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The Future of Labor and Employment Law in the United States

Katherine V.W. Stone*

There is a serious problem with the labor and employment law system in the United States today². Unions have declined to the point where they represent less than 8 per cent of the private sector workforce, employee wages have stagnated for more than three decades, employers are cutting back on workers' health insurance and pensions, and there is a dramatic growth in the numbers of the working poor. At the same time, there has been a rising chorus of complaints from labor scholars that the labor law has become "ossified,"³ that the law is failing to offer meaningful worker protection,⁴ that the courts and Labor Board have abandoned the "core values of labor law,"⁵ and that Congress has defunded the labor protective agencies such as the National Labor Relations Board (NLRB), the Occupational Safety and Health Administration (OSHA), and the Hour and Wage Division that administers the Fair Labor Standards Act (FLSA)⁶ Indeed,

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² The views expressed in this paper are not the views of The Regents of the University of California or any of its facilities, including UCLA, the UCLA College of Letters and Science, and the IRLE, and represent the views of the authors only. University affiliations of the authors are for identification purposes only, and should not be construed as University endorsement or approval.

³ Cynthia Estlund, *The Ossification of Labor Law*, 102 Colum. L. Rev. 1527 (2002).

⁴ Clyde Summers, *False Promises of Labor Law*; Michael H. Gottesman, In Despair, *Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 Chicago-Kent L. Rev. 59 (1993)

⁵ Ellen Dannin and David E. Bonier, *TAKING BACK THE WORKERS LAW* (ILR Press, 2006).

⁶ Ellen Dannin, *Finding the Workers' Law*, 8 Greenbag 19, 27 (2004); James Brudney, Schiavoni & Deborah Merritt, *Judicial Hostility Toward Labor Unions?*, 60 Ohio State L. Rev. 1675 (1999); Thomas O. McGarity, *OSHA's Critics and Regulatory Reform*, 31 Wake Forest L. Rev. 597 (1996).

some have contended that over the past two decades, there has been a passive repeal of the employment statutes.⁷

There is a reason that the field of labor and employment law – both as an academic subject and as an arena of social life – has declined. That is that the labor and employment laws do not address the concerns or vulnerabilities of the majority of the workforce today. Work itself is a prominent aspect of social life, but the regulatory framework governing the workplace is quickly becoming irrelevant.

The question that needs to be addressed is, how did the system come to this state and where is it going? In order to consider the future, one must develop an analytic and dynamic understanding of the present and the past. A future-oriented interpretation of the present and the past can help identify trends, provide a basis for critique, and point in some constructive directions. Hence I begin my discussion of the future of labor and employment law with a brief overview of where U.S. labor and employment law came from and what it is has become today. Then I offer some predictions or hypotheses about where the field of labor and employment law is going.

I. Labor and Employment Law in the Past

The American system of employment regulation is a two track system. “Labor law” provides the mechanism for collective bargaining and other form of employee collective action, while “employment law” sets minimal employment standards for all employees. Employment laws set minimum wages, establish safety and health standards, provide old age assistance, require unemployment insurance, compensate industrial injuries, mandate child care and medical leave, and establish other minimal terms of employment. Because the employment law standards are generally meant to be floors, they do not obviate the need for workers to bargain, whether individually or collectively, for employment standards above the set minima. Hence the two-track system of regulation reflects the American labor law’s commitment to settling distributional issues through private bargaining and removing such issues from the political process. While such a bifold approach may have been justified in an era of stable industrial

⁷ Jonathan Hiatt & Craig Becker, *At Age 70, Should the Wagner Act Be Retired?* 26 Berkeley J. Eml. & Labor Law 293, 307 (2005); James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 Tex. L. Rev. 1563 (1996); Dannin & Bonior, *TAKING BACK THE WORKERS= LAW*, supra note 3; Katherine V.W. 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 (1992).

production in which strong centralized unions and strong management which each were committed to industrial peace and stability, it does not adequately address the needs of the working population today.

The basic framework of today's labor and employment law originated in the New Deal period and was tailored to the job structures of that era. In that era, which I call the "industrial era," large firms organized their work forces into a set of practices that has come to be termed "internal labor markets."⁸ The term "internal labor market" is used to distinguish these practices from the neoclassical ideal of a large impersonal external labor market in which buyers and sellers contract freely and repeatedly for jobs of all types.⁹

The internal labor market job structures of the industrial era developed in the early and mid-twentieth century, based on the teachings of the scientific management and personnel management schools of thought.¹⁰ In internal labor markets, jobs are organized along rigidly defined lines of promotion, called job ladders. Workers are hired at the lowest rungs and then advanced, step by step, throughout their careers. The internal labor market job structure assumed a long-term relationship between the employee and the firm. It also assumed that job tasks were minutely delineated and carefully arranged so that each job provided the training for the job on the next rung. Workers tended to stay within a particular department and on a single promotion line, and had little lateral mobility within or between firms. They were rewarded with longevity-based pay and benefits, and their seniority defined both their bidding rights for higher jobs and their bumping rights in case of reductions in force.¹¹

By the 1930s, internal labor markets had become prevalent in large industrial firms. In that decade, the three most significant labor statutes were enacted and two major Supreme Court opinions were issued that together established a framework for governing labor relations that persists to this day. This framework was based upon assumptions rooted in the employment relationship that prevailed during the New Deal period. It was a framework that

⁸ Peter Doeringer & Michael Piore, INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS (1971).

⁹ Bruce Kaufman, HOW LABOR MARKETS WORK: REFLECTIONS ON THEORY AND PRACTICE BY JOHN DUNLOP, CLARK KERR, RICHARD LESTER, AND LLOYD REYNOLDS (Lexington Books, 1988).

¹⁰ Katherine Stone, *The Origin of Job Structures in the Steel Industry*, in Gordon, Reich & Edwards, LABOR MARKET SEGMENTATION (Lexington Books, 1975).

¹¹ Doeringer & Piore; Stone, WIDGETS TO DIGITS, EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE (Cambridge Univ. Press, 2004); Paul Osterman, INTERNAL LABOR MARKETS (. . .).

was appropriate to long-term employment relationships in stable work environments, but it is becoming increasingly out of date.

A. *The Three New Deal Labor Statutes*

In 1932, Congress enacted the Norris- LaGuardia Act, which declared it to be the public policy of the United States to support workers' right to organize and engage in collective bargaining.¹² The Act made it unlawful for federal courts to issue injunctions in many types of labor disputes. In 1935, Congress enacted the National Labor Relations Act (NLRA), which gave workers and enforceable right to engage in concerted action for mutual aid and protection, to organize unions of their own choosing, and to engage in collective bargaining.¹³ The NLRA also established an administrative agency, the National Labor Relations Board, (NLRB) to enforce those rights. In 1937, Congress enacted the Fair Labor Standards Act, which established a federal minimum wage and set maximum hours for employment.¹⁴ These three statutes, taken together, established a two-tiered system in which labor and management were encouraged to bargain to establish the terms of the employment relationship, while at the same time, individual employees not covered by collective bargaining were guaranteed certain minimal employment terms.

