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by

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Rethinking Labor Law: Employment Protection for Boundaryless Workers[1]

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The American workplace has changed dramatically in recent years, forcing us to rethink the framework of the labor and employment laws that were established during the New Deal period. For much of the 20th century, the prevailing employment paradigm was that employees had a long-term relationship to a firm and enjoyed a large amount of de facto long-term job security. Their firm provided job security, training, social insurance, and orderly advancement opportunities and obtained a loyal and knowledgeable work force in return. The longer employees stayed on the job, the more their wages rose and their benefits vested, giving them a greater stake in the firms over time. While not all employees had the secure and comfortable work life that the model envisioned, many did, particularly blue collar men in basic industry after the great union drives of the 1930s. The labor laws of that era were based upon the long-term attachment model of employment.

The 20th century ideal of work has come and gone. Job security in the private sector, in the form of long-term attachment between a worker and a single firm for the duration of the worker's career, is a vestige of the past. New ideas about how to organize work have generated new work practices that are proliferating throughout American enterprises. Today workers expect to change jobs frequently and employers engage in regular churning of their workplace, combining layoffs with new hiring as production demands and skill requirements shift. There has been an explosion in the use of atypical workers such as temporary workers, on-call workers,

[1] Presented at the Workshop on the Scope of Labor Law: Re-Drawing the Boundaries of Protection, Bellagio Study and Conference Center, Italy, May, 2005. Portions of this article are derived from the author's book, Katherine V.W. Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge Univ. Press, 2004).

leased workers, and independent contractors. Furthermore, "regular" full-time employment no longer carries the presumption of a long-term attachment between an employee and a single firm with orderly promotion patterns and upwardly rising wage patterns. No longer is employment centered on a single, primary employer. Instead, employees now expect to change jobs frequently. At the same time, firms now expect a regular amount of churning in their workforces. They encourage employees to manage their own careers and not to expect long-term career-long job security. Indeed, the very concept of the workplace as a *place,* and the concept of employment as involving an *employer,* are becoming out-dated.[2]

The transformation of work requires a transformation in labor law. Historically, labor laws have been enacted to address the social problems created by production arrangements of the current era. Each era has unique forms of work arrangements that generate its own forms of worker vulnerability. For example, workers compensation laws were passed by state legislatures in response to public concern about mounting workplace injuries in the early 20th century. The National Labor Relations Act and the Fair Labor Standards Act were enacted in the 1930s in the midst of the Great Depression, when unprecedented numbers of workers lost their jobs, their homes and their livelihoods. In the 20th century industrial era, employers did not always live up to their promises of long-term jobs with rising wages and secure retirements, but the labor and employment laws were designed to protect employees against the vulnerabilities and possibilities of exploitation present in the then-prevailing work relationship. The employment laws provided a floor of minimum wages and maximum hours, old age and disability insurance, minimal safety and health standards, and the right to organize into unions to bargain collectively for higher standards on a firm by firm basis.

[2] For a detailed description of the changing workplace, see Katherine V.W Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge Univ. Press, 2004).

As a result of the transformation of work, the current regulatory regime is seriously out of alignment with the reality of today's workplace. In the United States, the labor and employment laws give "regular" workers – those with long term, steady jobs with steady employers – a right to unionize and bargain collectively, social insurance against unemployment and workplace injuries, a minimum wage guarantee, and health and safety protection. Atypical workers – those lacking a long-term relationship with a particular employer – are usually not eligible for those employment rights. But today we are witnessing an inversion of the Lake Wobegon syndrome in the labor market. Lake Wobegon is the imaginary town in Minnesota where all of the children are above average. In the labor market today, all of the workers are becoming atypical.[3] Soon the atypical workers will be typical and the only really atypical ones will be those we today consider "typical."

The labor law regime we have inherited was compatible with and tailored to the job structures of the industrial era, and does not fit the reality of the workplace today. In light of the transformation of work, it is necessary to rethink the nature of employment regulation at a fundamental level. This article describes the changes in the nature of work, explains how the labor laws in the United States have been built upon a long-term attachment template, and suggests ways in which labor law protection should be expanded to include new types of workers.

I. The Changing Nature of Employment

During the twentieth century, most large firms organized work in ways that have come to be called "internal labor markets." In internal labor markets, jobs are broken down into minute tasks and then are arranged into hierarchical ladders in which each job provides the training for

[3] For references on the Lake Wobegon Syndrome in cognitive psychology, see <http://en.wikipedia.org/wiki/Lake_Wobegon_effect>

the job on the next rung up. Employers who utilized internal labor markets hired only at the entry level, then utilized internal promotion to fill all of the higher rungs.[4] These practices were based upon the teachings of the scientific management theories of Frederick Winslow Taylor and those in the personnel management movement. Thus in the early and mid 20th century, management reduced the skill level of jobs, while at the same time encouraging employee-firm attachment through promotion and retention policies, explicit or de facto seniority arrangements, elaborate welfare schemes and longevity-linked benefit packages. Because employers wanted employees to stay a long time, they gave them implicit promises of long-term employment and of orderly and predictable patterns of promotion.[5] While these systems had their origins in the blue-collar workplace of the smokestack industrial heartland, by the 1960s they were adapted to large white collar workplaces such as insurance companies and banks.

Sometime in the 1970s, employment practices began to change. Since then, there have been widespread reports that large corporations explicitly reject the notion that their employees should expect long term, no less lifetime, employment. Hence the attachment between employees and their firms has been weakened. At the same time, firms have increasingly turned to temporary, provisional, and contingent employees rather than utilize a "regular" workforce.[6] This casualization of work has reportedly become a fact of life both for blue collar and for high-end professionals and managers. This was expressed eloquently by Jack Welch, the notorious

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[4] For a discussion of the operation of internal labor markets, see Peter Doeringer and Michael Piore, *Internal Labor Markets and Manpower Analysis* (1971). On the origin of internal labor markets, see Katherine Stone, 'The Origin of Job Structures in the Steel Industry' in R. Edwards, D. Gordon, and M. Reich, *Labor Market Segmentation* (1975). See also, Paul Osterman, 'Introduction' in P. Osterman, *Internal Labor Markets* (1984); Sanford Jacoby, 'The Development of Internal Labor Markets in American Manufacturing Firms' in P. Osterman, *Internal Labor Markets* (1984) 23, 38-39.

[5] Sanford M. Jacoby, *Employing Bureaucracy: Managers, Unions and the Transformation of Work in American Industry, 1900-1945* (1985).

