film and television industries. The employees in below-the-line theatrical crafts—the workers who perform lighting, sound, camera work, props, costuming, make-up, stage-hand work, equipment loading, or driving—have long been

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organized into two competing unions.[497] The National Association of Broadcast Employees and Technicians (NABET) organizes employees on an industrial basis, and seeks to negotiate collective bargaining agreements between the various below-the-line crews and the major motion picture and television studios.[498] The International Alliance of Theatrical and Stage Employees (IATSE), is organized on a craft basis. The two unions function very differently and accordingly have had very different rates of success in the new workplace.

NABET began as an independent union in the 1930s and joined the CIO in the early 1950s. It is a typical industrial union that negotiates for long-term continuous employment by the major producers. Its collective agreements contain the standard seniority, job bidding, just cause for dismissal, and grievance arbitration provisions. In the 1960s and 1970s, NABET developed a reputation for militancy, having engaged in numerous strikes, strike threats, and highly visible arbitrations.[499] Since then, film and television companies whose employees are organized by NABET have bristled under the job security terms of the NABET agreements. Production work is often intermittent and unpredictable, so film and television companies do not want to have to support full complements of craftworkers on a year-round basis. Even in the relatively stable setting of television, the major networks do not want to pay idle crew members during summer rerun periods. Therefore, those film and television employers organized by NABET have tried to cut staff and substitute temporary per diem workers for permanent workers.

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. The International Brotherhood of Electrical Workers (IBEW) also represents broadcast engineers and technicians in the industry, but they are omitted from the following discussion because they do not have a major presence in the other below-the-line crafts. *See* Lois Gray & Ronald Seeber, *The Industry and the Unions: An Overview*, *in* UNDER THE STARS 15, 34–42 (Lois Gray & Ronald Seeber eds., 1996).

498

. *See* John Amman, *The Transformation of Industrial Relations in the Motion Picture and Television Industries: Craft and Production*, *in* UNDER THE STARS, *supra* note 497, at 113, 118–21.

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. *See id.* at 121.

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Because per diem workers are paid considerably less than the NABET union rate and are not eligible for benefits. Their use has become a source of great controversy. In the 1970s and early 1980s, the major television network executives repeatedly sought, in negotiations for the right to use per diems, but NABET consistently refused. In 1987, the National Broadcasting Corporation (NBC) renewed its efforts to utilize per diem and freelance workers, but NABET refused to even discuss it. Eventually NBC implemented its demands unilaterally and the union responded with a strike. After eighteen weeks, during which the network operated with supervisors, clerical staff, and nonunion strikebreakers, the union capitulated and granted the network every major concession it sought, including the right to use temporary workers.[500]

The NBC strike emboldened the other networks to obtain the right to use unlimited numbers of per diem employees. In 1987, CBS bargained hard on the issue and won its objective.[501] The American Broadcasting Company (ABC) also began to increase its use of per diem workers. Escalating tension at ABC about the extent to which the network could utilize per diem workers led to a lock-out in the fall of 1999. Ultimately, the company's position prevailed.

As the use of temporary workers has increased, regular employment at NABET-organized companies has declined. Accordingly, since the early 1990s, NABET membership has also been declining. In 1990, the NABET film local, Local 15, merged with IATSE, and in 1992, the remainder of the union merged with the Communications Workers of America.[502]

IATSE operates in a manner that is very different from its industrial union counterpart.[503] IATSE engages in a modern variation

500. *See id.* at 134–35.

501. *See id.* at 135–36.

502. *See id.* at 152–53.

503.

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of the nineteenth century insider-contractor system, in which lead workers hire their own crews on an individual job basis. For example, if a film producer wants to produce a film in New York, he calls up a lighting technician, sound engineer, or other craftworker in New York and asks him to put together a crew. The one called becomes the head lighting technician or head sound engineer for the job and then contacts others to assemble a crew. Each individual in the crew makes his or her own contract with the employer-producer within the framework of the local's Basic Agreement.

IATSE engages in a form of collective bargaining that combines collectively negotiated terms with individually negotiated ones. In this embedded contract bargaining model, the union negotiates a Basic Agreement that provides for individually negotiated agreements consistent with its terms. For each craft, a Basic Agreement sets forth some terms of the labor-management relationship and requires employees covered by it to establish other terms through individual contracts with the employer. For example, the typical IATSE Basic Agreement provides for union recognition as well as certain general terms such as health and safety at the workplaces, employer provision of housing during out-of-town production assignments, transportation costs for out-of-town locations, and employer contributions to the joint pension and health funds. It also sets minimum pay for each day worked. However, the agreement contains no seniority, just cause, or arbitration provisions—in fact, there is no provision for job security at all. To the contrary, the Basic Agreement contemplates that workers will be hired on an as-needed basis, working from job to job, sometimes on more than one job at a time.[504]

The most significant aspect of the Basic Agreement is that it specifies that employers must give each worker it hires a specific individual employment contract, called a cover sheet, that is set forth as

. Much of the information that follows comes from a series of interviews. Interview with Franklin Moss, Esq., International Alliance of Theatrical and Stage Employees (IATSE) counsel, Lipton, Watanabe, Spevak & Moss, in N.Y. City (May–June 2000).

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. *See, e.g.*, United Scenic Artists Local 829 Agreement with the League of Resident Theaters (Sept. 1, 1992–Aug. 31, 1996) (copy of file with author).

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an appendix to the Basic Agreement. The cover sheet is a one-page agreement, negotiated between the theater-employer and the individual employee, that fixes the level of pay and other terms relating to compensation for the specific job. The cover sheet also authorizes a dues check-off on behalf of the relevant IATSE local.[505]

IATSE's collective bargaining agreement is simply an umbrella that contains and defines the parameters of embedded individual bargains. In this form of embedded contract unionism, most of the significant terms of compensation and hours of work are derived from individual bargaining between a union member and the specific employing company. It is a form of bargaining that permits a combination of individualized and collectivized terms of employment. Embedded contract bargaining has proven to be a means for unions to provide minimum terms and protections and yet be compatible with the new boundaryless workplace. Because it is an arrangement that permits employers to reward superstars with megasalaries, embedded contract bargaining is also used for the talent groups in the entertainment industry, such as screen writers and actors, as well as for professional athletes.