In the same decade, the Supreme Court decided two cases that greatly expanded the power of the federal government to regulate private employment. In 1935, in *West Coast Hotel v. Parrish*, the Supreme Court held that it was constitutional for a state to enact legislation setting minimum wages for women's labor.¹⁵ In so holding, the Court overturned a previous decision, *Atkins v. Children's Hospital*, which held that a state maximum hour law was an unconstitutional infringement on the right of freedom of contract and hence a violation of the Due Process Clause.¹⁶ The Court justified its reversal in *West Coast Hotel* by declaring that there is a public interest in ensuring an adequate level of wages for working people. The *West Coast Hotel* decision opened the door for state and federal governments to enact a host of statutes regulating the terms of the employment contract.

¹² 29 U.S.C. §§ 101 - 115 (1988).

¹³ 29 U.S.C. §§ 151 - 169 (1988).

¹⁴ 29 U.S.C. §§ 201 - 219 (2004).

¹⁵ 300 U.S. 379 (1937).

¹⁶ 300 U.S. at 399.

Two years later, in 1937, the Supreme Court held, in *Jones and Laughlin v. NLRB*, that the NLRA was a constitutional exercise of Congress' power under the Commerce Clause.¹⁷ In so holding, the Court rejected previous interpretations of the Commerce Clause that had placed severe limits on Congressional power to legislate regarding the private sector. The *Jones and Laughlin* decision signified a monumental shift in the power of the federal government in all fields of regulation. The legislative and judicial developments of the 1930s provided the legal infrastructure for the two-tiered labor law regime of the post-war era – legal support for collective bargaining and mandated minimum terms of employment. While there have been many developments in the interpretation of the NLRA, and many new employment protections enacted by both national and state legislatures, this basic structure has survived to this day.¹⁸

B. The Operation of the Collective Bargaining Laws

The labor laws of the 1930s use industrial era labor relations as the template for the employment relationship. They assume that workers were employed in stable jobs by corporations that valued long-term attachment between the corporation and the worker, and that workers are employed in narrowly defined jobs with pre-determined lines of promotional opportunities that build upon the firm specific skills acquired in their current positions. Some of the respects in which the labor laws were tailored to the industrial era workplace are discussed below.¹⁹

1. The Concept of the Bargaining Unit

Under the NLRA, collective bargaining is organized around the concept of a “bargaining unit.” If there is a sufficient showing of interest by workers in a particular workplace, the National Labor Relations Board (the NLRB or the Board) determines the “appropriate unit” and conducts an election among employees working in the unit to determine whether a majority favor the union.²⁰ If the union wins the election, the union is certified and becomes the exclusive

¹⁷ NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

¹⁸ For an overview of the history of labor law in the United States, see generally, Katherine V.W. Stone, *Labor and the American State: The Evolution of Labor Law in the United States*, in Marcel van der Linden and Richard Price, *THE RISE AND DEVELOPMENT OF COLLECTIVE LABOUR LAW* (Peter Lang, 2000).

¹⁹ For more detail on the ways in which the labor laws assume an internal labor market arrangement of jobs, see Katherine V.W. Stone, *FROM WIDGETS TO DIGITS* (2004).

²⁰ 29 U.S.C. § 159(b).

representative of the unit for purposes of collective bargaining.²¹ 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.²² Any contract concluded between the union and the employer applies to all jobs 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. At the same time, the employees in the unit lose their right to take collective action apart from their certified representative,²³ and the union has a duty to represent fairly all employees in the unit -- those that support the union and those that do not.²⁴

The bargaining unit is thus an integral part of the statutory scheme of the NLRA. The agency that administers the Act, the National Labor Relations Board (NLRB) determines on a case by case basis what constitutes an appropriate bargaining unit. The Board does so by attempting 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.²⁵ Under the community of interest test, bargaining units tend to have static job definitions and clear department boundaries. The community of interest test assumes a functionally delineated workplace in which work tasks are continuous and well defined. In addition, the NLRB has a preference for worksite-specific bargaining units and has adopted a presumption in favor of single facility units.²⁶ Yet, much

²¹ Under the National Labor Relations Act (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 NLRA. *See id.* at 596.

²² *See* Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 200–04 (1944).

²³ *See* Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 64, 69–70 (1975).

²⁴ *See* Vaca v. Sipes, 386 U.S. 171, 177, 182 (1967); *Steele*, 323 U.S. at 200–02.

²⁵ *See* NLRB v. Action Auto., 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).

²⁶ *See* Charrette Drafting Supplies Co., 275 N.L.R.B. 1294, 1296–97 (1985); Haag Drug Co., 169 N.L.R.B. 877, 877–78 (1968); Metro. Life Ins. Co., 156 N.L.R.B. 1408, 1414–15 (1966); Dixie Belle Mills, Inc., 139 N.L.R.B. 629, 631–32 (1962). *See generally* Howard Wial, *The Emerging Organizational Structure of Unionism in Low-Wage Services*, 45 RUTGERS L. REV. 671, 681 n.34, 710–11 (1993).

of today's work involves networks across multiple establishments or multiemployer tasks, defying traditional bargaining unit definitions. Thus the NLRB's approach to bargaining unit determination is in tension with cross-utilization and the blurring of boundaries typical of work practices today.²⁷

The bargaining unit focus of the NLRA also means that terms and conditions negotiated by labor and management apply to the 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, today individuals experience considerable movement in their work lives, both within firms, between firms, and in and out of the labor market. As a result, in today's world of frequent movement, union gains are increasingly ephemeral from the individual's point of view.

B. Secondary Boycott Prohibitions

Another feature of the NLRA that assumes the existence of bounded job definitions and internal labor markets is the prohibition of secondary boycotts. For a hundred years, courts have been hostile to efforts by unions to exercise economic pressure against entities that are not involved in an immediate dispute.²⁸ Congress has visited the issue of secondary boycotts repeatedly. In 1914, Congress enacted the Clayton Antitrust Act,²⁹ which purported to legalize peaceful secondary pressure. However, in 1921, in *Duplex Printing Co. v. Deering*, the Supreme Court gave the Clayton Act an extremely restrictive interpretation that effectively nullified its labor-protective provisions.³⁰ Subsequent pressure by organized labor and progressives induced Congress to

²⁷ 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).

²⁸ 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). See generally, See, e.g., FELIX FRANKFURTER & WILLIAM GREENE, *THE LABOR INJUNCTION* 161–62 (1931).

²⁹ Pub. L. No. 106-274, ch. 323, 38 Stat. 730 (1914) (codified as amended in scattered sections of 15 U.S.C.).

³⁰ 254 U.S. 443 (1921).

enact the Norris LaGuardia Act in 1932, in which Congress again attempted to legalize peaceful secondary conduct by unions.³¹ The Norris LaGuardia Act was upheld and interpreted broadly by the Supreme Court in the *United States v. Hutchenon* in 1941, but the legality of secondary conduct remained controversial.³² In 1947, Congress enacted section 8(b)(4) in the Taft-Hartley amendments to the NLRA, which rendered secondary boycotts unlawful under the NLRA.³³ The scope of section 8(b)(4) and the larger issue of the lawfulness of peaceful secondary conduct remain controversial issues to this day.³⁴

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 be confined to the immediate parties in a bounded arena of conflict. Within the unit, economic pressure is seen as potentially effective, yet comfortably containable. The effort to limit economic warfare to “primary” participants assumes that the unionized workplace has static borders and that disputes within the entity between the firm and its workers affect only those immediate and identifiable parties.