[6] *See* Francoise J. Carré, 'Temporary Employment in the Eighties' in *New Policies for the Part-Time and Contingent Workforce* (Virginia L. duRivage ed., 1992) 48 (on growth of temporary employment); Peter F. Drucker, *Managing in a Time of Great Change* (1995) 66–67 (describing change in the composition of temporary workers); Chris Tilly,

former CEO of General Electric Company, in an interview with the Harvard Business Review in 1989 when he said:

> "Like many other large companies in the United States, Europe, and Japan, GE has had an implicit psychological contract [with its employees] based on perceived lifetime employment. People were rarely dismissed except for cause or severe business downturns. . . . This produced a paternal, feudal, fuzzy kind of loyalty. You put in your time, worked hard, and the company took care of you for life. . . 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."[7]

Labor economists have documented the trend away from long-term firm-worker attachment and toward short-term employment relationships. The Department of Labor's Current Population Survey (CPS), found dramatic declines in job tenure between 1983 and 2002 for all men over the age of 20, with the most significant declines amongst men in the age groups over age 45.[8] This is precisely the group who were the beneficiaries of the old psychological contract for long-term employment. In addition to the job tenure data, the CPS found a significant decline in the number of men who had been with their current employer for ten years or more. Similar large declines occurred for men in every age group over forty-five.[9] 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

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'Short Hours, Short Shrift: The Causes and Consequences of Part-Time Employment' in *New Policies for the Part-Time and Contingent Workforce* at 15, 17 fig.1.

[7] Noel Tichy and Ram Charan, 'Speed Simplicity, Self-Confidence: An Interview with Jack Welch' (September-October 1989) *Harvard Business Review* 1, 9.

[8] BLS News Releases, 'Employee Tenure in 2002' (Sept. 25, 2002) <http//146.142.4.23/pub/news.release/tenure.txt>

[9] For men between 55 and 65, the average time with a given employer declined from 15.3 to 10.2 years over the twenty year period; for men between 45 and 54, it declined from 12.8 to 9.1; for men between 35 and 44, it declined from 7.3 to 5.1. Id. Several economists who have analyzed this and other data sources have concluded that since 1980 there has been a significant decline in job tenure. See, David Jaeger and Anne Huff Stevens, 'Is Job Security in the United States Falling?' (1999) 17 *Journal of Labor Economics* S1; Robert G. Valletta, 'Declining Job Security' (1999) 17 *Journal of Labor Economics* S170 (citing numerous studies).

system, the overall percentages of women working for ten years or more is significantly lower than men at every stage.[10]

Sociologists have also noted the change in job patterns for workers today. For example, Richard Sennett, interviewed a number of younger employees about their experiences in the labor market, and reports:

> "The most tangible sign of that change might be the motto "No long term." In work, the traditional career progressing step by step through the corridors of one or two institutions is withering . . . Today, a young American with at least two years of college can expect to change jobs at least eleven times in the course of working, and change his or her skill base at least three times during those forty years of labor."[11]

In the late twentieth century, employers began to dismantle their internal labor market job structures. Facing rapidly expanding and increasingly competitive global product markets, they began to create new types of employment relationships that provided them the flexibility to make quick adjustments in production methods, product design, marketing strategies, and product mixes. To respond to intense global competition, firms needed the ability to decrease or redeploy their work force quickly as market opportunities shifted. Hence management theorists and industrial relations specialists developed what they call the "new psychological contract,"[12] or the "new deal at work."[13] In the new deal, the long-standing assumption of long-term attachment between an employee and a single firm has broken down. It has been replaced by other implicit and explicit understandings of the mutual obligations of employees and the firms that employ them.

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[10] *See* Francine D. Blau et al., *The Economics of Women, Men and Work* (3d ed. 1998) 113–15.
[11] Richard Sennett, *The Corrosion of Character* at 22.
[12] See e.g., Sandra L. Robinson & Denise M. Rousseau, 'Violating the Psychological Contract: Not the Exception But the Norm' (1994) 15 *Journal Organizational Behavior* 245, 246; Neil Anderson & René Schalk, 'The Psychological Contract in Retrospect and Prospect' (1998) 19 *Journal Organizational Behavior* 637, 637; Marcie A. Cavanaugh & Raymond A. Noe, 'Antecedents and Consequences of Relational Components of the New Psychological Contract' (1999) 20 *Journal Organizational Behavior* 323, 323.
[13] Peter Cappelli, *The New Deal at Work: Managing the Market-Driven Work Force* (1999) 217.

While the new employment relationship does not depend upon long-term employment, attachment, or mutual loyalty between the employee and the firm, it also does not dispense with the need for motivated and committed employees. Indeed, firms today believe that they need not merely predictable and excellent role performance, they need what has been described as "spontaneous and innovative activity that goes beyond role requirements." They want employees to commit their imagination, energies, and intelligence on behalf of their firm. They want employees to innovate, to pitch in, to have an entrepreneurial attitude toward their jobs. Thus current best management practices dictate that they give employees discretion, but they want to ensure that the discretion is exercised on behalf of the firm. Thus they want to elicit behavior that goes beyond specific roles and job demands, and gives the firm something extra. Organizational theorists characterize this something extra as organizational citizenship behavior, or "OCB."[14]

Much of current human resource policy is designed to resolve the following paradox: Firms need to motivate employees to provide the OCB and the commitment to quality, productivity, and efficiency while at the same time they are dismantling the job security and job ladders that have given employees a stake in the well-being of their firms for the past 100 years. Hence managers have been devising new organizational structures that embody flexibility while also promoting skill development and fostering organizational citizenship behavior.

A new employment relationship is emerging through such theoretical and experimental programs as total quality management (TQM), competency-based organizations, and high performance work practice programs. The advocates of the competency-based organization emphasize skill development by insisting that employees be paid for the skills they have, rather

[14] *See* Dennis W. Organ, *Organizational Citizenship Behavior: The Good Soldier Syndrome* (1988) 4-5.

than according to lock-step job evaluation formulas.[15] Skill-based pay, they claim, will give employees an incentive to acquire new skills and also make it incumbent upon employers to provide training and career development opportunities.[16] Advocates of TQM, meanwhile, counsel firms to involve every employee, at every level, in continuous product and service improvement. Some of the specific recommendations of TQM are to provide continuous training and opportunities for individual improvement, and to give workers direct contact with customers, external suppliers, and others who do business with the firm.[17]

Despite differences in emphasis, the various approaches that comprise the New employment relationship share several common features.[18] A defining characteristic of the new employment relationship is that employees do not have long term job security with a particular employer. Employees have episodic jobs, sometimes as regular employees, sometimes as temporary workers, and sometimes as independent contractors. Employment relationships are complex, without any one-size-fits-all model of what it means to be a worker.

