

EMPLOYEE REPRESENTATION IN THE BOUNDARYLESS WORKPLACE[†]

KATHERINE V.W. STONE*

INTRODUCTION

According to the Bible, the voice of the turtle is the harbinger of spring.¹ From unlikely places come portents of great change. In the employment relationship, there is a transformation underway no less dramatic than the change of the seasons, and it is presaged by signs as obscure and unlikely as the ancients' articulate turtle.

One sees signs of the change in the terminology of work. Employees are no longer "workers" or even "employees"—they are professionals in a particular skill or line of work. Cafeteria workers are now termed "Members of the Culinary Service Team"; salespeople are now "Sales Associates"; clerical workers are "Administrative Assistants"; and cashiers are "Cash Register Professionals." These new-breed professionals have their own web pages, magazines and trade conferences in which they network with others like themselves and keep abreast of opportunities and developments.

We also see evidence of change in the methods and strategies of job seekers. Job seekers today approach the labor market like generals preparing for a strategic air strike. They stake out their target companies on the Internet, gathering intelligence from former and current employees about the culture and customs of the local worksite. They study the garb of the local population to determine whether casual attire or professional attire is the appropriate

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* Professor of Law and Anne Evans Estabrook Professor of Dispute Resolution, Cornell Law School and Cornell School of Industrial and Labor Relations. This Article was delivered as the Twenty-second Annual Kenneth M. Piper Lecture, Chicago-Kent College of Law, April 2000. Portions of it appear in Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 (2001). The author would like to thank Anne Torrey and Danielle Van Jaarsdale for exceptional research assistance.

1. *Song of Solomon* 2:10–12 (King James).

camouflage for their interview. And they calibrate their primary weapon—the resume—to the terrain they expect to encounter.

Resumes are no longer crisp, chronological lists of schools attended and positions held. Today, resumes are narratives about skills mastered and tasks performed. Resume preparation services advise applicants to organize their resumes on a functional rather than a chronological basis, emphasizing abilities and potentials rather than work history. Such a resume does not highlight either past employers or the sequence of jobs. Indeed, one has to read a resume carefully to find the name of employers or the sequence of jobs.

Evidence of change is also apparent in employer recruitment tactics. Employers are using new approaches to attract applicants and are offering incentives tailored to the new sensibilities. McDonald's advertises on the radio and offers training in skills like management and finance—areas that go far beyond the immediate tasks of operating a register or making fast food. Burger King offers to help with college tuition.

At the other end of the spectrum, business consultants talk about the “talent wars” of recruitment. They advise firms to restructure human resource policies in order to attract the top talent by offering learning opportunities, lifestyle perks, and performance incentive compensation. For example, in his recent book *Winning the Talent Wars*, Bruce Tulgan advises that if firms wish to retain valued employees, they need to permit people to customize their jobs to suit their own ambitions and lifestyles.² He states that firms should let their employees select their work tasks, work location, schedule, and learning opportunities.³ In Tulgan's view, employees are free agents operating in a free talent market, so they should be offered whatever it takes to attract and keep them—whatever it takes except promotion opportunities or job security.⁴

Rosabeth Moss Kanter similarly advises firms that to attract a committed workforce, they need to make employees feel welcome and valued.⁵ She suggests giving employees gifts to welcome them into the workplace community, giving them buddies and mentors to cement their bond, staging periodic formal and informal recognition

2. BRUCE TULGAN, *WINNING THE TALENT WARS* 155–57 (2001).

3. *Id.*

4. *Id.* at 176–77.

5. ROSABETH MOSS KANTER, *E-VOLVE!: SUCCEEDING IN THE DIGITAL CULTURE OF TOMORROW* (2001) [hereinafter KANTER, *E-VOLVE*].

ceremonies to foster positive feelings, providing family-friendly schedules to accommodate private lives, and in other ways creating a culture of respect and trust.⁶ Conspicuously absent from her proposals are promises of job security. Rather, Kanter says, firms need to build commitment, not blind loyalty.⁷

These observable trends reflect what management theorists and industrial relations specialists call the “new psychological contract,” or the “new deal at work.” In the new deal, the long-standing assumption of long-term attachment between an employee and a single firm has broken down. No longer is employment centered on a single, primary employer. Instead, employees now expect to change jobs frequently. No longer do employees derive their identity from a formal employment relationship with a single firm; rather, their employment identity comes from attachment to an occupation, a skills cluster, or an industry. At the same time, firms now expect a regular amount of churning in their workforces. They encourage employees to look upon their jobs differently, to manage their own careers, and not to expect career-long job security.