Despite its goal of limiting the scope of economic conflict, secondary boycott law has never been able to formulate a precise principled distinction between who is an insider and who is an outsider to a labor dispute.³⁵ In today's network production, the assumption that there can be discrete, bounded conflict with clear insiders and outsiders is becoming less plausible than ever. Rather, unions are finding with increased frequency that efforts to bring economic pressure to bear transverses traditional bargaining unit and corporate boundaries.

³¹ Pub. L. No. 106-274, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101–115 (1994)).

³² 312 U.S. 219 (1941). In *Hutchinson*, 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.

³³ See 29 U.S.C. § 158(b)(4).

³⁴ Courts continue to enjoin secondary activity in disregard of specific statutory directives 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).

³⁵ 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 Elec. Workers v. NLRB*, 366 U.S. 667 (1961) (discussing the difficulty of distinguishing primary from secondary activity). Accord, *Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e)*, 113 U. PA. L. REV. 1000, 1004 (1965).

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.³⁶

C. The Definition of Employee and Employer

The NLRA only provides protections for those individuals who fall within the statute's definition of an "employee." Individuals who work for multiple employers or the wrong kind of employer can easily fall outside the protection of the statute. Agricultural laborers, domestic workers, supervisors, and independent contractors are explicitly excluded from the Act, as are government employees and employees covered by the Railway Labor Act.³⁷ There are additional NLRB-made exclusions for managerial and confidential employees.³⁸ Furthermore, employees who have some supervisory authority over others, or who have managerial decisions delegated to them, are excluded from coverage.³⁹ In today's workplace, in which hierarchies have been flattened and decision-making authority has been delegated downward, the supervisory and managerial exclusions deprive many low-level employees of the protections of the Act.⁴⁰

³⁶ See, e.g., *Dowd v. Int'l Longshoremens' Ass'n*, 975 F.2d 779, 783–87 (11th Cir. 1992) (finding efforts by an American union to obtain assistance of a Japanese union in pressuring a Japanese-affiliated employer to be an unlawful secondary boycott); *Carpenters' Local Union No. 1478 v. Stevens*, 743 F.2d 1271, 1277 (9th Cir. 1984) (finding that a collective agreement that imposed terms of collective agreement on employer's nonunion subsidiary was improper); *D'Amico v. Painters & Allied Trades Dist. Council No. 51*, 120 L.R.R.M. (BNA) 3473, 3480 (D. Md. 1985) (finding the effort by a union to achieve anti-double-breasting contract language to be unlawful secondary activity).

³⁷ See 29 U.S.C. § 152 (2) & (3).

³⁸ See *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 177–85 (1981) (sustaining the Board's creation of confidential exclusion); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974) (sustaining managerial exclusion); *In re Ford Motor Co.*, 66 N.L.R.B. 1317, 1322 (1946) (confidential exclusion).

³⁹ See *NLRB v. Health Care & Ret. Corp.*, 511 U.S. 571, 578 (1994) (finding that charge nurses are "supervisors" under the statute because they assign work to nurse's aides); *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).

⁴⁰ See, e.g., *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001) (finding certain nurses to be "supervisors" even though they had no subordinates and had no authority to hire, fire, promote, reward, or evaluate other employees.)

The exclusion for independent contractors has become particularly problematic. Because the test for independent contractor status is broad, many who are dependent on a particular employer for their livelihood are nonetheless classified as independent contractors and deprived of all labor law protections.⁴¹ Increasingly employers attempt to reclassify employees and to vary their employment practices so as to transform their former “employees” into “independent contractors.”⁴² 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.

The independent contractor exclusion also eliminates coverage for many part-time and short-term temporary workers.⁴³ 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. Yet, when a worker has 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.⁴⁴

D. The Act’s De Facto Exclusion of Temporary Workers

⁴¹ See generally, Katherine V.W. Stone, *Legal Protections for Atypical Workers*, 27 Berkeley Journal of Employment and Labor Law, 251, 279 - 281 (2006).

⁴² See, Andrea H. Brustein, *Casual Workers and Employee Benefits: Staying Ahead of the Curve*, 7 Univ. Pa. J. of Labor & Empl. L. 695 (2005); Patricia Ball, *The New Traditional Employment Relationship*, 43 Santa Clara L. Rev. 901 (2003). See also, Lisa Lawlor Graditor, *Back to Basics: A Call to Re-Evaluate the Unemployment Insurance Disqualification for Misconduct*, 37 John Marshall L. Rev. 27, 60-61 (2003) (arguing that employers regularly misclassify employees as independent contractors to avoid paying unemployment insurance).

⁴³ 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.

⁴⁴ 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 an employer’s assertion that employees are independent contractors for purposes of eligibility for a stock purchase plan).

One area in which the bargaining unit focus of the NLRA has been particularly out of step with labor market reality concerns the Act's treatment of long-term temporary employees. Indeed, the evolving law of temporary workers illustrates the difficulty of applying static notions of bargaining units to the complex employment relationships that arise with today's peripatetic work force.

Since the 1980s, temporary employment has been the fastest growing portion of the labor market. 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.⁴⁵ In 1999, the Bureau of Labor Statistics reported that nearly 2 million employees worked for temporary-help agencies or contract labor provider firms.⁴⁶ 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 alongside the firm's regular employees, with the same skills, duties, and job classifications. In this triangulated employment relationship, the NLRB has considered both the temporary agency and the user firm to be joint employers 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 regular employees unless both the provider-agency employer and the user-employer consented.⁴⁷ Thereafter, the Board refused to consider any unit that combined temporary and regular employees, absent consent of both employers.⁴⁸ Because it is highly unusual for an employer to consent to its employees forming a union, the dual consent requirement made it virtually impossible for temporary workers to unionize.

In 2000, the NLRB reversed its former position and held that regular employees and temporary employees could be in the same bargaining unit so long

⁴⁵ GAO, CONTINGENT WORKERS: INCOME AND BENEFITS LAG BEHIND THOSE OF THE REST OF THE WORKFORCE 16 (2000); *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).

⁴⁶ *See* BLS News Release 99-362, *Contingent and Alternative Employment Arrangements*, available at <http://stats.bls.gov/news.release/conemp.news.htm> (Dec. 21, 1999).

⁴⁷ *See* Lee Hosp., 300 N.L.R.B. 947 (1990).

⁴⁸ *See, e.g.*, Int'l Transfer of Fla., 305 N.L.R.B. 150 (1991).

as they shared a community of interest.⁴⁹ The Board also stated that temporary employees could unionize in a bargaining unit of all the employees of a single temporary work agency. As a result, the NLRB began to permit temporary employees to be included in bargaining units that are comprised of temporary and regular employees of a single employer, or that are comprised of all employees of a single temporary agency. This ruling greatly expanded the possibilities for temporary workers to claim the protection of the labor law. However, in 2004 the NLRB again reversed itself in the case of *Oakwood Care Center and N & W Agency*, and reinstated the dual consent requirement for temporary worker organizing efforts.⁵⁰ As a result, temporary workers are not able to organize in units with the permanent workers they work alongside. Rather, if they want to unionize, they must do so together with the other workers employed by their temporary agency. Yet agency temporary workers are dispersed and have little contact with each other. Thus, as a practical matter, temporary workers lack representation or a collective voice under the labor law.