The craft structure of IATSE made it amenable to the introduction of temporary workers. Whereas the use of per diem workers posed a serious threat to the industrial union model of NABET, it did not pose a similar threat to IATSE. Instead, the IATSE contract permits employers to use temporary workers without having to go outside the union. Indeed, under an IATSE contract, all employees are hired temporarily. Thus the employer pays for exactly the amount of labor it needs, hired on a job-to-job, or even on a day-to-day, basis. As a result, IATSE has been growing rapidly in the industry and many NABET workers have shifted to IATSE. The overall level of full-time employment in the industry has shrunk as the employers have shifted to greater use of temporary, atypical, nonunion workers, but the companies' preference for temporary workers has proved to be an opportunity rather than a threat to IATSE.

505 . *Id.*

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While IATSE was not threatened by temporary workers, it was threatened by changes in technology and industry structure. As a craft union, IATSE can only protect its members if most of the workers in a craft are unionized. If there are significant numbers of nonunion workers available, employers will seek to utilize them rather than comply with union standards. In the mid-1980s, IATSE experienced growing competition from nonunion workers employed by low-budget independent film producers who could not afford the minimal rates and terms of the IATSE basic agreement. Some IATSE members argued that the low-budget film workers should not be permitted in the union, but IATSE president Tom Short disagreed. Short took the position that having any workers in their craft outside the union was the greater threat. If they were outside, he reasoned, the low-budget, low-cost workers would constitute a source of trained strike-breakers, presenting the companies with a constant temptation to eliminate their unions. Thus the leadership of IATSE negotiated contracts with special concessionary rates with low-budget film producers and, at the same time, brought the new workers into the union.[506] So despite some dissatisfaction among the incumbents, the IATSE strategy succeeded in keeping the union strong, and in keeping its bastions like New York almost 100 percent union.[507]

The IATSE approach to the low-budget films illustrates the difference between new craft unionism and the old craft unionism still found in many of the building trades today. The old craft unions were notorious for restricting membership and using patronage networks and nepotism to ration the privilege of membership. These membership practices resulted in unions that were almost exclusively white and male, and provoked well-founded charges of racial, gender, and ethnic discrimination.[508] The exclusive practices of the craft

506. *See* Amman, *supra* note 498, at 146–48.

507. *See* Amman, *supra* note 498 at 142–43; Interview with Franklin Moss, *supra* note 503.

508. *See, e.g.*, DAVID MONTGOMERY, THE FALL OF THE HOUSE OF LABOR 199–201 (1987) (describing how craft unionism in metal-trades became all white and all male).

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unions ultimately weakened them because as crafts became easier to learn or as training opportunities proliferated, many trained, nonunion workers who were ready, willing, and able to underbid the unionized workers arrived on the scene.[509] In contrast, the IATSE approach of nonexclusive craft unionism retains the flexibility of craft unionism without generating a pool of underprivileged outsiders.

Also, in the past, many craft unions declined when technological change made their craft obsolete.[510] IATSE has attempted to prevent worker skill obsolescence by pressuring employers and equipment manufacturers to provide training for its members.[511] In addition, many IATSE locals provide training themselves. For example, the New York stage hand local sends members to courses all over the country in computerized lighting and other technical innovations in the craft, and pays for the courses out of union dues.[512]

IATSE is not the only union that has developed mechanisms for dealing with the boundaryless workplace based upon traditional craft union models. Dorothy Sue Cobble finds examples of similar practices in early-twentieth-century waitress unionism.[513] Cobble studied the Hotel Employee and Restaurant Employees Union's all-female waitress locals that existed from 1900 until the 1950s. These unions combined conventional practices of highly skilled craft unions with practices developed by nonfactory, unskilled workers such as longshoremen and teamsters.[514] Like the longshoremen, the waitress unions established union hiring halls and used closed shop

509. *See* David Montgomery, _____, *in* WORKERS' CONTROL IN AMERICA, *supra* note 1, at 117–22.

510. *See* Gray & Seeber, *supra* note 497, at 42–43.

511. *Id.* at 47–48.

512. Interview with Franklin Moss, *supra* note 503.

513. Cobble, *supra* note 533, at 421–23.

514. *See id.* at 420–21.

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agreements in order to obtain employment security, benefits, and minimal standards in restaurants in their locality. Like the craft unions, the waitress unions attempted to define occupational standards for waitressing. The waitress locals developed work rules, set craft standards, and established training and apprenticeship programs. By maintaining standards of competence, the union hiring halls gave employers a source for obtaining "good and reliable" workers, while at the same time giving the union control over the labor supply.[515]

Waitress unionism was occupationally based rather than employer or worksite-based, and it had many similarities to IATSE.[516] For example, like IATSE, the waitress union contracts did not provide protection against layoffs or unjust dismissal.[517] Also, the collective agreements of the waitress unions occasionally contained embedded contract provisions that permitted individual employees to negotiate their own bargains.[518] And like IATSE and other craft unions, the waitress unions had portable union-run benefit funds.[519] But unlike IATSE, the waitress workers had no identifiable skill, so that the success of their union depended upon their ability to maintain a closed shop.

Occupational waitress unionism atrophied in the 1950s and 1960s. In part, the rise of large hotels with unions organized on an industrial union model undermined the union's power. Then, in 1955, the union's fate was sealed by a Supreme Court decision that held that hotels and restaurants fell under the NLRA.[520] Thereafter, the act's

515. *See id.* at 426–27.

516. *See id.* at 432.

517. *See id.* at 425.

518. *See id.* at 427.

519. *See id.* at 425.