In recent years, many have written about the new deal at work, but few have considered the policy implications. From a policy perspective, it is important to define precisely what the new deal is and how it differs from the old deal. Once we understand the terms of the new employment relationship—the explicit and implicit promises, terms, obligations, and expectations that both parties bring to bear—we can evaluate the new workplace from the perspective of fairness to individuals, equity between individuals, and justice society-wide. Such an understanding will also enable us to reconsider existing labor and employment laws and to determine which aspects of the regulatory framework need to be retained and which ones abandoned. In this way we can begin to design a system of labor and employment law that can provide employee protection and social justice in the new workplace.

I. THE CONTOURS OF CHANGE

In the past, most large corporations organized their workforces into what has been termed an “internal labor market.”⁸ In internal

6. *Id.* at 211–14.

7. *Id.* at 225–26.

8. See PETER B. DOERINGER & MICHAEL J. PIORE, *INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS* (1971). For a discussion of the history of internal labor markets in

labor markets, jobs were arranged into hierarchical ladders and each job provided the training for the job on the next rung up. Employers who utilized internal labor markets hired only at the entry level and then utilized internal promotion to fill all of the higher rungs. Employers wanted employees to stay a long time, so they gave them an implicit promise of long-term employment and of orderly and predictable patterns of promotion. Consistent with internal labor market job structures, employers structured pay and benefit systems so that wages and benefits rose as length of service increased.

In recent years, employers have dismantled their internal labor market job structures and abandoned the implicit promises that went along with them. Instead, they are creating new types of employment relationships that neither depend upon, nor encourage, longevity.⁹ Employers make these changes to gain the flexibility needed to cross-utilize employees and make quick adjustments in production methods as they confront increasingly competitive product markets. Work has thus become contingent, not merely in the sense that it is formally defined as short-term or episodic, but also in the sense that the attachment between the firm and the worker has been weakened.¹⁰ Employment no longer depends upon having an ongoing relationship with an employer. Rather, we are witnessing the “recasualization” of the regular, full-time employment relationship.

Changes in the employment relationship are evident in the employment data on job tenure and turnover. Labor economists report a significant decline in male job tenure in the 1990s.¹¹ Thus, for

American industry, see Katherine Stone, *The Origins of Job Structures in the Steel Industry*, in LABOR MARKET SEGMENTATION 27 (Richard C. Edwards et al. eds., 1975) [hereinafter Stone, *Job Structures*]. For a thoughtful review of the recent economic literature on internal labor market institutions, see CLAUDIA DALE GOLDIN, UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN 247 (1990).

9. See, e.g., *The Future of Work: Career Evolution*, ECONOMIST, Jan. 29, 2000, at 89; see also PETER F. DRUCKER, MANAGING IN A TIME OF GREAT CHANGE (1995); ROSABETH MOSS KANTER, ON THE FRONTIERS OF MANAGEMENT 190 (1997) [hereinafter KANTER, FRONTIERS]; RICHARD SENNETT, THE CORROSION OF CHARACTER: THE PERSONAL CONSEQUENCES OF WORK IN THE NEW CAPITALISM 23 (1998); see generally Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 (2001) [hereinafter Stone, *Psychological Contract*].

10. Some scholars have emphasized the increase in temporary, part-time and other forms of atypical work to describe the increased contingency in the employment relationship. See, e.g., Gillian Lester, *Careers and Contingency*, 51 STAN. L. REV. 73 (1998). While these types of employment have indeed been growing rapidly, they remain a minuscule portion of the workforce. See generally Stone, *Psychological Contract*, *supra* note 9, at 539–49. More important are changes occurring in the nature of full-time “regular” employment.