B. Statutory Protections for Individual Employees

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.⁵¹ 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.⁵²

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

⁴⁹ *Sturgis & Textile Processors*, 331 N.L.R.B. 1298, 165 L.R.R.M. (BNA) 1017 (2000).

⁵⁰ 176 L.R.R.M. (BNA) 1033 (2004).

⁵¹ Social Security Act of 1935, August 14, 1935, Ch. 531, 49 Stat. 620, codified as amended in scattered sections of 42 U.S.C.

⁵² Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 - 219.

1970s, individual employment protections were expanded by national legislation to provide occupational safety and health protection,⁵³ pension insurance,⁵⁴ expanded protection against discrimination for government employees⁵⁵ and pregnant women,⁵⁶ and protection for federal employee whistleblowers who report employer wrongdoing.⁵⁷ In the 1980s, the federal government enacted the Worker Adjustment and Retraining Notification Act (WARN) requiring employers to give their employees advance notice of plant closings and mass layoffs,⁵⁸ and the Employee Polygraph Act to provide protection for worker privacy interests.⁵⁹ 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.

In addition to the legislative developments described above, in the 1980s some state courts began to imply exceptions to the at-will employment doctrine, thereby giving workers in those states judicial protection against unfair dismissal. The exceptions were not uniform – some 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. Some courts became more receptive to the application of conventional torts to workplace harms. Thus, for example, some workers could recover for mistreatment under theories of the tort of

⁵³ 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.

⁵⁴ 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.

⁵⁵ Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified and amended in scattered sections of 29 U.S.C.)

⁵⁶ Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 42 U.S.C. 2000e

⁵⁷ 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.

⁵⁸ 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

⁵⁹ Employee Polygraph Act, 29 U.S.C. §§ 2001-2009

intentional infliction of emotional distress or defamation in job references. Despite these exceptions, however, the bulk of American nonunion workers remained subject to the at-will doctrine and basically unprotected for their job-related grievances.

Even with the expansion of individual worker statutory and judge-made rights, in many important respects the employment laws remain tailored to the industrial era workplace and are thus less effective in the workplace of today. For example, the New Deal social security and unemployment insurance programs 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.

Other types of employment law protections also assume an employment relationship and hence are not available to persons designated “independent contractors.” 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.⁶⁰ 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 get none. 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.⁶¹

III. The Demise of the New Deal System and the State of Labor and Employment Law Today

Because the labor and employment laws were tailored to the job structures of the industrial era of the 20th century, they have become obsolete as internal

⁶⁰ 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).

⁶¹ See generally, Katherine V. W. Stone, *Legal Protection for Atypical Employees*, 27 *Berkeley Journal of Employment and Labor Law* 253 (2006). See also, Lisa Horwedel Barton, *Reconciling the Independent Contractor Versus Employee Dilemma: A Discussion of Current Developments as they Relate to Employee Benefit Plans*, 29 *Cap. Univ. L. Rev.* 1079 (2002).

labor markets have declined in importance and new ideas about how to organize work have generated new work practices that are proliferating throughout American enterprises. 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 rapidly declining.⁶² 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. In addition, there has been an explosion in the use of atypical workers such as temporary workers, on-call workers, 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 career-long job security.⁶³

A new employment relationship is emerging to replace the industrial era internal labor markets. Today's world of speciality production and knowledge work has spurred the development of new job structures, the job structures of the "digital era." In the new digital era, theoretical and experimental approaches such as total quality management (TQM), competency-based organizations, and high performance work practice programs, are transforming business practices. The advocates of the competency-based organization emphasize skill development by insisting that employees be paid for the skills they have, rather than according to lock-step job evaluation formulas.⁶⁴ Skill-based pay, they claim, will give employees an incentive to acquire new skills and also make it incumbent upon

⁶² According to the United States Department of Labor's Current Population Survey, job tenure for men between 55 and 65, measured as the average time with a given employer, declined from 15.3 to 10.2 years between 1883 and 2002. For men between 45 and 54, it declined from 12.8 to 9.1; for men between 35 and 44, it declined from 7.3 to 5.1. BLS News Releases, 'Employee Tenure in 2002' (Sept. 25, 2002) <<http://146.142.4.23/pub/news.release/tenure.txt>> 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).

⁶³ For a detailed description of the changing workplace, see Katherine V.W Stone, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* (Cambridge University Press, 2004).

⁶⁴ See, Edward E. Lawler, III, *THE ULTIMATE ADVANTAGE: CREATING THE HIGH-INVOLVEMENT ORGANIZATION*, at 156 (1992).

employers to provide training and career development opportunities.⁶⁵ 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.⁶⁶

Despite differences in emphasis, the various approaches that comprise the new employment relationship share several common features.⁶⁷ 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.⁶⁸

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 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.⁶⁹

⁶⁵ See, *id.* at 144 - 156. See generally, Stone, *The New Psychological Contract*, 48 UCLA L Rev. at 560-565.

⁶⁶ See Joshua G. Rosett & Richard N. Rosett, CHARACTERISTICS OF TQM (NBER Working Paper No. 7241, 1999); Eric E. Anschutz, TQM AMERICA (1995). See generally, Stone, *The New Psychological Contract*, 48 UCLA L. Rev. at 565-568.

⁶⁷ 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).

⁶⁸ ROSABETH MOSS KANTER, E-VOLVE 192 (2001).

⁶⁹ THOMAS A. STEWART, INTELLECTUAL CAPITAL: THE NEW WEALTH OF ORGANIZATIONS, at ix (1997); THOMAS O. DAVENPORT, HUMAN CAPITAL: WHAT IT IS AND WHY PEOPLE INVEST IN IT 152-56 (1999).

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.⁷⁰

As part of the new employment relationship, firms now also provide employees with opportunities to interact with a firm's customers, suppliers and even competitors.⁷¹ 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,⁷² and the use of company-specific grievance mechanisms.⁷³

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

Today's valuation of employees' cognitive contribution stands in direct contrast to the scientific management approach. Under scientific management,

⁷⁰ ROSABETH MOSS KANTER, *ON THE FRONTIERS OF MANAGEMENT* at 175 (1997) (reporting that the tide is moving "toward more varied individual compensation based on people's own efforts").

⁷¹ For example, one of the most touted practices of Total Quality Management is that "management 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." Eric E. Anschutz, *TQM AMERICA: HOW AMERICA'S MOST SUCCESSFUL COMPANIES PROFIT FROM TOTAL QUALITY MANAGEMENT* 53 (1995).

⁷² See Janice Klein, *The Paradox of Quality Management: Commitment, Ownership, and Control*, in CHARLES HECKSCHER, *THE POST-BUREAUCRATIC ORGANIZATION*, 178 - 182.