When employees are with a firm in an employment relationship, they are given implicit understandings that provide a substitute for the job security of the past. Many employers explicitly or implicitly promise to give employees not job security, but "employability security" – i.e. opportunities to develop their human capital so they can prosper in the external labor market.[19]

Another feature of the new employment relationship is that it places emphasis on the worker's intellectual and cognitive contribution to the firm. Unlike scientific management, that

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[15] *See*, Edward E. Lawler, III, *The Ultimate Advantage: Creating the High-Involvement Organization* (1992)156.
[16] *See, id.* at 144 - 156. See generally, Stone, 'The New Psychological Contract' 48 *UCLA Law Review* 560-565.
[17] See Joshua G. Rosett & Richard N. Rosett, 'Characteristics of TQM' (1999) NBER Working Paper No. 7241; Eric E. Anschutz, *TQM America* (1995). See generally, Stone, 'The New Psychological Contract' 48 *UCLA Law Review* at 565-568.
[18] Mark Roehling et al., 'The Nature of the New Employment Relationship(s): A Content Analysis of the Practitioner and Academic Literatures' (1998) Ctr. for Advanced Human Res. Studies, Working Paper No. 98-18, 2.

attempted to diminish or eliminate the role of workers' knowledge in the production process, today's management theories attempt to increase employee knowledge and harness their knowledge on behalf of the firm.[20]

The new employment relationship also involves compensation systems that peg salaries and wages to market rates rather than internal institutional factors. The emphasis is on offering employees differential pay to reflect differential talents and contributions.[21]

Another feature of the new employment relationship is firms providing employees with opportunities to interact with a firm's customers, suppliers and even competitors.[22] Regular employee contact with the firm's constituents is touted as a way to get employees to be familiar with and focused on the firm's competitive needs, and at the same to raise the employees' social capital so that they can find jobs elsewhere. The new relationship also involves a flattening of hierarchy, the elimination of status-linked perks,[23] and the use of company-specific grievance mechanisms.[24] We can thus summarize the major differences between the new employment relationship and the old as follows:

old employment relationship	new employment relationship
job security	employability security
firm specific training	general training
deskilling	upskilling
promotion opportunities	networking opportunities
command supervision	micro-level job control
longevity linked pay & benefits	market-based pay

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[19] Rosabeth Moss Kanter, *E-Volve* (2001) 192.
[20] Thomas A. Stewart, *Intellectual Capital: The New Wealth of Organizations* (1997) at ix; Thomas O. Davenport, *Human Capital: What it Is and Why People Invest in it* (1999) 152-56.
[21] Kanter, *supra* note 19, at 175 (reporting that the tide is moving "toward more varied individual compensation based on people's own efforts").
[22] Anschutz, *supra*. n. 17 at 53.
[23] *See* Janice Klein, 'The Paradox of Quality Management: Commitment, Ownership, and Control' in Charles Heckscher, *The Post-Bureaucratic Organization* 178 - 182.

II. The Labor Laws and the Old Workplace

The labor and employment laws are neither compatible with, nor responsive to, the problems generated by the new employment relationship. The basic framework of the labor and employment laws in the United States originated in the New Deal period, when President Franklin D. Roosevelt and a Democratic Congress took affirmative steps to assist American workers who had been devastated by the Great Depression. In that decade, four significant labor statutes and two major Supreme Court opinions established a framework for governing labor relations that persists to this day.[25] This framework consists of two types of regulation – statutory protections establishing minimal standards for individual employees, and regulation to facilitate collective bargaining to enable unionized workers to establish employment terms by contract. Both were structured in ways that assume long term, stable employment relationships.

A. The Collective Bargaining Law

The collective bargaining law -- the National Labor Relations Act -- was designed to promote the self-organization of workers to enable them to constitute a countervailing power so they could bargain with employers about the operation of internal labor markets. In the bargaining process, labor and management were encouraged to jointly determine the rules by which the workplace would be governed.

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[24] *See* Jerald Greenberg, *The Quest for Justice on the Job* (1996) 32–39. See generally, Jason Colquitt, et. al., 'Justice at the Millennium: A Meta-Analytic Review of 25 years of Organizational Justice Research' (2001) 86 *J. of App. Psych.* 425, 435-36.

[25] Norris La Guardia Act, 29 U.S.C. §§ 101 - 115; National Labor Relations Act, 29 U.S.C. §§ 151 - 169; Social Security Act of 1935, August 14, 1935, Ch. 531, 49 Stat. 620, codified as amended in scattered sections of 42 U.S.C.; Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 - 219. The two Supreme Court decisions are *N.L.R.B. v. Jones and Laughlin Steel Corp*. 310 U.S. 1 (1937) (holding that it is not a violation of the Commerce Power for Congress to legislate about private employment) and *West Coast Hotel Co. v. Parrish* 300 U.S. 379 (1937) (holding that it is not a violation of substantive due process for a state law to set the maximum hours of work for women workers).

In many respects, collective bargaining under the NLRA assumes the existence of stable employment of long-term employees. For example, under the Act, the unionized workplace is divided into discrete bargaining units, each unit a well defined, circumscribed, and economically stable group. While the individuals in the unit could and did change, the bargaining rights and bargaining agreements applied to the unit. Unions negotiated agreements that contained wages, work rules, and dispute resolution systems for those individuals working in the unit. The terms and benefits applied to the job -- they did not follow the worker to other jobs when they left the unit. Job-centered benefits were not problematic in a workplace in which jobs themselves were stable and long-term, but as individuals move between departments and jobs, bargaining unit based unionism means that union contractual gains are ephemeral from the workers' point of view.

The assumption of long-term employment has also permeated union bargaining goals. Many of the benefits and work rules unions negotiated rewarded long-term employment and were thus consistent with the implicit lifetime employment commitment. Wages, vacations, and sick leave policies in collective bargaining agreements are usually based upon length of service. Employers insisted on long vesting periods for pensions, thereby reinforcing the norm of long-term employment. Unions have been quite effective in policing employers' implicit promises of long-term employment and preventing employer breaches. They almost invariably insist on seniority and just-cause-for-discharge clauses to protect against opportunistic employer behavior. At the same time, unions establish grievance and arbitration systems to give workers an expeditious and inexpensive mechanism to enforce the psychological contracts of the industrial era workplace.

B. Social Insurance Laws

In addition to the laws to promote collective bargaining, Congress in the New Deal period enacted minimal employment standards for individual employees not covered by collective bargaining. Federal and state employment laws provided a safety net and set a floor of benefits for those workers who remain outside the bilateral collective bargaining system. In 1935 Congress enacted the Social Security Act which provided old-age assistance and disability insurance.[26] It also had provisions for unemployment compensation for workers who lost their jobs through no fault of their own. In 1938, Congress enacted the Fair Labor Standards Act (FLSA) which established a federal minimum wage and set maximum hours for employment.[27]

An important feature of the New Deal social security and unemployment insurance programs was that they were not universal in their coverage. Rather, they tied crucial social insurance protections to employment, thereby reinforcing the bond between the employee and the firm. Furthermore, they did not provide mandatory and universal health insurance. Thus workers were left to obtain health insurance from individual employers, usually as a product of labor-management negotiations.