11. See David A. Jaeger & Ann Huff Stevens, *Is Job Stability in the United States Falling?: Reconciling Trends in the Current Population Survey and the Panel Study of Income Dynamics*,

example, the Bureau of Labor Statistics of the Department of Labor found a significant decline in the proportion of men who have been with their current employer for ten years or more between 1983 and 1998.¹² For men ages forty to forty-four, it declined from 51 percent in 1983 to 39 percent in 1998.¹³ Similar large declines occurred for men in every age group over forty-five.¹⁴ Men between ages fifty-five and sixty-four have also seen their median years on their current job decline from 15.3 in 1983 to 11.2 in 1998.¹⁵ For men ages forty-five to fifty-four, the decline was from 12.8 years to 9.4 years.¹⁶ These are dramatic changes. Princeton economist Henry Farber analyzed the data and found that the most pronounced decline was in the job tenure of men with a high school diploma or less.¹⁷ That is, those blue-collar men who were the beneficiaries of the internal labor markets of the past have seen their job security dissipate.

For women, there was not such a marked decline, and in some cases there was even a modest rise.¹⁸ But because women have not traditionally been part of the long-term employment system, the overall percentages of women working for ten years or more is significantly lower than men in any event.¹⁹

In addition to the aggregate economic data, we know a lot about the contemporary labor market from the accounts of journalists, researchers, and corporate executives. These informants report that there is a fundamental change in the implicit, psychological contract under which most Americans are now employed. For example, sociologist Richard Sennett interviewed a number of younger employees about their experiences in the labor market, and reports:

The most tangible sign of that change might be the motto "No long term." In work, the traditional career progressing step by step through the corridors of one or two institutions is withering; so is

17 J. LAB. ECON. S1, S24-S25 (1999).

12. News Release, Bureau of Labor Statistics, Employee Tenure in 2000 (Aug. 9, 2000), BLS NEWS RELEASES, at <http://www.bls.gov/news.release/tenure.t01.htm>.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. HENRY S. FARBER, ARE LIFETIME JOBS DISAPPEARING? JOB DURATION IN THE UNITED STATES: 1973-1993 20-24 (Nat'l Bureau of Econ. Research, Working Paper No. 5014, 1995).

18. Bureau of Labor Statistics, *supra* note 12.

19. *Id.*

the deployment of a single set of skills through the course of a working life.²⁰

Sennett also interviewed an executive at AT&T who told him: "In AT[&]T we have to promote the whole concept of the work force being contingent, though most of the contingent workers are inside our walls. 'Jobs' are being replaced by 'projects' and 'fields of work.'" ²¹

Jack Welch, the miracle-maker CEO of General Electric Company, expressed the same sentiment eloquently when asked by the *Harvard Business Review* in 1989, "What is GE's psychological contract with its people?" Welch replied:

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

That kind of loyalty tends to focus people inward. But given today's environment, people's emotional energy must be focused outward on a competitive world where no business is a safe haven for employment unless it is winning in the marketplace. The psychological contract has to change.²²

The popular management theorist, Peter Drucker, stated bluntly: "[T]here is no such thing as 'lifetime employment' anymore—such as was the rule in big U.S. or European companies only a few years ago. . . ." ²³ Thomas Davenport, a principal in the management consulting firm Towers Perrin, writes, "Has the psychic contract evolved since 1983? You bet it has."²⁴

Why are corporations restructuring their employment practices? Work practices are being adjusted to production requirements. As firms are forced into a more competitive environment through increased trade and global competition, they have to pay more attention to short-term cost reduction. In addition, the takeover battles in the market for corporate control force firm managers to be

20. SENNETT, *supra* note 9, at 22.

21. *Id.*

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

23. See DRUCKER, *supra* note 9, at 71 (describing changes in composition of temporary workers).

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

responsive to short-term changes in revenues and demand. Part of this responsiveness involves just-in-time production, just-in-time product design, and just-in-time workers.

II. THE VIEW FROM ORGANIZATIONAL THEORY

The essential features of the new employment relationship are best understood in the terminology of organizational behavioral theory. These researchers both study contemporary human resource practices and advise human resource professionals about how to create a workplace that can function smoothly and efficiently in today's competitive environment. The core conceptual building blocks of their approaches are three concepts: the psychological contract, the boundaryless career, and organizational citizenship behavior. It is important to understand these concepts in order to address questions for employee representation in the new workplace.