520. *See* Hotel Employees Local No. 255 v. Leedom, 358 U.S. 99, 99 (1958); *see also* Floridan Hotel of Tampa, Inc., 124 N.L.R.B. 261, 263–64 (1959).

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prohibition on closed shops and its ban on supervisors in bargaining units spelled the demise of the union's essential practices. By 1970, the International Union merged the craft- and gender-specific locals, ending the tradition of occupational unionism in the industry.[521]

Cobble uses history to argue that occupationally based-craft unionism could be a successful form of representation today.[522] And indeed, several contemporary unions have adopted some of the practices of the new craft unionism described above. For example, the Service Employees International Union (SEIU) initiated a Jobs for Janitors program in 1985 to organize janitors on a geographic basis and to attempt to induce employers to commit to a standard agreement.[523] The union has since developed a referral service for janitors and has successfully organized janitors in twenty cities without trying to control entrance into the occupation.[524]

Howard Wial has drawn on the experience of SEIU's Justice for Janitors campaign, the Hotel and Restaurant Employees city-wide organizing drives and other similar experiences to propose a form of geographic and occupational unionism that would enable low-wage service workers to organize loosely defined occupational groupings within a geographic area.[525] Wial proposes that unions organize low-wage service workers along a common "job mobility path," i.e., a series of jobs between which workers move regularly. In the model, unions would attempt to get employers to agree to an agreement for the mobility path that sets area-wide standard wages and benefits and

521. *See* Cobble, *supra* note 533, at 430.

522. *See id*. at 431–35.

523. *See* Elise Blackwell, *A Commitment to Organization: Justice for Janitors*, BEYOND BORDERS, Spring 1993, at 16.

524. *See* Wial, *supra* note 448, at 702

525. *See id*. at 693–98. Wial's proposal is similar to that proposed by Dorothy Sue Cobble for service workers, discussed *supra* note 533, at 424–26.

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mandates benefit portability.[526] Wial writes, "In occupations like janitorial work, where workers move frequently between a large number of small worksites in a relatively small geographical area, the area-wide uniformity of wages and benefits that results from multiemployer bargaining raises workers' standard of living and removes it from labor market competition."[527] Wial advocates that employees who regularly move between jobs along a mobility path be organized into a single union.[528]

Several unions have also adopted some of the attributes of new craft unionism with regard to training. Stephen Herzenberg, John Alic, and Howard Wial describe the use of union-negotiated training programs in the construction industry, in which employers contribute to funds for apprenticeship programs that are administered by joint union-employer boards.[529] These training programs are designed to enable workers to keep their skills up-to-date. Similarly, in 1993, the unions at twelve hotels in the San Fransisco area set up a joint training fund administered by unions and employers to upgrade their workers' skills.[530] The Philadelphia chapter of the hospital workers' union, District 1199, has a training program designed to give entry level hospital employees the skills necessary to move up to higher occupational levels.[531] In 1992, the Wisconsin Regional Training Partnership was formed of approximately forty unionized manufacturing firms and their unions in the Milwaukee area to provide training for the firms' current workers and workers who were laid

526. *See* Wial, *supra* note 448, at 701.

527. *Id.* at 694 (citation omitted).

528. *See id.* at 696–97.

529. *See* STEPHEN HERZENBERG ET AL., NEW RULES FOR A NEW ECONOMY 131–33 (1998).

530. *See id.* at 134–35.

531. Joan Fitzgerald & Virginia Carlson, *Ladder to a Better Life*, AM. PROSPECT, June 19, 2000, at 54, 56–57.

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off.[532] These union-sponsored training programs have differing goals, from job performance improvement to individual career development. But these examples demonstrate that some unions understand the necessity of training as a matter of employee survival in a world in which neither work nor skills are steady.

Thus, there are emerging examples of new craft unionism that can address some of the problems facing workers in the boundaryless workplace. Members of such occupationally based unions are not guaranteed jobs, but they are able to develop networks with which to find them. Similarly, new craft union members are not guaranteed income, but they work under contracts that contain minimal terms to ensure a living wage. Further, members are not guaranteed protection of their skills from technological change, but the unions provide a mechanism for continual learning.

Overall, then, nonexclusive craft unionism, with embedded contract bargaining and a job-to-job insider contracting employment system, is better suited to the modern workplace than is the industrial union model. However, this form of unionism does not solve all the problems of the boundaryless workplace. While it is inclusive rather than exclusive, the insider contract form of job placement favors insiders and thus reinforces cliques. It thus poses a serious danger that long-time members will use their own contacts and prerogatives to monopolize employment opportunities and exclude newcomers, particularly on racial and gendered lines. Part VI described the dangers of informal discrimination in employer-controlled workplaces; the same danger is posed by worker-controlled job structures. Therefore, a union hiring hall or a union-maintained referral list would be a fairer method of allocating job assignments than the inside contracting method, because a hiring hall or referral list permits external monitoring for fair employment practices.[533]

532. *See* HERZENBERG ET AL., *supra* note 529, at 135–36.

533. *See* Dorthy Sue Cobble, *Organizing the Post Industrial Work Force: Lessons from the History of Waitress Unionism*, 44 INDUS. & LAB. REL. REV. 419, 432–34 (1991).

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Another limitation of the new craft unionism in the new workplace is that it may only be suitable for skilled work. If a job requires no skill or training, an employer has no incentive to turn to the union to fill it. And without a closed shop, it cannot protect low-skilled workers or workers without occupational mobility paths. But if the laws policing discrimination were strengthened and if the laws prohibiting the closed shop were eliminated, it could prove to be an effective vehicle for boundaryless unionism.

2. Citizen Unionism

Another form of unionism that is emerging to address the boundaryless workplace is geographically based rather than workplace or skill-based. Locality-based unions, or citizen unions, operate by enlisting all employees in a locality or region to pressure area employers to provide the labor market protections workers need to survive in the boundaryless workplace. Notwithstanding the growth of the internet and other pervasive indicia of globalization, most people today still look to their local city, town, or county to provide the basic accouterments of daily life such as schools, libraries, hospital, and parks. Also, while Americans change their residences frequently, most of these moves are within the same county or metropolitan area.[534] Thus, most people would benefit from improvements in their locality's social infrastructure and have a strong incentive to work toward that end. Citizen unionism draws on those impulses.