Over the past thirty years, the employment laws have expanded in number and scope as the extent of the collective bargaining system has contracted. In the 1970s, individual employment protections were expanded by national legislation to provide occupational safety and health protection,[28] pension insurance,[29] expanded protection against discrimination for

[26] Social Security Act of 1935, August 14, 1935, Ch. 531, 49 Stat. 620, codified as amended in scattered sections of 42 U.S.C.
[27] Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 - 219.
[28] Occupational Safety and Health Act of 1970 (OSHA) (Pub.L. 91-596, Dec. 29, 1970, 84 Stat. 1590), codified and amended in scattered sections of 5, 15, 18, 29, 42, & 49 U.S.C.
[29] Employee Retirement Income Security Act of 1974 (ERISA) (Pub.L. 93-406, Sept. 2, 1974, 88 Stat. 829), codified at 29 U.S.C. 1001 et seq.

government employees [30] and pregnant women, [31] and protection for federal employee whistleblowers who report employer wrong-doing.[32] In the 1980s, the federal government enacted the Worker Adjustment and Retraining Notification Act (WARN) to require that employers give their employees advance notice of plant closings and mass layoffs,[33] and the Employee Polygraph Act to provide protection for worker privacy interests.[34] In the same period, numerous states enacted legislation to protect the job security, privacy, dignity, and other concerns of employees. Thus as union density has declined in the private sector, statutory protections have become the main source of worker rights. Yet most of those statutory protections are only available to workers who have an on-going relationship with a specific employer.

C. Job Security and At-Will Employment

In addition to the legislative developments of the 1970s and 1980s, many states in the United States revised their at-will doctrines and restricted employers' right to fire employees, thereby giving workers in those states judicial protection against unfair dismissal. Some states adopted a common law tort of unjust dismissal, imposing tort liability when an employer discharged an employee for a reason that violates public policy. For example, a court found an employer liable in tort for dismissing an employee who missed work to serve on a jury.[35] Another imposed liability for dismissing an employee who refused to commit perjury.[36] In

[30] Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified and amended in scattered sections of 29 U.S.C.)
[31] Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 42 U.S.C. 2000e
[32] Civil Service Reform Act of 1978 (Pub.L. 95-454, Oct. 13, 1978, 92 Stat. 1111), codified as amended in scattered sections of 5 U.S.C.
[33] Worker Adjustment and Retraining Notification Act (WARN) (Pub.L. 100-379, Aug. 4, 1988, 102 Stat. 890), codified at 29 U.S.C. §§ 2101-2109
[34] Employee Polygraph Act, 29 U.S.C. §§ 2001-2009
[35] *Needs v. Hocks* 536 P.2d 512 (Oregon, 1975)
[36] *Petermann v. International Bhd. of Teamsters*174 Cal. App. 2d 184 (1974).

addition, a small number of states adopted an implied covenant of good faith and fair dealing into employment contracts, thus finding that an employer breached an employment contract by discharging an employee in a situation that demonstrated egregious bad faith. The prototype situation in which a court found an employer liable for breaching an implied covenant was when an employer discharged a salesman just before a large commission on a sale he had completed became due and payable.[37]

A third type of exception to the at-will doctrine, adopted by 43 U.S. states, was an implied-in-fact contract exception. In these cases, employers who made express or implicit promises of job security were held liable for breach of contract if they did not honor them. For example, in 1984, the Supreme Court of Washington held that when an employer puts promises of fair treatment and limitations on its powers of arbitrary dismissal in an employee handbook, the employer is obligated to act in accordance with those promises.[38] In addition, some U.S. courts imposed contractual liability on employers who engaged in arbitrary dismissals after giving verbal promises of lifetime employment and fostering a corporate culture that assured its employees that they would not be fired unfairly.[39]

The exceptions to the at-will rule were not uniform – some U.S. states recognized a tort of unjust dismissal, some imposed implied terms of good faith and fair dealing into employment contracts, and some expanded the situations in which they would enforce implied contracts for job security. In the same period, some U.S. courts became more receptive to the application of conventional torts to workplace harms. Thus, for example, some U.S. courts permitted workers to sue for intentional infliction of emotional distress when they were the victims of extremely

[37] *Foley v. National Cash Register Co*. 364 N.E. 2d 1251 (Mass. 1977).
[38] *Thompson v. St. Regis Paper Co*. 685 P.2d 1081 (Wash.,1984).
[39] See, e.g., *Pugh v. See's Candies* 171 Ca. Rptr. 917 (Ca., Ct. App. 1981), overruled in part on other grounds by *Guz v. Bechtel Nat'l, Inc*. 24 Cal. 4th 317 (2000).

abusive employer treatment.[40] Despite these exceptions, however, the vast majority of nonunion workers remained subject to the at-will doctrine, lacking job security or regulatory protection for their job-related grievances.

III. The Problem of Boundaryless Workers with Bounded Protections

The changes in workplace practices described above have rendered many features of the existing regulatory framework obsolete. The former regulatory structure was based on the template of long-term employment relationships and is not well suited to the newly emerging employment system in which firms engage people in non-traditional relationships and employees have several short-term relationships with a variety of employers over their working lives. As more and more workers are de-linked from a particular employer, workers' legal rights change dramatically. They lose many of their protections and benefits, be they contractual, common law, or statutory. Atypical employees and independent contractors fall outside the coverage of many labor laws . At the same time, the new employment relationship collapses the distinctions between regular employees and temporary workers, and between employees and independent contractors. The result is that workers increasingly fall outside the scope of labor law protections. Further, the existing laws do not respond to the needs of either regular or atypical employees because they do not address the important sources of vulnerability.

Two features of the new employment relationship require us to rethink labor law and devise some new types of employment protections. First, the changing nature of work involves a redistribution of risk from the firm to the employee so that any labor regulation needs to respond

[40] See, e.g. *Bodewig v. K-Mart, Inc*. 54 Or. App. 480, 635 P.2d 657 (App. Ct. 1981); *Tandy Corp. et al. v. Bone* 283 Ark. 399, 678 S.W.2d 312 (Ark. 1984*); Moniodis v. Cook* 64 Md. App. 1, 494 A.2d 212 (1985); *Smithson v. Nordstrom, Inc*. 63 Or.App. 423, 664 P.2d 1119 (App. Ct. 1983); *Shipkowski v. United States Steel Corp*. 484 F.Supp 66 (E.D. Penn. 1983).

to the new risks that are currently generated. Second, the new work practices are collapsing the distinction between regular and atypical employees, so that many who are in most need of social protection fall outside the ambit of the regulatory regime. As a result, we need to rethink the labor and employment laws, and ensure that regulation be devised that address the risks and vulnerabilities of both regular and atypical employees.

A. New Risks for "Regular" Employees

1. The decline in job security

Regular employees face new risks under the new employment relationship. First and foremost, they face a risk of losing their jobs. To be sure, regular employees in the United States have always been hired under an at-will employment contract. An at-will contract is one that can be terminated by either party at any time for any reason. Given the at-will rule, one might say that all employees in the United States are temporary employees because they have no legally enforceable right to an on-going employment relationship. However, until recently, many employees had some job security through a combination of customary, contractual, and common law protections. This is no longer the case.

As explained above, until recently many employees had the protection of internal labor markets and their implicit promises of job security. In internal labor markets, the implicit promise was part of a workplace culture in which employees were not fired unless there was good cause. With the rise of the new employment relationship, this form of customary job security is waning. Employers no longer promise to, nor are they are expected to, keep employees on the payroll when demand for the product fluctuates downward. Rather in the new employment relationship, the risk of the firm's short-term and long-term success is placed squarely on the employee.