A. *The New Psychological Contract*

To understand these changes in the employment relationship, scholars of organizational behavior have developed the concept of a "psychological contract" between an employee and the firm. The term "psychological contract" refers to an individual's *beliefs* about the terms of his or her employment contract,²⁵ and the employee's perceptions of the terms of a reciprocal exchange.²⁶ A psychological contract is distinguished from mere expectations, which reflect the employee's hopes and aspirations but not the belief in mutual obligation.²⁷ When expectations are not met, an employee is disappointed; when a psychological contract is breached, the employee feels wronged.²⁸ Researchers find that "[f]ailure to honor a contract creates a sense of wrongdoing, deception and betrayal with pervasive implications for the employment relationship."²⁹

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

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

27. See Robinson & Rousseau, *supra* note 25, at 246.

28. See *id.* at 247.

29. *Id.*

Academic interest in the notion of psychological contracts developed in a period in which middle management employees in large American corporations were the victims of large-scale downsizing and corporate restructuring. In studying those left standing after massive layoffs in their firms (a group referred to by the evocative term, “layoff survivors”) as well as those who lost their jobs but were later reemployed at new firms (termed “expatriate managers”), organizational sociologists theorized that these employees’ intense sense of unfairness and anger resulted from changes in their employment inconsistent with their tacit assumptions about the employment contract terms.³⁰

The term psychological contract is useful to theorists of organizational behavior because it captures the fact that parties bring expectations of reciprocal obligation to the employment relationship, and it accounts for the intense sense of injustice that can result when these expectations are not met. For present purposes, the important fact of the psychological contract is that it is undergoing a profound transformation. According to one scholar:

[Under] the old psychological contract, the employer was seen as a caretaker for the employee. Employees who were good performers were virtually guaranteed a job by their employer until retirement, the employer helped employees plan their careers and provided promotions to ensure career development, and employees were loyal and committed to the job and the organization. In the new psychological contract, both employees and employers have lower expectations for long-term employment, employees are responsible for their own career development, and commitment to the work performed has replaced commitment to the job and organization.³¹

Research into the new psychological contract tries to characterize the new set of expectations that managers impart to their employees—expectations not of long-term job security and continuous promotion along a job ladder, but of something else. The terms of the new psychological contract can be found in the literature about competency-based organizations, total quality management, and other high-involvement work practices that define the new

30. See generally Neil Anderson & René Schalk, *The Psychological Contract in Retrospect and Prospect*, 19 J. ORGANIZATIONAL BEHAV. 637, 643–44 (1998) (summarizing studies on the impact on employees of employer breach of psychological contracts).

31. Marcie A. Cavanaugh & Raymond A. Noe, *Antecedents and Consequences of Relational Components of the New Psychological Contract*, 20 J. ORGANIZATIONAL BEHAV. 323, 324 (1999) (citations omitted).

workplace as it is imagined, and currently being constructed, by managers and management consultants.

B. The Notion of the Boundaryless Career

A “boundaryless career” is a career that does not depend upon traditional notions of advancement within a single hierarchical organization. It includes an employee who moves frequently across the borders of different employers, such as Silicon Valley technicians, or one whose career draws its validation and marketability from sources outside the present employer, such as from professional associations and extraorganizational networks. It also refers to changes within organizations in which individuals are expected to move laterally, without constraint from traditional, hierarchical career lattices.³² It has been defined as “a career which unfolds unconstrained by clear boundaries around job activities, by fixed sequences of such activities, or by attachment to one organization.”³³

The advent of boundaryless careers is said to correspond to the growth in joint ventures, outsourcing, and other forms of network production that permit and sometimes even encourage mobility between related enterprises. It is also related to change within firms where departmental boundaries and job definitions are becoming replaced with broadly defined bands.³⁴ Whereas careers previously were understood to unfold in structured ways, either within internal labor markets or along fixed lattices on organizational flowcharts, recent research on careers has found fluidity. One scholar writes, “Inside firms in the United States, decentralization and increasing emphasis on cross-functional coordination and teams have blurred previously rigid departmental boundaries. Many American employers have moved to more general job descriptions, emphasizing key values, rather than precise, predetermined duties.”³⁵

The concept of a boundaryless career is a major departure from the internal labor markets of the past. Instead of job ladders along which employees advance within stable, long-term employment

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

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

34. See *id.* at 345; DAVENPORT, *supra* note 24, at 152–56 (urging firms to create “communities of practice”).

35. Miner & Robinson, *supra* note 33, at 347 (citation omitted).

settings, there are now increased possibilities for lateral mobility between and within firms, with no set path, no established expectations, and no tacit promises of job security.