A geographically based citizen union is like a worker-based civic association, which includes as its members working people of all types, from all types of employers, in a given locality. It exerts pressure on employers in an area to ensure area-wide workers the ability to operate in the boundaryless workplace. Citizen unionism has some similarity to the One Big Union movement in Canada that took place in the early years of the twentieth century, in which all workers in a given town or

534. *See* U.S. BUREAU OF THE CENSUS, *supra* note 87, at 63.

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locality organized around the goal of conducting a general strike.[535] In recent years, some contingent worker groups have formed, locality-based organizations, with the goal not of calling a general strike but of creating an effective political and economic pressure group. Citizen unionism is just in its incipiency, however, so this conception of boundaryless unionism can only be described in a sketchy form.

a.

Citizen Unionism: Issues that a Citizen Union Might Address

(1) Benefits

Citizen unions could pressure employers in a given locality to provide portability and uniformity in their pension and health benefit offerings, or they could operate their own plans that provide uniform benefits and portability and that do not impose waiting periods or sanctions for job-hopping. Citizen unions could also monitor employer efforts to redesign benefit plans and negotiate with benefit providers to ensure portability and satisfactory benefit levels.

(2) Training

Citizen unions could pressure employers to pay for training and retraining throughout an employee's lifetime, or they could sponsor their own training programs to help employees learn job-related skills. Unions could also negotiate with area employers to establish local and regional training, retraining, and upskilling centers (TRUCs), paid for by employers, with a board of directors made up of area unions, employers, and members of community groups representing contingent workers and the employed. In this version, the TRUCs would offer free training to all residents of the locality in skills required

535. *See* Wial, *supra* note 448, at 690–91 (discussing the organizational structure of the One Big Union movement in Canada).

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by area employers, regardless of whether they are union members, currently employed, or formerly employed by a contributing employers. The purpose of the TRUCs would be to enable local employees to acquire the necessary skills to participate in the boundaryless workplace.

(3) Child Care

Citizen unions could create employer-financed, cross-workplace child care centers akin to the TRUCs described above. Indeed, they could be part of the same program, a kind of KIDS-TRUCs. These too should be available free to all employees who are residents of the locality in order to enable them to participate in the boundaryless workplace. Such an institution would make it possible for employees to move between jobs and not have to worry about displacing a child from his or her current child care situation. Such centers could also provide care for older children, such as after-school care programs, school vacation and snow day coverage, educational programs, and homework assistance.

(4) Wages

Citizen unions could pressure local employers to adhere to a local wage schedule, or local minimum wages, for broadly defined categories of work. They could pressure for wage subsidies for low-paid work. In addition, they could also monitor employers that pay substandard wages, and report violations of wage and hour laws to the appropriate governmental authorities.

(5) Legal Assistance to Individual Employees

Citizen unions could provide legal assistance to individuals who are bringing lawsuits to enforce laws regarding minimum wages, occupational safety and health, pension security, antidiscrimination, and other worker protection measures. In addition, such unions could represent employees in the nonunion dispute resolution procedures that

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have proliferated in the wake of the Supreme Court's decision in Gilmer v. Interstate/Johnson Lane Corp.,[536] which upheld the use of predispute arbitration systems to resolve employees' discrimination complaints. As Part VI discusses, nonunion employers have moved with great dispatch to establish nonunion arbitration systems and compel employees to arbitrate their statutory claims.[537] Unions could provide a valuable service by assisting workers in these employer-crafted tribunals. Unions have considerable expertise in the area of arbitration, and they could use it to assist nonunion workers and, at the same time, ensure that legislative gains in employment standards are enforced. Union business agents could press for fair procedures, help workers select arbitrators, and supply representation in the proceedings. By doing so, unions would establish a reputation as defenders of all workers, and would gain valuable insights into working conditions in nonunion settings.

(6) Corporate Citizenship

Citizen unions could act at the local and regional level to pressure corporations to become good corporate citizens. Citizen unionism is animated by the idea that because employers in a boundaryless workplace draw on the collective skills, knowledge, experience and expertise of the local workforce, they should contribute to the welfare of that workforce generally. Employers should be pressured to contribute to the local school systems, libraries, museums, cultural programs, sporting events, and hospitals. They should also fund enrichment programs for children. Corporate contributions of this

536. 500 U.S. 20 (1991).

537. *See, e.g.*, Katherine Van Wezel Stone, *supra* note 93, at 27 (discussing the rapid growth of nonunion arbitration systems); *see also* Grodin, *supra* note 405, at 4–5 & n.6 (reporting on studies **[AUTH complete]**). Often individual workers are told they must consent to the employer's arbitration system or lose their job. Often they are given little information about the system and its implications, and have no opportunity to participate in its design nor in the selection of arbitrators. Even in those cases where employees are permitted to participate in arbitrator selection, individual employees have no basis on which to make such a judgment. *See* Stone, *supra* note 391, at 1040.

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sort would benefit all working people in the communities in which they operate. Citizen unions could use their clout to induce employers to become corporate citizens at the local and regional level.

The foregoing proposals embody a vision for a type of unionism that is neither industrial nor craft-based, but rather geographically based. They envision a form of unionism that speaks to workers in their roles as citizens as well as in their roles as workers.[538] By reconceptualizing workers as citizens of a locale who have a shared interest in the health, education, well-being, and employabilty of the entire local population, narrow labor issues are transformed into issues of general concern. Citizen unionism makes it possible for workers to bring their collective strength to bear on issues that are of concern to them in their role as citizens as well as in their role as workers.

b.