Contractual job security was a second source of job security for many employees in the past, and it too is waning. For the past half century, many private sector employees had unions that negotiated collective bargaining agreements containing job security provisions. Most labor-management contracts have a provision that specifies that an employer can only terminate an employee for "just cause." "Just cause" is an amorphous concept, but it has been given meaning over the past fifty years by labor arbitrators on a case by case basis. Most union contracts also establish grievance and arbitration procedures to provide an informal tribunal to enforce the contractual job security protection. In the 1960s and 70s, when unions were prevalent in the private sector, many nonunion firms emulated their union counterparts by promising job security and some even instituted nonunion grievance procedures to adjudicate allegations of wrongful discharge.[41] However, union density has declined drastically since the 1980s, so that today less than 9 per cent of private sector workers have unions at all.[42] As unions decline, the number of employees who have contractual protection for job security also declines. Further, as unions decline, non-union employers no longer feel the need to emulate the union workplace, so non-union job security provisions also wane.

A third source of job security came from the U.S. courts. As discussed above, in the mid-1980s, some state courts began to provide common law job security protection to fill the vacuum created by the steep union decline. However, the legal changes in the at-will rule of the 1980s and 1990s have been undermined in recent years. In many states, courts have limited the tort of unjust dismissal and the covenant of good faith and fair dealing to cases of extremely abusive employer conduct, so that there have been relatively few cases in which employers were found liable either for unjust dismissal or breach of an implied covenant of good faith and fair dealing.

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[41] Thomas A. Kochan, Harry C. Katz & Robert B. McKersie, *The Transformation of American Industrial*

In addition, some courts have eliminated the possibility of punitive damages in wrongful dismissal cases, making the remedy less meaningful. In addition, employers in implied contract jurisdictions can avoid liability by placing an explicit disclaimer of just cause liability and a clear statement that the employment relationship is at-will in their employment manuals. There is evidence that employers are increasingly doing just that.[43] Furthermore, an employer can avoid liability for unjust dismissals by establishing a mandatory arbitration system for disputes concerning terminations and designing the systems to make it difficult for employees to prevail. The use of employer-promulgated arbitration systems has been growing at a rapid rate as employers seek to limit their liability both for employment discrimination and for wrongful dismissal.[44]

As the customary, contractual, and common law protections for the job security of regular employees are disappearing, those employees revert to their default status as at-will employees. Under the new employment relationship, regular employment has been transformed into a relationship of de facto as well as de jure free agency. Lacking customary, contractual, or common law job security, today's regular employees are difficult to distinguish from temporary ones.

2. Other risks for regular employees

In addition to the risk of job loss, the new employment relationship shifts onto regular employees many other risks that were previously borne by the firm. For example, the new employment relationship generates a level of wage inequality and wage uncertainty that was not

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[42] Katherine V.W Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge Univ. Press, 2004) 123.

[43] Mark Berger, 'Unjust Dismissal and the Contingent Worker: Restructuring Doctrine for the Restructured Employee' (1997) 16 *Yale Law & Policy Rev.* 1, 5-6.

[44] In 2001, the Supreme Court gave its approval to the use of these systems in the case of *Circuit City Stores v. Adams* 532 U.S. 105 (2001). See also, *Gilmer v. Interstate/Johnson Lane* 500 U.S. 1 (1991). *See* Katherine V.W.

feasible under the old internal labor market arrangements. In internal labor markets, wages were set by institutional factors such as seniority and longevity. Wages today are increasingly pegged to individualized factors such as pay for performance, and to the external labor market through techniques such as bench-marking. One result is wage uncertainty for employees. Gone are the days of reliable and steadily progressing pay levels along some pre-arranged or pre-agreed-upon scale. Instead, an individual's pay can fluctuate greatly from month to month, or even week to week.

In addition to job insecurity and wage uncertainty, the new employment practices place on employees the risk of losing the value of their labor market skills. When jobs are redesigned to provide greater flexibility, their skill requirements often increase.[45] Newly trained employees thus have an advantage over older ones, and on-going training becomes not an opportunity for advancement but a necessity for survival. The new employment practices thus impose not only risks of job loss on employees, but also risks of depreciation of their skill base. Rather than being able to count on a rising wage level and a comfortable retirement, many workers are anticipating a lifetime of retooling just to stay in place.

Another type of risk that is generated by the new employment relationship involves the dissolution of stable and reliable employee old age and social welfare benefits. In the United States, social insurance is linked to employment. Workers obtain health insurance, pensions, disability, long-term care, and most other forms of social insurance from their employers, when they can get it, rather than from the state. Even most forms of state-mandated insurance benefits, such as unemployment compensation and workplace accident insurance, require a worker to

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Stone, 'Employment Arbitration Under the Federal Arbitration Act' in *Employment Dispute Resolution and Worker Rights in the Changing Workplace* (Adrienne E. Eaton & Jeffrey H. Keefe eds., 2000) 27.

[45] For a series of case studies that illustrate how job resdesign leads to changing skill requirements, see Harry C, Katz, *Industry* 'Studies of Wage Inequality: Symposium Introduction' (2001) 54 *Indus. & Labor Rel. Rev*. 399.

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

The impact of the new employment relationship on social insurance goes beyond simply the change in job longevity. Employers are also restructuring their plans so as to shift more risk of uncertainty onto employees. In the area of pensions, there has been a historic shift in the past two decades. In the past, almost all private pensions were "defined benefit" plans. In a defined benefit plan, employers contribute to a fund on behalf of its covered employee, and each employee is guaranteed a specified benefit level at the time of retirement, a benefit determined by the individual's length of service and final out-going salary level. Since the 1980s, many employers have terminated their defined benefit plans altogether or have converted them to defined contribution plans. The result is that today, defined contribution plans have overtaken defined benefit plans as the dominant form of employer-provided pension in the United States.[46]

In defined contributed plans, the employer contributes a fixed amount into an account for each worker based on the number of person-hour worked. Often the worker is given some choices about how the funds in his/her account shall be invested. Upon retirement, the amount of the worker's pension is determined by the value of that account at that time. If the funds were invested well, or if the market did well overall, the worker's pension could be high. But if they

[46] Edward A. Zelinsky, 'The Defined Contribution Paradigm' (2004) 114 *Yale L. Rev.* 451.

were invested poorly or if retirement occurred amidst a market downturn, the pension could be paltry. The risk, both of the market and of bad decisions, falls on the individual employee.

In all, the new free agency model of employment has put regular employees at risks in many respects. Indeed, as free agents, regular employees have come to resemble atypical workers in many respects. They can be dismissed at any time, they have no reliably rising wage scales, their benefits are nonexistent or ephemeral, and they do not have an orderly path of progression to define their working careers. Thus regular workers are coming to share with their less privileged counterparts the problems of risk and uncertainty that the atypical have long endured.