C. The Concept of Organizational Citizenship Behavior

The concept of organizational citizenship behavior is another prominent concept in contemporary organizational theory. Organizational citizenship behavior ("OCB") means behavior that goes beyond the requirements of specific role definitions.³⁶ It is widely recognized that while organizations need predictable role performance, they also need spontaneous and innovative activity that goes beyond role requirements. Firms want employees to take an entrepreneurial approach to their jobs. They want to foster OCB and induce employees to exercise creativity on behalf of the firm. Much of current human resource policy is designed to encourage OCB, but to do so without making promises of job security. That is, the goal of today's management is, in the opinion of one consultant, to engender commitment without loyalty.³⁷

D. The Nature of the New Employment Relationship

The concepts of the psychological contract, the boundaryless career, and OCB are used by management and organizational theory to address a fundamental paradox in today's workplace: Firms need to motivate employees to provide quality, productivity, and efficiency while, at the same time, firms are dismantling the job security and job ladders that have given employees a stake in the well-being of their firms in the past. Internal labor markets were adopted by firms to solve problems of employee motivation, encourage skill acquisition, and discourage employee oppositional behavior. In the new era, what in the new employment systems will accomplish these goals?

Rosabeth Moss Kanter acknowledges that the new high-commitment management models are colliding with "the job-insecurity reality" found in American corporations.³⁸ She resolves the paradox by advocating that firms offer "employability security"

36. See DENNIS W. ORGAN, ORGANIZATIONAL CITIZENSHIP BEHAVIOR: THE GOOD SOLDIER SYNDROME 4-5 (1988).

37. PETER CAPPELLI, THE NEW DEAL AT WORK: MANAGING THE MARKET-DRIVEN WORK FORCE 217 (1999); see also, KANTER, E-VOLVE, *supra* note 5, at 225-26.

38. KANTER, FRONTIERS, *supra* note 9, at 190.

instead of employment security.³⁹ She says firms should provide lifetime training and retraining opportunities.⁴⁰ She claims that this will enable them to attract high-caliber talent and will give those employees who are downsized other opportunities.⁴¹

Peter Drucker also tries to confront the paradox of employee motivation in the “no long-term” world.⁴² He recommends that employees market themselves for their knowledge and their human capital. They should plan to work in networks—for corporations, but not as employees of the corporations.⁴³ He says upper management needs to stop emphasizing loyalty and, instead, learn how to instill trust.⁴⁴

Janice Klein, a former G.E. executive turned M.I.T. Sloan School Professor, also attempts to provide an answer.⁴⁵ She advocates a flattening of hierarchies, such as through the elimination of executive dining rooms, managerial parking spaces, and other status-linked perks.⁴⁶ She says firms must make a visible commitment to equity of sacrifice in times of workforce reductions.⁴⁷ The task, she states, is for managers to “find other means to convince employees that they are in the same boat together.”⁴⁸

Thus it is possible to enumerate the elements of the new psychological contract. One important element is the promise of training to enable employees to develop their human capital to insure that they remain employable. Rosabeth Kanter observes that “[t]he chance to learn new skills or apply them in new arenas is an important motivator in a turbulent environment because it’s oriented toward securing the future.”⁴⁹ For example, Towers Perrin counsels employers: “[T]o attract the right people, organizations are adopting total reward strategies that include learning and development opportunities and

39. *Id.*

40. *Id.* at 192.

41. *Id.*

42. *See* DRUCKER, *supra* note 9, at 71–72.

43. *See id.*

44. *See id.*

45. *See* Janice A. Klein, *The Paradox of Quality Management: Commitment, Ownership, and Control*, in *THE POST-BUREAUCRATIC ORGANIZATION: NEW PERSPECTIVES ON ORGANIZATIONAL CHANGE* 178 (Charles Heckscher & Anne Donnellon eds., 1994).

46. *Id.*

47. *Id.*

48. *Id.* at 179.