Citizen Unionism and Bargaining Power

To be plausible, citizen unionism has to address the issue of power. What kinds of power would a citizen union have to compel local corporations to comply with its demands? What economic weapons does it have to exert pressure on employers? Why would corporations submit to these kinds of social citizenship demands when they can always move away?

The bargaining power of a citizen union arises from several sources. First, the union can exert public pressure on local corporations through publicity campaigns, informational picketing, and shaming in the local press. It can publicize bad working conditions and breaches of implicit promises to provide training, child care, or other basic benefits. Unions could publish annual lists of good corporate citizens and of bad corporate citizens, urging people to

538

. Raymond Miles has a similar conception of geographically based unionism, and many of his proposals parallel mine. *See* Raymond E. Miles, *Adapting to Technology and Competition: A New Industrial Relations System for the 21st Century*, CAL. MGMT. REV., Winter 1989, at 23–25. However, his geographically based unionism is limited to addressing workplace issues, rather than branching out to larger issues of concern to working families in their communities.

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patronize the former and shun the latter. They could publish each company's on-going donations to important civic causes like the local schools. Local plant managers who live in a community are surprisingly vulnerable to pressures of these types from their neighbors, colleagues, and fellow country club members.

Second, citizen unions can organize boycotts of products or services produced by bad corporate citizens. The union-sponsored product boycott was a powerful economic weapon for labor during the nineteenth century era, and it could be revived as a powerful tool.[539] Corporations that produce products directly for consumers are sensitive to changes in demand. Those that do not produce consumer products often operate in networks with corporations that do produce for direct consumption, or have buyers and suppliers that do so. Exerting economic pressure on a buyer or supplier in order to affect the labor conditions or corporate behavior of a target corporation would run afoul of the current secondary boycott laws, but part of the legislative program of citizen unionism would be to change the secondary boycott laws to permit such tactics.[540]

Citizen unions would use such public pressures and boycott tactics to induce corporations to sign codes of conduct in which the corporation pledges to provide certain specified terms to its employees, such as training, child care, and portable benefits. It would be possible to draft these codes so as to make them enforceable by the community union in a federal or state court.[541]

539. On the role of the boycott for nineteenth century unionism, see MONTGOMERY, *supra* note 508, at 147–48.

540. *See infra.*

541. If codes of conduct are treated as collective agreements between a labor organization and an employer, a union or an individual could enforce them in a federal court. *See* Groves v. Ring Screw Works, 498 U.S. 168, 175 (1990); Smith v. Evening News Ass'n, 371 U.S. 195, 197 n.4 (1962). However, if the codes were held to be contracts between individuals and a firm, they would be enforceable under state contract law. *See* Caterpillar Inc. v. Williams, 482 U.S. 386, 396–97 (1987). *See generally* Alan Hyde et al., *After Smyrna: Rights and Powers of Unions that Represent Less than a Majority*, 45 RUTGERS L. REV. 637, 648–49 n.38 (1993).

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In addition to applying direct pressure on area employers, a citizen union could be a potent force in the political process. On the local level, it could run candidates and push for legislation to provide some of the measures mentioned above, including portability of benefits, a local minimum wage, publicly funded wage supplements, publicly funded child care, and training programs. A federation of citizen unions could play a similar role in state and national politics.

On the national level, a federation of citizen unions could serve as a potent force to lobby for measures that promote equality and justice in the workplace and in society more generally. It could press for antidiscrimination legislation, occupational safety and health protection, minimum wage increases, universal health insurance, and other worker protection measures. In addition, because a citizen union defines its members both as workers and as citizens of a locality, a state, and a nation, it can go beyond traditional labor issues and address issues of concern to working people more generally. In particular, it can promote a more egalitarian income distribution.

Income distribution is becoming an increasingly important concern as the boundaryless workplace produces wide disparities in income, between and within categories of workers, and between as well as within firms.[542] New compensation practices are generating more inequality within firms.[543] Furthermore, high involvement work practices have been found to be particularly prevalent in firms that are exposed to foreign trade.[544] For example, Princeton economist Marianne Bertrand finds that companies that face competitive

542. FRANK LEVY, THE NEW DOLLARS AND DREAMS: AMERICAN INCOMES AND ECONOMIC CHANGE 2 (1998) (summarizing data on rising income inequality in the 1980s and 1990s); s*ee also* ROBERT FRANK, THE WINNER-TAKE-ALL-SOCIETY 211–31 (1995) (discussing the increasing gap in income between top and bottom in U.S. labor market).

543. *See, e.g.*, David Lebow et al., *Recent Trends in Compensation Practices*, Board of Governors of the Federal Reserve System, July 15, 1999, at 8 (reporting on Federal Reserve study that found firms are increasingly using compensation systems that permit greater differentiation among employees).

544. *See* Mason, *supra* note 180, at 211–12.

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pressures from the global marketplace have adopted more flexible wage policies.[545] These findings suggest that as global competition increases, more firms will adopt new work practices and institute more wage dispersion.

To preserve some reasonable level of equality and social cohesion, redistributive measures need to be placed on the national political agenda. While public animosity toward welfare has made politicians wary of explicit talk of redistribution toward the poor, there are several proposals to this effect currently circulating. For example, Barry Bluestone and Teresa Ghilarducci demonstrated that an increase in the earned income tax credit combined with an increase in the minimum wage would have significant poverty-reducing effects.[546] Edmund Phelps has advocated publically funded wage subsidies for low-income workers to reflect the external productivity of the employee and her contribution to society.[547] And Bruce Ackerman and Anne Alstott have proposed to give every child in America a "stake" of $80,000 upon reaching maturity. Their citizenship stakeholder proposal, they claim, would help to equalize opportunity, and would partially overcome those aspects of inequality that stem from intergenerational privilege.[548]

These proposals have considerable merit, but at present, there is no organized group that can effectively press for them. A citizen

545 . *See* Marianne Bertrand, *Changes in the American Workplace*, *in* PROCEEDINGS, 52ND ANN. N.Y.U. CONFERENCE ON LABOR AND EMPLOYMENT LAW (1999).