B. Problems of Atypical Workers

Atypical workers – temporary workers, leased workers, part-time workers, trainees and apprentices, and "dependent" independent contractors – are a growing portion of the American labor force. In 2005, the Department of Labor classified 16.2 million people – 12.1 percent of the workforce – as contingent workers. Of these, there were an estimated 10.3 million independent contractors. 2.5 million on-call workers, 1.2 million temporary help agency workers, and 813,000 workers for contract work companies out of a total full time workforce of 139 million.[47] In addition, in 2003 the Department of Labor found that there were over five million involuntary part-time workers – those who want but do not have regular employment.[48] A survey of firms in

[47] U.S. Dept. of Labor, Bureau of Labor Statistics, 'Contingent and Alternative Work Arrangements – February, 2005' (USDL 05-1433, Gov't Printing Office, July 27, 2005). See also, Sharon R. Coheny, 'Workers in Alternative Working Arrangements' (Nov. 1998) *Monthly Labor Rev.* 4-6.

[48] U.S. Dept. of Labor, Bureau of Labor Statistics, 'A Profile of the Working Poor, 2003 Table 1' (Gov't Printing Office, Report 983, March, 2005) p. 6 . See also, Chris Tilly, *Half a Job: Bad and Good Part-Time Jobs in a Changing Labor Market* (Temple University Press, 1996). Writing in 1996, Rebecca Blank estimated that between 4.6 and 8.5 percent of the workforce is in contingent or part-time work involuntarily and would prefer regular, full time employment instead. See Rebecca M. Blank, 'Contingent Work in a Changing Labor Market' in *Generating Jobs* (Richard Freeman and Peter Gottschalk, eds. 1998).

all industries and of all sizes conducted by the Upjohn Institute found that 78 percent of all private firms used some sorts of flexible staffing arrangements.[49]

Atypical workers have long experienced risks of joblessness, pay variability, skill obsolescence and benefit gaps. Indeed, unlike regular employment, atypical employment does not convey even the illusion of job security. Temporary workers can spend years working alongside a regular permanent employees without any expectation of continued employment nor right to participate in the employer's benefit plans.[50] Temporary workers move from firm to firm, often dispatched for short term assignments by a temporary help agency. On-call workers are either retained by a specific employer to work on an as-needed basis, or placed on-call by a temporary help agency are required to be available for work without knowing their next place or hours of work. "Independent contractors" are often unskilled workers who face shape-ups in ad hoc hiring halls on street corners every morning.[51] None of these types of workers have a reasonable expectation of long term employment with a particular employer, even though they can spend years in the labor force doing the same kind of work in the same geographic area. Atypical workers receive significantly less pay than their regular employee counterparts and are less likely to receive health insurance or pensions from their employers.[52]

1. Atypical Workers Under the Labor Law

The labor laws in the United States make sharp distinctions between regular workers and atypical workers, and between employees and independent contractors. Atypical workers – contingent, temporary and part-time workers – enjoy some protections of the employment laws.

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[49] Susan Houseman, 'Why Employers Use Flexible Staffing Arrangements' (Oct. 2001) 55 *Indus. & Labor Rels. Rev*. 149.
[50] See, *Vizcaino v. Microsoft* 103 F.3d 1006 (1997).
[51] See, e.g., Jennifer Gordon, *Surbarban Sweatshop* (2005).
[52] See, Stephen F. Befort, 'Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perpsective on Contingent Work' (2003) 24 *Berkeley J. of Emp. & Lab. Law* 153, 164; Patricia Ball, 'The New

They are covered by the minimum wage legislation, workers compensation, and occupational health and safety legislation. If they earn more than $500 in a quarter, their employer is required to make social security payments on their behalf. However, there are many statutory employment protections from which atypical workers are explicitly, or as a practical matter, excluded. For example, unemployment insurance, family and medical leave and social security disability insurance have minimum hours eligibility requirements that temporary workers and part-time workers often cannot satisfy.[53]

Temporary workers also lack meaningful rights to engage in collective bargaining because, under a recent National Labor Relations Board (NLRB) ruling, temporary workers are not able to organize in the same bargaining units with the permanent workers they work alongside unless both the agency and the user employer consent.[54] In overturning a prior decision, the NLRB held that absent employer consent, temporary workers can only organize into a unit with other temporary workers who work at their temporary agency. Given that agency temporary workers spend their days at widely disparate and varying workplaces, without opportunities to meet each other or know of each others existence, organizing a temp agency is difficult if not impossible to achieve.

Atypical workers often lack coverage under the employment discrimination laws that prohibit employment on the basis of race, gender, ethnicity, age, religion, or disability status. The discrimination laws only apply to employers who have a set minimum number of employees.

Traditional Employment Relationship' (2003) 43 *Santa Clara L. Rev*. 901, 909-913 ; Clyde Summers, 'Contingent Employment in the United States*'* (1997) 18 *Comparative L. J.* 503, 510 .

[53] Stephen F. Befort, supra., 24 *Berkeley J. Empl. & Lab. Law* at 162-164; Patricia Ball, *supra.*, 43 *Santa Clara L. Rev*. at 917.

[54] *Oakwood Care Center and SEIU*, 343 N.L.R.B. No. 76, 176 L.R.R. M. 1033 (2004), overruling *In Re M.B. Sturgis, Inc.*, 331 N.L.R.B. 1298 (2000).

Employers often avoid coverage by keeping the number of employees below the statutory minimum by designating the majority of its work force as independent contractors.[55]

The Employment Retirement Income Security Act (ERISA) permits employers to exclude temporary workers and part-time workers who work less than half a year from their pension plans. Hence many temporary workers are let go after five and a half months in order to preclude coverage from pension plans. And those who work for more than half a year may still never receive a pension because many pension plans provide that benefits do not vest for five years.

In addition, most common law courts that grant dismissal protection to employees deny protection for temporary workers on the grounds that they had no reasonable expectation of long term employment in the first place.[56]

2. Independent Contractors Under the Labor Law

In contrast to atypical employees, independent contractors are not eligible for any of the protections provided by the employment law statutes because they are not considered "employees." Unlike Europe and Canada, in the United States there have not been legislative efforts to create an intermediate category between "employee" and "independent contractor" that would give atypical workers some of the employment protections available for standard workers.[57] Rather in the United States there are only two categories – employee and independent contractor– where the former gets some employment law protections and the latter does not.

[55] For example, in *Arbauch v. Y & H Corp*., the plaintiff experienced severe sexual harassment on the job but was not able to sue because her employer had classified its truck drivers as independent contractors, leaving it with less than the requisite fifteen "employees" necessary to trigger the protection of Title VII. *Arbaugh v. Y & H Corp*. Civ. 03-30365 (5th Cir., August 18, 2004).

[56] Berger, supra. n. 44.

[57] For an analysis of the use of the intermediate category in the United Kingdom, see Guy Davidov, 'Who is a Worker?' (2005) 34 *Indus. L. J.* 57. See also, Stephen F. Befort, 'Labor Law at the Millenium' (2002) 43 *Boston Coll. Law Rev*. 351 (discussing the development of an intermediate category of dependent independent contractors in Canada, Sweden, and Germany).