⁷³ See JERALD GREENBERG, *THE QUEST FOR JUSTICE ON THE JOB* 32-39 (1996). See generally, Jason Colquitt, et. al., *Justice at the Millenium: At Meta-Analytic Review of 25 years of Organizational Justice Research*, 86 *J. of App. Psych.* 425, 435-36 (2001).

workers were not expected to gain or use knowledge in their jobs. Knowledge was a monopoly tightly held by management. Today, firms believe that they can acquire a competitive advantage by eliciting and harnessing the knowledge of their employees. According to *Fortune* magazine editor, Thomas Stewart, “Information and knowledge are the thermonuclear competitive weapons of our time.”⁷⁴

The emerging employment relationship has two diametrically opposed consequences. On the one hand, it creates a more interesting work environment and offers workers more autonomy and freedom than did the industrial era job structures. Yet on the other hand, for many it creates uncertainty, shifts risk, and fosters vulnerability. Some of the groups that are disadvantaged in the new work regime are easily identified. For example, older workers caught in the transition are heavy losers. Having been led to expect a good job and a secure future, they instead discovered that their expectations were chimeral.⁷⁵ Another group that has not fared well is the low-skilled – those who have neither the necessary training nor the ability to reinvent themselves, retool, and adapt to new labor market demands. A third group is the risk-adverse -- those who were comfortable in internal labor markets and lack the desire or initiative to seek out opportunities, to network, and to build their own careers.

In addition to the older, the unskilled, and the risk-adverse, all workers now face heightened risks at certain times in their working lives. Given the churning and constant change that characterize the new workplace, all face a high likelihood that their working lives will be peppered by occasional periods of unemployment. Therefore every worker requires a reliable safety net to ease the transitions and cushion the fall when they are left behind by the boundaryless workplace.

IV. Labor Law and Employment Protection in the Future

The foregoing historical perspective returns us to the question, what will the labor and employment law look like in the future? In the past, labor and employment laws were enacted as the result of pressure from organized labor and social reformers to ameliorate the vulnerabilities and injustices that occur in the

⁷⁴ Thomas A. Stewart, *INTELLECTUAL CAPITAL: THE NEW WEALTH OF ORGANIZATIONS*, at ix (1997).

⁷⁵ For example, a case study of white collar workers laid off at IBM and Link Aerospace in Binghamton, New York – two companies known for their paternalistic long-term employment relationships – concluded that “downsizing and displacement change the expectations about the relationships among workers and between employers and workers. C. Koeber, *Corporate Restructuring, Downsizing and the Middle Class: The Process and Meaning of Worker Displacement in the “New” Economy*, 25 *Qualitative Sociology* 217, 219 (2002).

operation of the labor market. The labor and employment laws in effect today share that origin. The problem for the future is that the labor and employment laws no longer provide redress for the most pressing problems of workers. The changing nature of work has caused new problems to arise in the operation of the labor market, problems that call for new kinds of regulatory interventions. Today workers move frequently between firms and within firms, so bargaining-unit based unionism gives little protection. And the employment laws do not give adequate protection to the individuals who move in and out of the labor market, or who do not have a typical relationship with a single employer.

There are two possible scenarios for the future of labor law. One scenario is that labor law will continue to atrophy, unions will continue to decline, and individual employee rights will be chipped away through the combined processes of narrowing judicial construction of existing rights, the development of a robust waiver doctrine whereby employees will have rights on paper but not in practice, pressures from globalization for lower labor standards, and a slow erosion of specific monetary standards through inflation. This scenario is a likely one given the declining power of unions at the legislative level that results from labor's declining numerical strength. Union political power is necessary to pressure politicians to maintain employment standards at current levels or raise them higher. In this first scenario, worker rights will decline in all the respects just mentioned, and we will see a return to the laissez-faire labor regulation of the pre-Wagner Act era.

The other scenario is that labor laws will evolve in a way that represents a marked break with the present in order to address the needs and concerns of individuals in the new workplace. I predict that changes will come in some or all of these respects:

1. a partial collapse of the distinction between labor law and employment law
2. an expanded focus on the legislative front rather than on collective bargaining to set employment conditions
3. an expansion of collective bargaining to new groups, such as independent contractors, atypical workers, immigrants, unemployed workers, and geographically-defined groups.
4. a broadening the field of labor and employment law to include all issues of concern to working people, such as health care policy, training and education, welfare, intellectual property protection, pensions and social security, housing policy, and other areas of social law.
5. the creation of a new type of social safety net to focus on the problem of transitions and gaps in people's labor market experiences.

In the remainder of this essay, I sketch some aspects of each of these items.

1. Collapsing the distinction between labor and employment law

As stated above, the U.S. system of employment regulation has maintained a distinction between the collective bargaining rights for unionized workers and individual employment rights for other workers. Though this distinction sounds fixed in theory, there has in fact always been a permeable boundary between these bodies of regulation. The labor law Section 301 preemption doctrine serves as the primary traffic cop that directs individuals with work-related disputes to one body of law or the other. However, the preemption doctrine itself has been an evolving and changing set of rules, so that some individual rights can be vindicated by individuals who have union contracts, and some cannot.⁷⁶

Recent developments have challenged this distinction. Increasingly workers with individual employment law claims have brought their claims in a collective form, either as class actions under most employment statutes, or as “collective actions” under the Fair Labor Standards Act. Class actions have long been a feature of employment discrimination litigation, but now they have spread to other types of alleged employment law violations. Collective actions under the FLSA are similar to class actions, but in some respects, the requirements for a “collective action” are easier for plaintiffs to satisfy than those for a class action under Rule 23 of the Federal Rules of Civil Procedure.⁷⁷ Collective employment disputes have been brought in both state and federal courts, alleging violations of both state and federal labor laws.⁷⁸

Employment class actions occupy the vast majority of work of management-side employment law firms. As one observer writes, “A sample of 150 FLSA “collective action” cases prosecuted by the Department of Labor as of January 2005 reads like a Who’s Who of corporate America, including Wal-Mart

⁷⁶ The general principle of Section 301 preemption, subject to some exceptions, is that if vindication of an individual employment right requires a court to interpret a collective bargaining agreement, the action is preempted and left to be decided in private arbitration. For a detailed discussion of how the preemption doctrine operates to mediate the boundary between labor law and employment law and how the doctrine has changed over time, see Katherine V.W. Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 Chi. L. Rev. 575 (1992).

⁷⁷ Collective actions under the FLSA are provided for at 29 U.S.C. Section 216. They do not have the same stringent requirements for numerosity and typicality that are imposed by Rule 23 of the Federal Rules of Civil Procedure for class actions, so it is easier under the FLSA for a collective action to be maintained.

⁷⁸ Examples of a state law class actions brought under a state employment law are *Ammenta v. Osmose*, 135 Cal. App. 4th 314 (2006) (California minimum wage law); . . .