546 . BARRY BLUESTONE & THERESEA GHILARDUCCI, MAKING WORK PAY: WAGE INSURANCE FOR THE WORKING POOR 25–27 (1996).

547 . *See* EDMUND S. PHELPS, REWARDING WORK 106–09 (1997). *But see* Anne L. Alstott, *Work vs. Freedom*, 108 YALE L.J. 967, 1056–58 (1999) (criticizing wage subsidies and advocating **[AUTH edits unclear, please fix]**)

548 . *See* BRUCE ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY 24–34 (1999). Bruce Ackerman & Anne Alstott also advocate that Social Security be transformed into a citizen pension that is not be linked to employment status. This way, they argue, the issue of old age financial security would express our society's "commitment to the ideal of a dignified old age," not to a particular role in the labor market. *Id.* at 140–54.

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union that included working people at all points in their work lives, regardless of whether they were attached to a particular workplace or employment relationship, would be a powerful force in lobbying for such measures. Indeed, a citizen union might prove to be the only interest group available to promote such redistributive programs.

None of the activities of citizen unionism described above depend upon NLRB certification of a majority representative. Rather, they envision a union that functions as a hybrid of a local-improvement civic association and a citizens' lobbying group, emphasizing issues emanating from the workplace. Citizen unionism as thus portrayed could supplement and support plant level collective bargaining by individual unions in settings in which they exist.

c.

Citizen Unions and Local Agglomeration Economies

One possible objection to these proposals is that the more unions exert pressure on corporations at the local and regional level, the more temptation there will be for corporations to relocate to avoid union demands. This is the well-known danger of the race to the bottom, and it reflects the fact that capital is generally more mobile than labor. It is often posited that absent some reason for remaining in a particular locale, corporations will tend to move to locations that have the lowest labor costs.[549]

While there is considerable evidence that corporations often race to the bottom, or at least away from the top, there are circumstances in which corporations do not move to the lowest labor cost location. Sometimes corporations want to take advantage of a specifically trained labor force, or be near particular markets or raw materials.[550]

549. *See* Katherine Van Wezel Stone, *Labor and the Global Economy*, 16 MICH. J. INT'L L. 987, 992–94 (1995) (citing race-to-the-bottom studies); Katherine Van Wezel Stone, *To the Yukon and Beyond: Local Laborers in a Global Labor Market*, 3 J. SMALL & EMERGING BUS. L. 93, 96–98 (1999) [hereinafter Stone, *Yukon Trail*].

550. *See* Stone, *Yukon Trail*, *supra* note 549, at 97–98.

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Furthermore, in today's world, corporations often want to be near others that produce in their field so as to take advantage of agglomeration economies.

In the 1980s, economists began to study the effect of agglomeration on economic growth. They found that firms producing certain types of goods and services were likely to locate near others of their type, such as the diamond district on 47th street in New York City or the clusters of used car lots found in most small cities.[551] This lead economists to hypothesize that when certain types of firms were located in proximity to one another, they all received value from agglomeration that was independent of any single firm's contribution. Since then, a great deal of empirical work has confirmed the existence of localized agglomeration economies that play a powerful role in the locational choices of firms.[552] One well-known study is Anna Lee Saxenian's description of the dramatic effects of agglomeration in the Silicon Valley computer industry.[553] Other examples of successful localized agglomeration economies are the clusters of biotechnology firms around Princeton, New Jersey, of banking and financial firms in New York City, and of computer hardware manufacturing firms around Austin, Texas. Regional economists attribute much of the positive effects of agglomeration economies to the skills and knowledge that is concentrated in, and shared among, the locality's work force.[554]

551. *See generally* John M. Quigley, *Urban Diversity and Economic Growth*, J. ECON. PERSP., Spring 1998, at 132 (describing studies).

552. *See, e.g.*, Matthew P. Drennan, *National Structural Change and Metropolitan Specialization in the United States*, 78 REGIONAL SCI. 297, 314–15 (1999) (describing an empirical study finding agglomeration economy in information-intensive industries in urban areas). *See generally* Edward L. Glaeser, *Are Cities Dying?*, J. ECON. PERSP., Spring 1998, at 148–50 (citing studies).

553. *See* ANNA LEE SAXENIAN, REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 150 (1994).

554. *See generally* JOHN MCDONALD, FUNDAMENTALS OF URBAN ECONOMICS (1998).

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When locational choices of firms are influenced by the prospects of valuable agglomeration effects, those firms will be less likely to move overseas, or across the country, to escape rising labor costs. Indeed, many of the measures for which citizen unions might mobilize are measures that could enhance the value of the region's human capital, and thus increase the value of agglomeration. For example, corporate contributions to adult education and training programs can help make a locality's workforce more flexible and skilled, thereby providing a benefit to all area employers. Yet, no individual employer has an incentive to establish such programs unilaterally because it would have no means of capturing all the benefits for itself, or preventing their capture by a competitor. However, if a union induces all area-wide firms to contribute jointly, then all local firms share in the benefit. Similarly, if enough corporations contribute to a local school system to raise the level of educational attainment, that would help attract a highly skilled workforce to the benefit of all local firms. In this way, the prospects of agglomeration economies combined with increased reliance by corporations on human capital could provide the glue to keep corporations in place and prevent them from bolting each time a citizen union demands that local firms adopt good corporate citizenship behavior.

d.