49. KANTER, *FRONTIERS*, *supra* note 9, at 53.

the creation of better work environments, in addition to the traditional pay and benefits.”⁵⁰

Another feature of the new psychological contract involves the promise of networks. Not only can employees raise their human capital, they can raise their “social capital” by meeting and interacting with people from other departments within the firm, with customers and suppliers of the firm, and even with competitors.

The new psychological contract also involves compensation systems that peg salaries and wages to market rates rather than internal institutional factors. The emphasis is on differential pay to reflect differential talents and contributions.⁵¹ Thus, for example, Towers Perrin urges its clients to reward “results, not tenure, even at the hourly level.”⁵² It also advocates allocating a “significantly disproportionate share of all pay programs for high-performing employees,” and striking “differen[t] deals based on employee contribution.”⁵³ It acknowledges that these recommendations will create dissatisfaction amongst lower-performing employees, and says:

Top Companies also plan for and achieve higher turnover rates. This strategy is based on the hypothesis that significant pay differentiation provides more motivation for the average and poor contributors to leave as they can get a better deal at other companies which tend to offer higher levels of base pay.⁵⁴

Other features of the new psychological contract include the flattening of hierarchy, the provision of opportunities for lateral as well as vertical movement within and between organizations, and the promotion of contact between employees at all levels and firm constituents, including suppliers and customers. It also involves the use of company-specific dispute resolution devices to redress perceived instances of unfairness.⁵⁵

50. *Global Survey Highlights Growth in Variable Pay*, TOWERS PERRIN MONITOR (Towers Perrin, New York, N.Y.), Feb. 1999, at 3.

51. See, e.g., KANTER, *FRONTIERS*, *supra* note 9, at 175 (reporting that the tide is moving “toward more varied individual compensation based on people’s own efforts”).

52. Towers Perrin, *Perspectives on Total Rewards*, *PERSP. ON PEOPLE: PERFORMANCE & REWARDS*, Jan. 2000, at http://www.towers.com/towers_publications/publications/pubs_frame_towers.asp?target=pubs_date.htm.

53. *Id.*

54. *Id.*

55. See Alexander J.S. Colvin, *The Relationship Between Employment Arbitration and Workplace Dispute Resolution Procedures*, 16 OHIO ST. J. ON DISP. RESOL. 643, 644–53 (2001) (discussing the development of peer review, open door policies, management appeal boards, mediation, and arbitration at TRW in the 1990s).

We can thus make a chart comparing the new to the old psychological contract:

<u>Old psychological contract</u>	<u>New psychological contract</u>
<ul style="list-style-type: none"> • job security skills • firm-specific training • de-skilling • promotion opportunities • command supervision • longevity-linked pay & benefits • collective bargaining & grievance procedures 	<ul style="list-style-type: none"> • employability skills • general training • up-skilling • networking opportunities • micro-level job control • market-based pay • company-specific dispute resolution systems for individual micro disputes

III. REGULATING THE NEW WORKPLACE

The new employment system has implications for labor and employment regulation. Many aspects of the present system of labor and employment law were built upon an assumption of strong firm-worker attachment, long-term jobs with a single employer, and promotion ladders to define progress throughout a career. For example, the collective bargaining laws were designed to promote the self-organization of the workers so they could constitute a countervailing power that could bargain with employers about the operation of internal labor markets. Unions negotiated agreements that contained seniority and just-cause for discharge clauses that enabled them to enforce the firms' promises of lifetime employment security. Unions also negotiated other terms that were consistent with a lifetime employment commitment, such as longevity-based wages, vacation and sick leave policies, and other benefits. Long-vesting periods for pensions also assumed and reinforced the norm of long-term employment.

At the same time, the New Deal social security and unemployment programs tied most social insurance protections to employment, thereby reinforcing the bond between employee and firm. Thus,

there evolved a social welfare system in which a worker's health insurance, disability insurance, and retirement security depended upon having an on-going relationship to an employer.