(seven times in the previous five years); Bed, Bath & Beyond; Nortel Networks; Safeco Insurance Companies (twice); Pep Boys; Electronic Arts, Inc.; Minolta Business Solutions; Countrywide Credit Industries; Conseco Finance Corp.; NBC; Ameriquist Mortgage Co. (three times); First Union Corp.; and, Perdue Farms. Public entities being sued included the City of Louisville and the Chicago Transit Authority. The majority of these claims were misclassification cases, mostly for unpaid overtime.”⁷⁹

Through consolidation of claims, employment law collective actions can result in sizeable damage awards. For example, in recent wage and hour suits in California alone, the Coca-Cola Bottling Company settled a case for \$20.2 million, Bank of America settled for \$22 million, and Rite Aid Corp. settled for \$25 million.⁸⁰ In 2002, United Parcel Service agreed to pay \$18 million to settle a similar suit on behalf of misclassified supervisors.⁸¹ The same year, Starbucks Corp. also paid \$18 million to settle two class action suits on behalf of current and former managers and assistant managers in California who claimed that they had been misclassified as “exempt” employees and thereby denied overtime compensation.

Collective employment litigation, whether under technically “class actions” or FLSA “collective actions,” are an expanding form of collective action in an era of declining union activity. While such actions do not create the experience of solidarity and collective empowerment that unionization efforts and strikes do, they share some features with other conventional forms of collective action. They reflect a shared sense of work related wrong and they define a group of workers –the class – as having a shared interest. They also operate through representatives, the named plaintiffs and the class counsel, who speak to management for the workers and, at least in theory, represent their interests. Collective employment actions are greatly feared by management because, apart from their potential exposure, the suits are on-going disputes with incumbent employees who are presumably disgruntled and thereby potentially poisonous to general workplace morale.⁸²

⁷⁹ Scott Miller, *Class Action, Collective Action, and Collective Bargaining*, (unpublished manuscript available from author, May, 2007), citing Alaimo, et al., *Emerging FLSA Trends*, 84 Mich. Bar Journal 15 (2005)

⁸⁰ David Hechler, “Suits by Workers Over Wages Increase,” 24 *The National Law Journal* A15 (2001).

⁸¹ Ogletree, Deakins, Nash, Smoak & Stewart, P.C., “Another Day, Another Multimillion-Dollar Settlement,” 12 *California Employment Law Letter* 1 (November 11, 2002).

⁸² This point was made to me in conversation by the head of employment litigation for one office of Jackson, Lewis law firm, the largest employer-side employment law firms in the United States.

Class actions also have some obvious and significant differences with conventional unionization efforts. First, they do not generally involve the type of mobilization that typically occurs in a union drive. Furthermore, they do not aim to form lasting organizations nor do they offer the prospects of an on-going bargaining relationship between workers and an employer over the whole range of issues involved in the employment relationship. They take a long time to run their course, but essentially they are one-shot, single issue challenges to a company's employment practices. And they also do not generally foster the type of bonds of solidarity on which conventional unionism relies.⁸³ And finally, they seek to vindicate pre-existing statutory rights, not to define the normative rules that shall govern the workplace. That is, unlike collective bargaining, they are not an exercise in labor-management self-regulation.

It is interesting to note that the features of collective employment actions that distinguish them from collective bargaining parallel the broad changes in the work force. In collective litigation, relatively atomistic employees come together to fight on one issue. Some class members may not be employed by the defendant at the time of the lawsuit, and the members of the class often have never met each other. Once the suit is over, any bonds of solidarity dissolve. This is similar to the mobile, self-contained knowledge worker that is the paradigm of today's worker. Hence it is possible that ex post single issue workplace governance is the form that collective action will continue to take in the future.⁸⁴

Despite the differences between collective employment litigation and collective bargaining, as unions decline collective litigation has become an important venue for the protection of employment rights. Their profusion suggests that this may be an important form of employee collective action for the future. If that is the case, then the specific legal requirements of maintaining a collective legal action – whether a class action or a FLSA collective action – will come under increased scrutiny. For example, in some employment discrimination litigation, courts have begun to question the application of Rule 23(b)'s commonality and typicality requirements to workplaces in which management authority is diffuse and delegated to lower-level supervisors.⁸⁵ This issue is posed

⁸³ For an incisive account of the relationship between unionism and solidarity, see Claus Offe and Helmut Weisenthal, *Two Logics of Collective Action*, in Claus Offe, *DISORGANIZED CAPITALISM* (1980).

⁸⁴ I am grateful to Professor Fred Tung of Emory Law School for this insight.

⁸⁵ Compare *Allen v. Chicago Transit Authority*, 2000 WL 1207408 (N.D. Ill. 2000) (finding no commonality and hence refusing to certify class action where the company had neither a highly centralized nor entirely subjective method of determining promotions) with *McReynolds v. Sodexo Marriott Services, Inc.*, 208 F.R.D. 428 (D.D.C. 2002) (certifying class action alleging employment discretion despite the company's decentralized decision-making structure and lack of uniform promotion policy). See generally, Stone, *FROM WIDGETS TO DIGITS*, at 174 - 178.

presently in the behemoth employment discrimination case, *Dukes v. Wal-Mart Stores*, involving 1.5 million present and former Wal-Mart employees.⁸⁶ There is similar debates about the requirement in FLSA collective actions that class members “opt in” rather than “opt out” as is permitted under Rule 23.⁸⁷ As employment class actions continue to proliferate, these procedural requirements will take on added significance.

Another feature of these new types of collective actions is the involvement of unions. More and more, unions are financing and otherwise assisting unorganized workers in mounting employment class actions. For example, the United Food and Commercial Workers Union has been actively involved in wage and hour suits against Albertson’s grocery chain, Tyson Foods, Perdue Farms, and the Nordstrom retail chain.⁸⁸ The Writers’ Guild sponsored several wage and hour class action lawsuits against television reality shows even though the employees involved were not represented by the union.⁸⁹ Some have argued that by assisting these types of actions, unions can gain a foothold in unorganized workplaces that could lead to greater organizing success down the road. While there is no evidence to date that this has occurred, it remains a hopeful prospect for a labor movement that is experiencing hemorrhaging losses.

Before we can conclude that collective employment actions are either a substitute for actual unionization or a foot-in-the-door method to revitalize the union movement, it is necessary to look at some legal issues that are waiting in the wings. One issue is whether a union, by giving unorganized workers financial assistance in the form of legal representation in employment litigation, is giving an unlawful benefit to improperly influence workers’ choice whether or not to unionize. Some have argued that when a union finances an employment litigation, it is an unlawful payment of benefits and hence a violation of Section 8(a)(1) of the statute.⁹⁰ Another issue that might arise is whether a union that

⁸⁶ *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004), *aff’d* *Dukes v. Wal-Mart Stores, Inc.*, 474 F. 3d 1214 (9th Cir. 2007), *withdrawn and superseded by Dukes v. Wal-Mart Stores, Inc.*, 509 F. 3d 1168 (9th Cir. 2007) (affirming lower court’s class certification).

⁸⁷ See, e.g., Catherine R. Ruckelshaus, *Labor’s Wage War*, 35 *Fordham Urb. L.J.* 373, 386-388; Matthew W. Lampe, E. Michael Rossman, *Procedural Approaches For Countering The Dual-Filed Flsa Collective Action And State-Law Wage Class Action*, 20 *Lab. Law.* 311, 313-316 (2005).