Examples of Citizen Unionism

Citizen unionism, as proposed herein, has some partial embodiments in the real world. For example, centers for contingent workers are appearing in many metropolitan centers to assist temporary workers with work-related problems. These centers address problems of contingent workers of all occupational types on an area-wide basis. The Boston Center for Contingent Work (CCW) uses media and other mechanisms to pressure companies that hire contingent workers to adopt codes of conduct that specify minimum rights and benefits. CCW is also active in lobbying the Massachusetts state legislature to enact a Workplace Equity Bill that would end discrimination in wages

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and benefits for contingent workers. To date, the bill has garnered significant support. CCW also works with local area labor unions to encourage them to provide for wage and benefit parity for contingent workers in their collective bargaining agreements.[555]

Recently CCW has joined with contingent worker organizations from more than twenty-five cities to form the National Alliance for Fair Employment (NAFFE). NAFFE is lobbying to get temporary workers the same rights under the labor and employment laws as permanent employees. NAFFE has also proposed a Temporary Industry Code of Conduct (Code), which would require temporary employment agencies to provide temporary workers with written job descriptions, adequate safety equipment, on-site orientation, training, sick pay, holiday pay, health insurance rates, and transportation to work sites that are not publically accessible.[556] The Code further specifies that temporary workers may join unions at client employers if it is in accordance with the existing collective agreement.[557] It also provides that "[t]he agency will pay welfare-to-work participants a living wage consistent with local standards and benefits."[558]

Another example of geographic multioccupational unionism is the Workplace Project in Long Island. Begun in 1992, the Workplace Project attempts to organize Latino immigrant workers on Long Island into membership organizations.[559] It seeks to bring people together at a grassroots level who work in multiple occupations to address their

555 . *See* Interviews with Tim Costello & Gail Nicholson, Director & Associate Director of Center for Contingent Work (CCW) in Boston, Mass. (May 2000).

556 . *See* National Alliance for Fair Employment, Contingent Workers Fight for Fairness 29–33 (May 2000) (unpublished manuscript on file with author), *available at* www.fairjobs.org (last visited Jan. 24, 2001).

557 . *See id.* at 32.

558 . *Id.* at 33.

559 . Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 428–29 (1995).

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common economic, social, and political problems. The Workplace Project, like CCW, organizes across industry and occupational lines and exerts pressure within a single locality or region. Its long-term plan is to develop workplace committees in each of the industries in which its members work, such as restaurants, landscaping services, and house-cleaning, to press for improvements in minimum wages and health standards.[560] The Workplace Project has also been active in lobbying for state laws that affect immigrant workers. In 1997, together with other workers' rights groups, it secured the passage of the Unpaid Workers Prohibition Act, the strongest wage enforcement law in the country.[561]

There are also several examples of cross-workplace organizations that involve workers with different types of skills within the same general industry. For example, the Washington Alliance for Technology Workers (WashTech) involves technical workers of all types in the Seattle area. It is a community-based membership organization that addresses the labor-related issues of high-tech firms by utilizing publicity and lobbying.[562] WashTech's goals address many of the issues raised by the new psychological contract—benefit portability, training, assistance with networking, concerns about noncompete covenants, and the problems of temporary work.[563]

560 . *See id.* at 449.

561 . Unpaid Wages Prohibition Act of 1997; s*ee* Jennifer Gordon, *The Campaign for the Unpaid Wages Prohibition Act: Latino Immigrants Change New York Wage Law* (Carnegie Endowment, Working Paper No. __, 1999).

562 . For information about WashTech, see *WashTech: A Voice of the Digital Workforce*, *at* http://www.washtech.org. (last visited Oct. 6, 2000). The WashTech Mission Statement states: "WashTech is an organization of high-tech workers and allies joining together to provide an effective voice in the legislative and corporate arenas, and to advocate for improved benefits and workplace rights." *Wash Tech Strategic Goals and Objectives at* http://washtech.org/mission_goals.php3 (last visited Dec. 3, 2000).

563 . *See id.* The WashTech goals state:

> What Are Our Goals?
> Establish a statewide voice for high-tech workers and ensure that we are at the table in any policy decisions that directly affect us.

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WashTech is notable because it is affiliated with a union, the Communications Workers of America (CWA).

There are other cross-workplace groups that are developing new models of unions that similarly blur the line between workplace and locality. All of these efforts contain elements of the conception of citizen unionism described above, and are thus the beginning of an effort to create models of boundaryless unionism.

Citizen unionism is compatible with traditional workplace-based local unions. A citizen union could have area local unions as affiliates, and work with them on job-related issues that cut across workplaces. The AFL-CIO's Union-Community program is a start on this model.

Citizen unionism is also consistent with employer-specific employee caucuses. Such caucuses are emerging with increased frequency, usually around a single issue or comprised of a specific racial or ethnic group.[564] For example, IBM workers recently organized a network when the company converted its pension plan to a cash balance plan in such a way that threatened to defeat many long-term workers' expectations of continually increasing pension benefits. The IBM workers held meetings and utilized email, media, stockholder resolutions, and exerted pressure on the Securities and Exchange Commission and Congress. They were successful in challenging the company policy.[565] The IBM workers' network was

> Work to make sick pay, holiday pay, and decent medical coverage basic workplace rights that should be expected by anybody working full-time in this industry, whether they be "temps," contractors, or regular employees.
> Educate workers about their legal rights to organize, negotiate contracts, and share employment information.
> Combat the unbalanced nature of the agency/employee relationship by challenging "at-will" contracts, restrictions on agency choice, and non-compete clauses in contracts.
> Help WashTech members improve their skills and keep pace with the high-tech marketplace by providing low-cost training and classes.
> Assist WashTech members in professional networking, sharing career advice, and negotiating fair contracts.

Id.

564 . *See* Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149, 159, 601 (1993).

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comprised of computer specialists, engineers, and technicians—workers who have until now eschewed conventional unionism. The network they formed around the pension issue has affiliated with the CWA. Other single-issue employee caucuses have become a common form of employee protest. Local unions or employee caucuses would benefit from having a local citizen union to give publicity and support to their campaigns, boycotts, and strikes.

D. Reforms in the Labor Law to Facilitate Boundaryless Unionism

New forms of unions will require, and create, new types of labor laws. We have already seen some of the ways in which the National Labor Relations Act embodies the old psychological contract's assumption of long-term stable employment. The centrality of the bargaining unit in the labor law creates and reinforces hard boundaries between individual establishments or departments and the rest of the world. Other aspects of the labor law such as the secondary boycott prohibition and the industrial pluralist treatment of arbitration similarly reinforce separatism and discourage boundaryless organizational forms. As the workplace changes and new union practices emerge, there will have to be changes in the labor law to accommodate new forms of employee representation.