Increasingly employers attempt to reclassify employees and to vary their employment practices so as to transform their former "employees" into "independent contractors."[58] Many low paid employees such as janitors, truck loaders, typists, and building cleaners have been redefined as independent contractors even when they are retained by large companies to work on a regular basis. Independent contractors are not covered by minimum wage, workers compensation, unemployment compensation, occupational safety and health laws, collective bargaining laws, social security disability, anti-discrimination laws, or any of the other employment protections discussed above.[59]

There has been a great deal of litigation in recent years about whether particular individuals or jobs should be classified as an employee or an independent contractor.[60] Two different tests have been used for distinguishing an employee from an independent contractor. Under the National Labor Relations Act, courts use a restrictive common law agency test that focuses primarily on the employer's right to control the work tasks of the putative contractor.[61] Under the Fair Labor Standards Act, the courts use a broader "economic realities" test that looks at numerous factors to determine whether the individual is in fact dependent upon the employer.[62] For other purposes, some courts developed a hybrid of the two tests that uses a multi-factored economic realities test but gives particular weight to the employer's right to

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[58] See, Andrea H. Brustein, 'Casual Workers and Employee Benefits: Staying Ahead of the Curve'(2005) 7 *Univ. Pa. J. of Labor & Empl. L* 695; Patricia Ball, 'The New Traditional Employment Relationship' (2003) 43 *Santa Clara L. Rev*. 901. See also, Lisa Lawlor Graditor, 'Back to Basics: A Call to Re-Evaluate the Unemployment Insurance Disqualification for Misconduct' (2003) 37 *John Marshall L. Rev.* 27, 60-61 (employers regularly misclassify employees as independent contractors to avoid paying unemployment insurance).

[59] See generally, Lisa Horwedel Barton, 'Reconciling the Independent Contractor Versus Employee Dilemma: A Discussion of Current Developments as they Relate to Employee Benefit Plans'(2002) 29 *Cap. Univ. L. Rev.* 1079.

[60] *Mendoza v. Bishop* 2005 WL 123982 (*OhioLujan v. Minagar* (21 Cal. Rptr. 3d 861 (2004) App. 2005); *Burditt v. Kerr-McGee Chem. Corp*. 982 F. Supp. 404 (N.D. Miss. 1997) For discussions of misclassification disputes, see Steven J. Arensault, et. al., 'An Employee By Any Other Name Does Not Smell As Sweet: A Continuing Drama' (2000) 16 *Lab. Law*. 285; Barton, supra. n. 60, *Cap. Univ. L. Rev*. 1079.

[61] *Roadway Package System* 326 NLRB 842 (1998).

[62] *Real v. Driscoll Strawberry Associates, Inc.* 603 F.2d 748 (9thCir. 1979).

control the employee's work.[63] However, in 1992, the Supreme Court in *National Mutual Insurance v. Darden* rejected the hybrid test and insisted that for ERISA, and by implication for all the employment statutes other than the Fair Labor Standards Act, the common law agency test should be applied.[64] The Court explained that the employer's right to control the work was paramount. It enumerated thirteen factors to use to determine the application of test in any given case. The factors are:

> (1) the hiring party's right to control the manner and means by which the product is accomplished; (2) the skill required; (3) the source of the instrumentalities and tools; (4) the location of the work; (5) the duration of the relationship between the parties; (6) whether the hiring party has the right to assign additional projects to the hired party; (7) the extent of the hiring party's discretion over when and how long to work; (8) the method of payment; (9) the worker's role in hiring and paying assistants; (10) whether the work is part of the regular business of the hiring party; (11) whether the hiring party is in business; (12) the provisions of employee benefits; and (13) the tax treatment of the hired party.[65]

None of these factors looks to the individual's economic dependency on the employing firm. The Ninth Circuit recently applied these factors in *Vizcaino v. Microsoft* to find that Microsoft had deprived numerous individuals of benefits because it had misclassified them as independent contractors when they were, in fact, employees.[66]

C. Collapsing the Distinctions

In today's workplace, it is often difficult to distinguish between employees and independent contractors. Both are expected to use discretion, to manage their own careers, to move from job to job and project to project. Under the right to control test, "employees" are defined as those whose work tasks are controlled by the employer and "independent contractors"

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[63] *Spirides v. Reinhardt* 613 F.2d 826, 831 (D.C. Cir. 1979); *Equal Employment Opportunity Comm'n v. Zippo Mfg. Co.* 713 F.;2d 32, 38 (3d Cir. 1983).
[64] *National Mutual Insurance v. Darden* 503 U.S. 318 (1992). See, Stephen F. Befort, 'Labor and Employment Law at the Millenium' (2002) 43 *Bos. Coll. L. Rev*. 351.
[65] *National Mutual Insurance v. Darden* 503 U.S. at 323-24.
[66] *Vizcaino v. Microsoft Corp*. 120 F.3d 1006, 1009-10 (9th Cir. 1997).

are those whose work tasks are not controlled by the employer. Yet in the new employment relationship, employers grant more and more discretion to lower level employees and attempt to give even the lowest level of employee considerable control over their day to day work tasks. Indeed, the wisdom of total quality management, competency-based organization theory, and other contemporary high performance work programs is that when employees are given discretion to use their judgment, creativity, and knowledge, they develop organizational citizenship behavior and bring valuable ideas to the firm. These approaches attempt to encourage employees to innovate and to have an ownership attitude toward the work process. Therefore the trend toward granting of discretion to employees collapses the distinction between employees and independent contractors under the right to control test. So not only are employers restructuring tasks to turn employees into independent contractors, they are also making the distinction between the two groups almost meaningless. Just as the atrophy of internal labor markets makes all workers "temporary" in a real sense, so too does the employer's quest for OCB render all workers "independent contractors."

As employment tasks are revised and employment relationships are redefined in order to transform more and more employees into independent contractors, more and more individuals are left without the protections of the labor and employment laws. Yet many of these individuals share the vulnerabilities of regular and atypical employees. Some have termed these types of workers,"dependent independent contractors." Their jobs are insecure, their incomes fluctuate, they lack reliable and affordable benefits, and they need to constantly upgrade their skills. Hence any reform in labor law has to include these dependent independent contractors if it is to address the problems of the new workplace.

IV. Recommendations for Reform

The employment laws need to be revised in many ways if we are going to address the vulnerabilities of both regular and atypical employees. As I have tried to show, the two groups are quickly becoming indistinguishable, and hence it is necessary to think about legal reforms that do not distinguish between regular and atypical workers, be they temporary workers, part-time workers, independent contractors, or others in dependent employment relationships. Some of the reforms that will be required are described below.