⁸⁸ David Hechler, *Suits by Workers Over Wages Increase*, 24 *National Law Journal* 1 (2001).

⁸⁹ *Sharp v. Next Entm’t*, LASC Case No. BC 336170 (filed July 7, 2005) and *Shriver v. Rocket Sci. Labs., LLC*, LASC Case No. BC 338746 (filed Aug. 23, 2005). See generally, Amanda Bronstad, “More 'story tellers' claim overtime,” 27 *Los Angeles Business Journal* 10 (August 29, 2005).

⁹⁰ Add cite.

participates in the negotiation of a settlement of an employment class comprised of unorganized workers is acting in a representative capacity without having attained majority status. In such a case, its actions will violate section 8(a)(2) of the statute. If union involvement in employment class actions are to be an important tactic in the future of the union movement, the labor law will need to be modified to address these issues.

2. Shifting from collective bargaining to legislation to set employment conditions

As explained above, the New Deal system involved setting the core conditions of the employment contract by bargaining, whether collectively or individually, between the worker and the employer. The individual employment standards were set at a minimal level. For example, the minimum wage is so low that a worker working full time at minimum wage would not receive the poverty level wage for a family of four. The legislation anticipates that workers with sufficient bargaining power will bargain for wages above the set minimum. Similarly, state workers compensation laws vary as to their adequacy, but none of them provide full income replacement for workers injured on the job.

In recent years, as unions have declined, more statutory employment rights have been created that are applicable to all workers, whether unionized or not. In addition, as unions decline, the nature of legislated individual employment rights have shifted from a floor to a baseline. That is, the more recent employment standards are not designed to set bare minima, but to set an adequate baseline level of protection. For example, the Occupational Safety and Health Act imposes a “general duty on employer to provide each worker a work environment that is free from identified hazards.” Similarly, workplace privacy protections and employment discrimination legislation is designed to ensure individuals a workplace that is free of discrimination and respectful of employee privacy. This is not to say that these and other employment rights are set at an optimal or even a truly adequate level. For example, the family and medical leave act mandates a minimal period of leave for child-bearing, but does not mandate pay replacement for the period of the leave. But unlike the original New Deal employment rights, the more recent statutory rights are intended to apply to a majority of workers, not merely those at the margins of subsistence.

This change in the nature of employment rights and the increase in rights for all employees represents a shift in the locus of employment regulation away from collective bargaining and toward the state. In a similar fashion, some legislatures and state courts have fashioned exceptions to the at-will rule – albeit generally narrow exceptions -- which have come to supplant the just cause protection that used to be found in union contracts. Some exceptions take the form of non-retaliation protection found in other employment statutes, and some take the form of judicially created doctrines such as the tort of unfair dismissal.

This is not to say that union contracts no longer offer job security protection nor that state and federal exceptions are ample or widespread, but rather than as unions decline, courts and legislatures have to some extent stepped in.

The shift from collective bargaining to legislation does not necessarily signal the end of unionism, but rather presages a change in union strategy and tactics. Unions may shift their focus from exerting employer-specific pressure to exerting pressure in the political arena, including federal, state and local. This would represent a significant turn from the U.S. labor movement's traditional position that dates back to Sam Gompers in the 1890s that union pressure was most effective in the economic realm rather than in the political realm. As discussed above, employer-centered union pressures are rendered less effective than they were in the past because employees have little attachment to either a specific employer or a particular craft group.

In terms of the future of employment law, we can expect not only more employment laws, but also more controversy about them. We can expect an increased role of labor in politics and with it, increased litigation about union political expenditures. There is a storm of litigation about the *Beck* rules concerning which fees must be paid by individuals who are in unionized bargaining units but have chosen not to be members. This issue and others resulting from unions' involvement in politics will increase in their urgency.⁹¹

3. Expanding collective bargaining to new groups, particularly geographically-defined groups

There is evidence that employees feel they need unions, but not necessarily the unions that now exist.⁹² Given the decline of worker-firm attachment, workers need organizations that further their joint interests but that are not pegged to a particular employer. Because workers move frequently within and between firms throughout their working lives, there needs to be a mechanism for workers to deploy their collective power to negotiate conditions across employers.

At the present time, some new types of organizations are forming that attempt to engage in a form of bargaining with multiple employers that are in different industries or utilize workers with differing skills. For example, in many cities, unions have worked with community groups to enact living wage

⁹¹ Marick F. Masters, Ray Gibney & Tom Zagenczyk, *Worker Paycheck Protection: Implications For labor's Political Spending and Voice, Industrial Relations* (manuscript on file with author); Marick F. Masters & Ray Jones, *The Hard and Soft Sides of Union Political Money*, 20 J. Lab. Res. 297 (1999).

⁹² Richard Freeman and Joel Rogers, WHAT DO UNIONS DO?

ordinances to improve labor standards for low wage public sector employees.⁹³ Presently there are there are city-wide living wage ordinances in Baltimore, Los Angeles, and other places as a result of area-wide political pressures by community and labor groups. Although such ordinances are limited to public sector employees, they suggest a new form of bargaining for workers across industries on a locality-wide basis. We could foresee city ordinances that set industrial safety codes, mandate paid family leave, require employers to provide health insurance, and address other issues that are part of the shared needs of all working people in the area. living wage ordinances.

In a similar vein, in Los Angeles, San Antonio, and some other cities, unions and community groups have worked together to negotiate agreements with city authorities and private investors to provide job creation, job training, affordable housing, social services, public parks, and other community improvements in exchange for support for development projects.⁹⁴ There have also been multiple-employer organizing efforts of immigrant workers within particular sectors.⁹⁵ In many cities, worker centers have developed to inform low wage workers, often immigrants, of their legal rights.⁹⁶

The present labor law does not easily accommodate area-wide multi-employer, multi-sector bargaining, particularly when it involves union-community partnerships on one side, and multiple employers and city agencies on the other. However, organizations that engage in such efforts could provide important benefits for workers in today's labor market. Although workers change jobs more than in the past, they usually find new jobs in the same geographic area of their previous jobs. Hence it would be desirable for the labor law to facilitate area-wide bargaining on such issues as minimum pay levels, health and pension benefits, leave policies, safety standards, job training programs, job transfer rights, and employment benefits at the local and/or regional level. To do so, the labor law would have to abandon the present notion of bargaining units, and devise another mechanism for determining legally sanctioned bargaining rights.

⁹³ See Stone, *Privization, Globalization and Privatization: Three Challenges to Labour Rights in Our Time*, 44 Osgood Hall L. J. 77, 98 - 99 (2006).

⁹⁴ For a detailed account of the union-community alliances and the negotiation of a "community benefits agreement" in Los Angeles, see Scott L. Cummings, *Mobilization Lawyering: Community Economic Development in the Figueroa Corridor*, in Austin Sarat & Stuart A. Schiengold, eds., *CAUSE LAWYERS AND SOCIAL MOVEMENTS*, 313 - 324 (Stanford Univ. Press, 2006). On similar efforts undertaken by the Industrial Areas Foundation in San Antonio and other cities in Texas, see Paul Osterman, *GATHERING POWER: THE FUTURE OF PROGRESSIVE POLITICS IN AMERICA* (Beacon Press, 2002).