To reform the labor law in a way that would facilitate the formation of boundaryless unions would require abandoning those features of the law that treat the unionized workplace as an isolated and separate sphere. For example, to enable new craft unionism to expand, it would be important for the NLRB to abandon the presumption in favor of single-establishments and other impediments to multiemployer bargaining. It would also have to abandon the notion that it can identify a "community of interest" in a bargaining unit, and instead permit bargaining units to be determined according to

. *See* http://memberes.nbcim.com/btvpension/StockResolution.htm **[AUTH provide correct address]** (Oct. 16, 2000) for information and documents pertaining to the IBM pension conversion battle.

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the wishes of the employees involved. This would require a change in the statute.[566]

Inclusive craft unionism will also require a change in the secondary boycott laws to permit unions to bargain for terms and conditions that affect workers at establishments within a production network, including an employer's subsidiaries or its joint venture partners. Instead of banning closed shops, the law should permit unions that maintain nondiscriminatory hiring halls or other nondiscriminatory job referral systems to bargain for closed shops. Also, if unions are to develop an insider contracting system, it would be necessary to amend the definition of supervisor in section 2(11) of the NLRA so that lead workers can be union members when they play an inside contractor role.

Further reforms that would assist in the formation of new craft unions are the modification of the independent contractor exclusion in section 2(3) by the adoption of an "economic realities" test for determining who is an employee.[567] This change would enable unions to organize workers who have employment relationships with multiple employers.

The other changes in the labor law would be necessary to facilitate the formation of citizen unions and to enable them to bargain with employers in a locality for area standards in compensation, benefits, health and safety, training, and child care. Some of the legal reforms that would facilitate area-wide bargaining for area standards and portable benefits are:

(1) to require multiemployer bargaining when a union requests it; (2) permit unions to engage in coordinated bargaining about the scope of the bargaining unit; (3) adopt European-style extension laws that

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. To determine bargaining units by the wishes of employees would require a change in the statute, see 29 U.S.C. §___.

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. *See* 29 U.S.C. § 152(3); NLRB v. Hearst Publ'ns., Inc., 322 U.S. 111 (1944) (adopting an "economic facts" test to determine whether an individual is an employee or independent contractor for purposes of NLRA). *Hearst* was repudiated by Congress in the 1947 Taft Hartley Amendment to § 23 of the NLRA.

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extend negotiated standards to all firms of the same type in the same locale; (4) amend ERISA to require employer-funded pension and health benefit plans to offer portability and otherwise facilitate movement between employing units; (5) overturn the Beck decision that restricts union contributions to political and lobbying campaigns; (6) change the definition of concerted, protected activity so that workers are protected in their efforts to act collectively to affect legislation and politics; and (7) repeal section 8(b)(4) of the NLRA and permit unions to engage in peaceful secondary activity.

Some of the foregoing suggestions have been proposed by others concerned with the growing representation gap and the lack of representation rights of atypical employees.[568] Some are minor revisions in existing rules, some challenge fundamental aspects of the conceptual scheme. None of the proposals will magically produce boundaryless unionism; rather, they are aimed at removing the legal obstacles to this goal. While attempts at labor law reform have not succeeded in the recent past, it is useful to articulate proposals for reform so that legal change can be envisioned. To actually produce a form of representation appropriate to the new workplace will require both a bold vision with broad reach and, at the same time, many small-scale experiments by many local unions, national unions, and other types of workers' groups.

Conclusion

In conclusion, there has been a fundamental change in the employment relationship, one that will have profound significance for employees and for society more generally. Long-term employment with a single employer and advancement up a single job ladder is no longer the predominant career trajectory. Rather, employees now operate in a boundaryless workplace, moving frequently across departmental lines and between firms. As a result, there has

568. *See, e.g.*, HERZENBERG ET AL., *supra* note 529, at 155, 161–66 (proposing wage parity for part-time workers and proposing legal changes that would favor multiemployer bargaining).

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developed a new psychological contract between employees and firms in which employees are expected to take individual responsibility for their career development, rather than provide long-term attachment and loyalty to a single employing unit for the duration of their work lives. In return, firms implicitly promise to provide employees with training, general skill development, networking opportunities, and individual market-based compensation.

This article began with a detailed description of the emerging employment system and then analyzed the impact of the changing employment relationship on three areas of labor and employment law – the ownership of human capital, employment discrimination, and employee representation. In each area, it was argued that the new employment relationship makes it necessary to reconsider our legal rules and regulatory frameworks. Specific reforms have been proposed, together with conceptions for new regulatory approaches. These proposals are designed to reframe the legal issues and reinvigorate public debates about how to ensure justice and equity in the new workplace.

In addition, this article has argued that the new workplace does not make labor unions obsolete. Rather, in the boundaryless world, unions are more necessary than ever. They alone have the potential to enable workers to participate meaningfully in the boundaryless workplace and to ensure that the new workplace offers fairness, equity and dignity. But unionism has to change. Because the boundaryless quality of the workplace, unionism cannot be grounded solely in a specific employing relationship. Rather, as the boundary between workplaces softens, the boundary between work lives and nonwork lives will also become blurred. Workers' identities will meld into their identities as citizens. Today's boundaryless workplaces can give rise to boundaryless labor organizations – organizations that welcome the unorganized as well as the organized, the permanent as well as the contingent, the full-time as well as the part-time, 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 necessary for labor organizations to address not only issues of worker rights but also social rights more broadly.

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It is my hope that the preceding analysis and proposals will make it possible to imagine a legal framework that can promote justice, equality, dignity and fairness in the emerging workplace. Once such a framework exists in the imagination, it becomes possible to construct it in the real world.

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