A. Expanding Collective Bargaining Rights

The labor laws need to be reformed so that workers can organize across employer units without limitation by narrow notions of bargaining units, and so that they can assert economic pressure beyond the boundaries of the firm without constraint by secondary boycott laws. Labor laws also need to permit or even promote a form of organization that includes atypical together with regular, employed together with unemployed, part time as well as full time, and independent contractors as well as employees. Such an organization might play a representational function in a particular workplace, but its primary role will be as a political and economic force that can protect workers interests and rights on a region or local basis.[67]

B. Employment Rights for All Employees

Individual employment rights, such as unemployment insurance, workers compensation, minimum wage, social security disability, rights to organize, and so forth must be broadened so they apply to all workers, be they regular, temporary, or dependent independent contractors.

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[67] I describe this type of unionism in detail in Stone, *From Widgets To Digits* at 219 - 239.

C. Protection for Independent Contractors

It is necessary to revise the test for independent contractor status so that they come under the labor law protections. One way to accomplish this would be to return to the economic realities test that looks to the degree of dependency of the worker. However, simply instituting the economic realities test is not enough because it runs the danger of depriving workers who have several employers of protection. A better approach is to base employee status on the individual's vulnerability and relative power vis a vis the party who pays for her services. The relevant question to ask is whether the individual is so situated that they require the protections the law provides.

D. Making Training A Priority

In the new workplace, all workers need continual training to upgrade their skills and develop new ones. Employers promise employability, but they do not always provide it. Hence there is a role for local government, working with local companies and representatives of local unions and civil organizations, to identify the training needs of the community and insure that workers have access to training and re-tooling throughout their lives. These training needs should be offered for free to all in a community, through the community college system or other state-sponsored training program.

E. Shoring up the Social Safety Net

In order for individuals to survive and thrive in the new boundaryless labor market, they need child care for young children, after-school care programs for school age children, school vacation and snow day coverage, educational activities and homework assistance. Individuals also need affordable and reliable health insurance, disability insurance, and old age assistance. These should be provided by the state and available to everyone. However, if national insurance

is not politically feasible, then employers should be encouraged or required to form multi-employer plans that enable workers to keep their benefits as they move amongst employers in a given locality. The state should also require employers to expand eligibility to all who work for them, in any capacity.

F. Transition Assistance

In the current era, it is inevitable that many will have periods in which they are not in the labor force. Sometimes these will involuntarily be periods of unemployment between jobs. Sometimes individuals will take time out of the workplace to care for a young child or an elderly dependent. Other times, workers will need to retool, learn new skills, or reposition oneself in relation to the changing requirements of work. Thus one of the most pressing needs of workers today is to have income support for these times of transition. To design meaningful employment protections we need to design ways to support workers as they move in and out of the changing, boundaryless workplace. That is, we need to find a way to provide everyone with transition assistance.

There are various approaches we could take to the problem of transition assistance. One would be to expand the welfare system by eliminating the work requirement and time limits. However, given the intense opposition to welfare in any form in the United States, this approach is politically inconceivable. Alternatively, we might consider a proposal that has been much discussed in Europe – a proposal for social drawing rights.

The concept of social drawing rights grew out of a study in 1999, sponsored by the European Commission and conducted by a group of labor relations experts. The group, of which Alain Supiot was the chair, was charged with considering the impact of changes in the workplace on labor regulation in Europe. In 2000 it issued a report, known as the Supiot Report. The

Report describes a changing employment landscape in Europe that mirrors changes that have occurred in the United States -- a movement away from internal labor markets toward more flexible industrial relations practices. It found that the new work practices have entailed a loss of job and income security for European workers. The Report called for new mechanisms to provide workers with "active security" by which they mean mechanism that equip individuals to move from one job to another.[68]

The Supiot Report contained a number of suggestions for changes in the institutions regulating work to provide active security. Their most visionary proposal was for the a creation of "social drawing rights" to facilitate worker mobility and to enable workers to weather transitions. Under the proposal, an individual would accumulate social drawing rights on the basis of time spent at work. The drawing rights could be used for paid leave for purposes of obtaining training, working in the family sphere, or performing charitable or public service work. It would be a right that the individual could invoke on an optional basis to navigate career transitions, thereby giving flexibility and security in an era of uncertainty. As Supiot writes, "They are *drawing* rights as they can be brought into effect on two conditions: establishment of sufficient reserve and the decision of the holder to make use of that reserve. They are *social* drawing rights as they are social both in the way they are established . . . and in their aims (social usefulness)."[69]

The concept of social drawing rights is derived from existing arrangements in which workers have rights to time off from work for specified purposes such as union representation, maternity leave, and so forth. The Report makes an analogy to sabbatical leaves, maternity

[68] See Alain Supiot, et. al., *Beyond Employment*(Oxford Press, 2001) 56 ; Alain Supiot, et. al., 'A European Perspective on the Transformation of Work and the Future of Labor Law*'* (1999) 20 *Comp. Lab. L. & Pol. Jo.* 621-628. See also, David Marsden & Hugh Stephenson, 'Discussion Paper, Labor Law and Social Insurance in the New

leaves, time off for union representatives and training vouchers to observe that "we are surely witnessing here the emergence of a new type of social right, related to work in general."[70] Social drawing rights, it is said, would smooth these transitions and give individuals the resources to retool and to weather the unpredictable cycles of today's workplace.

In the United States, we have precedents for the concept of paid time off with re-employment rights to facilitate career transitions or life emergencies. There are well established precedents for paid leaves for military service, jury duty, union business, and other socially valuable activities. Some occupations also offer periodic sabbatical leaves. The concept is also built into the idea of temporary disability in state workers compensation and other insurance programs, which provide compensation and guarantee re-employment after for temporary absences. The recent Parental Leave Act extends the concept of leave time to parenting obligations, although it does not mandate that such leave time be compensated. These programs all reflect and acknowledge the importance of subsidized time away from the workplace to facilitate a greater contribution to the workplace. They could serve as the basis for developing a more generalized concept of career transition leave.

Conclusion

The workplace is changing and the labor laws must change as well. Workers today are forced to bear many new risks in the labor market – risks of job loss, of wage variability, of benefit gaps, of skill obsolescence, and of intermittent prolonged periods of unemployment. Our labor laws do not address these problems, either for regular or for atypical workers.

Economy: A Debate on the Supiot Report' (London School of Economics, July 2001) Centre for Economic Performance.

[69] Alain Supiot, et. al., *Beyond Employment* at 56.

[70] *Id.*

The changing nature of work creates new opportunities for workers, but also new types of vulnerabilities. As employer-employee attachment is episodic rather than long-term, the problem of transitions have risen to the fore. Thus the challenge for regulation today is not to recreate the era of worker-employer attachment, but to find a means to provide workers with support structures to enable them to weather career transitions.

This article has made some proposals for reform that are designed primarily to provide livelihood security and ease transitions as workers move around in the boundaryless labor market. The proposals only scratch the surface of the profound changes in our labor laws that are necessitated by the changing workplace. Simply enumerating these proposals demonstrates both how far-reaching change has to be and how difficult it will be to attain. Yet if we are going to formulate policy that is relevant to the present era, it is necessary to think broadly, no matter how quixotic it may seem.