⁹⁵ See, e.g. Ruth Milkman, *LA STORY* (2006).

⁹⁶ See, e.g., Jennifer Gordon, *SUBURBAN SWEATSHOPS*; Janice Fine, *WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE AMERICAN DREAM* (2006).

Proposals for geographic unions, such as put forward by Charles Heckscher, Raymond Miles, and this author, can serve as a starting point.⁹⁷

One objection to these initiatives is that the more that unions exert pressure on corporations at the local 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 people. Absent some particular reason for remaining in a particular locale, corporations will tend to move to locations that have the lowest labor costs.⁹⁸

While 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 cost location. Sometimes corporations want to take advantage of a specifically trained labor force, and sometimes they want to be near particular markets or raw materials.⁹⁹ In today's world, often corporations want to be near others that produce in their field 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.¹⁰⁰ This led economists to hypothesize that when certain types of firms were located in proximity to each other, they all received value from the fact of 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

⁹⁷ See, Raymond E. Miles, *Adapting Technology to Competition: A New Industrial Relations System for the 21st Century*, Cal. Mgmt. Rev., Winter, 1989, 23 - 25 (advocating a turn to geographically based unionism); Charles Heckscher, ASSOCIATIONAL UNIONISM (...); Stone, FROM WIDGETS TO DIGITS, 217 - 239. For details about the labor law changes that such proposals would require, see Stone, FROM WIDGETS TO DIGITS, supra.. at 237 - 239.

⁹⁸ See Katherine Van Wezel Stone, *To the Yukon and Beyond: Local Laborers in a Global Labor Market*, 3 J. OF SMALL & EMERG. BUS. LAW. 93, 96-98 (1999); Katherine Van Wezel Stone, *Labor and the Global Economy*, 16 MICH. J. OF INT'L LAW 987, 992-94 (1995).

⁹⁹ See Stone, *To the Yukon and Beyond*, id at 97-98.

¹⁰⁰ See generally, John M. Quigley, *Urban Diversity and Economic Growth*, 12 J. OF ECON. PERSPECTIVES 125, 132 (1998) (describing studies).

firms.¹⁰¹ One well-known example is Annalee Saxenian's description of the dramatic effects of agglomeration in the Silicon Valley computer industry.¹⁰² The clusters of biotechnology firms around Princeton, New Jersey, of banking and financial firms in New York City, and computer hardware manufacturing firms around Austin, Texas are other examples of successful localized agglomeration economies.

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 geographic unions might mobilize are measures which 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 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 and ensuring that the benefits were not captured by a competitor. 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 education attainment, that would help attract a high skilled workforce. In this way, the prospects of agglomeration economies combined with corporations' increased reliance 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.

4. *Broadening the labor and employment law field*

The field of labor and employment has until now been seen as narrowly related to issues that arise in the employer-employee relationship in the workplace. However, given today's fluid and boundaryless workplace, issues concerning work and of concern to workers do not always involve their relationships to their immediate employer. Rather, labor and employment law implicates many other areas of law that regulate one's relationship to the labor market. These include issues such as health insurance, training and education, welfare assistance, pensions and social security. Also, there are new issues that

¹⁰¹ See, e.g. Matthew P. Drennan, *National Structural Change and Metropolitan Specialization in the United States*, 78 REGIONAL SCIENCE 297, 314-15 (1999) (empirical study finding agglomeration economy in information-intensive industries in urban areas). See generally, Edward L. Glaeser, *Are Cities Dying*, J. of Econ. Perspectives 139, 148-50 (1998) (citing studies).

¹⁰² Annalee Saxenian, REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128 (1994).

have arisen for workers in their capacity as workers as a result of the new employment practices.

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

The law of post-employment restraints – covenants not to compete and trade secret law – has always been complex and untidy. The area is a primal soup mixing considerations, including employees' interests in job mobility, employers' interests in protecting business secrets, the public interest in a free labor market, and courts' interests in enforcing contracts. In the past 10 years, 44 states have passed states to change their laws on post-employment restraints in ways that are more restrictive of employees and favor employers. In addition, many courts have adopted new approaches that have expanded the criteria under which covenants will be enforced, and have expanded their definition of trade secrets to give employers more protection. Some of these new criteria and doctrines are in direct conflict with the terms and implicit understandings of the new employment relationship. For example, many courts now say that it is legitimate for employers to impose covenants to protect customer contact and employer investment in employee training. However, the new employment relationship promises to give employees networking opportunities and training for their own future employability. In this area, judicial interpretation is occurring without a proper understanding of the changes in the employment relationship. It is therefore necessary to develop a framework for deciding disputes involving the ownership of human capital in a fashion that protects the individual employee's control of her own knowledge and hence her ability to exert individual power in the labor market.

5. *Creating a new type of safety net such as workplace sabbatical/ social drawing rights*

In the future, it will be important to create a new type of social safety net, one tailored to the vulnerabilities of the workplace of today. Because most workers today will experience discontinuities in their labor market experiences, they need a way to provide for gaps and transitions. This will require portable health benefits, lifetime training and retraining opportunities, universal and adequate old age assistance, and other forms of assistance for individuals who are in periods of transition between jobs or changing careers.

To date, neither our welfare laws nor our labor and employment laws have focused on the problem of transition assistance. However, the issue has been actively considered in Europe where a group of distinguished labor relations experts was convened by the European Commission in 1999 to consider the implications of the changing nature of work. 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 and to devise proposals for reform. In 2000, the group 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. The authors 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.¹⁰³

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 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

¹⁰³ 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 Economy: A Debate on the Supiot Report* (Centre for Economic Performance, London School of Economics, July 2001).

are social both in the way they are established . . . and in their aims (social usefulness).”¹⁰⁴

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 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.”¹⁰⁵ 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, or to use more familiar parlance, a workplace sabbatical.

A workplace sabbatical would be a right, accrued by time spend in the labor force, to paid leave for the purpose of retooling, retraining, and repositioning oneself in the labor market. This right should be made a part of the contract of employment similar to a right to unemployment compensation. The workplace sabbatical right should not be an implied in fact term of the contract of employment – that is, it does not depend upon an employer implicitly promising employability, training and networking opportunities, and hence it cannot be disclaimed or waived. Rather, the right to a workplace sabbatical should be an implied-in-law term that it grows out of the recognition that workers today are vulnerable to changing technological demands, and need opportunities to change and develop their human capital as they face a lifetime of job transitions. The justification for imposing such a term is that it tracks the normative as well as practical reality of today’s workplace.

¹⁰⁴ Alain Supiot, et. al., *Beyond Employment* at 56.

¹⁰⁵ *Id.*

Conclusion

The workplace is changing and the labor and employment laws will 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. Currently our labor and employment laws do not address these problems, either for regular or for atypical workers. The changing nature of work has rendered much of the legal framework obsolete, and a new framework will be created to take its place. It remains to be seen whether the new framework will be a free market framework of laissez faire capitalism, or whether it will be the creation of a new type of rights and safety net that enables workers to thrive in the new workplace.