For many, the employment and social welfare system in postwar America embodied the epitome of a good life.⁵⁶ These benefits were not always given freely or gratuitously—workers often fought hard to achieve them. And workers needed unions to enforce the old psychological contract against opportunistic reneging by management. Nonetheless, once in place, the lifetime employment system containing multiple forms of job and livelihood security was beneficial to both management and labor.⁵⁷

Existing labor regulation and social insurance programs are not well suited to the emerging employment system comprised of implicit promises for employability security, human capital development, lateral employment mobility, and networking opportunities. Instead, the new workplace threatens to erode employee representation, derail social insurance schemes, and increase income inequality.⁵⁸ While each of these issues merits extensive treatment, the remainder of this article focuses on the first: the prospects for collective bargaining and unionism in the boundaryless workplace.

A. *Employee Representation in the Boundaryless Workplace*

The new psychological contract and its corresponding job structures were initially constructed in nonunion environments, and they operate almost exclusively nonunion to this day. Hewlett Packard, TRW, and the nonunion divisions of G.E. are three leading exemplars of the employment practices described above. Hewlett Packard and TRW have always been nonunion, and G.E. engaged in aggressive deunionization efforts first, and then instituted new workplace practices once their unions had been eliminated. The sequence of deunionization first and workplace restructuring later has become commonplace in many large firms since the 1980s.⁵⁹

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

57. *Id.*

58. See generally Stone, *Psychological Contract*, *supra* note 9 (discussing ways that the new workplace threatens to trigger conflicts over ownership of human capital and exacerbate problems of employment discrimination).

59. THOMAS A. KOCHAN ET AL., *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* (1986).

The rapid decline of unions since the 1980s has given management a free hand to restructure work practices. In the past twenty years, union density in the private sector declined from almost 17 percent in 1983 to less than 10 percent in 2000.⁶⁰ This decline is particularly striking in light of the fact that in the same period, workers' real wages declined more than 10 percent, so that one might have expected aggressive organizing activity and union growth.⁶¹ The decline was most pronounced in large manufacturing firms where internal labor markets had been most established.⁶² While there has been some union growth since 1995, it has been primarily amongst public sector and service sector workplaces, such as health care and janitorial providers, fields that have been least affected by the new work practices described above.⁶³ Unions have not been able to gain even a foothold in the new technology-intensive workplaces that are expanding rapidly today.⁶⁴

The pattern of aggressive deunionization followed by workplace restructuring also characterized industrial relations practices in major corporations in the late nineteenth and early twentieth centuries, when internal labor markets were first established. In the 1890s and early 1900s, employers first broke the unions and then instituted Taylorism and other work rationalization measures.⁶⁵ Like the implementation of scientific management in the early twentieth century, today's boundaryless workplaces are being created in the vacuum left by the deunionization drives of the previous decade.⁶⁶

The fact that the boundaryless workplace is a nonunion workplace is cause for concern. Unions are an essential element of democracy. As Alexis de Tocqueville pointed out long ago, voluntary organizations are the vehicle by which citizens' private concerns are shared and translated into public issues.⁶⁷ Without robust voluntary

60. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES § 637, at 411 (121st ed. 2001), available at <http://www.census.gov/prod/www/statistical-abstract-01.html>.

61. See generally Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 581 & n.16 (1992) [hereinafter Stone, *Legacy*].

62. *Id.* at 581.

63. *Id.* at 581–82 & n.18.

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

65. See Stone, *Job Structures*, *supra* note 8, at 34–36.

66. See Stone, *Legacy*, *supra* note 61 at 578–79 (discussing union decline in 1980s).

67. 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 114–18 (Phillips Bradley ed., Henry Reeve trans., Vintage Books 1945) (1835); see also ROBERT A. DAHL, *POLYARCHY*:

organizations, it is virtually impossible in a modern democracy for groups to articulate shared concerns and bring their interests into the public arena. Unions provide democratic participation and voice to a large sector of the population that might otherwise remain silent and unrepresented. They operate both in the workplace and in the political process to ensure that the concerns of working people and those of other disadvantaged groups are expressed and heard. Unions represent people who do not have any other access to the political process, and therefore they are an essential element of any pluralistic democracy.⁶⁸ Indeed, the labor movement is the only major political institution that is dedicated to promoting the interests of working people generally.⁶⁹ In the past, unions have been at the forefront in lobbying efforts for civil rights, welfare benefits, food stamps, environmental protection, national health insurance, and many other issues of general social welfare.

Unions are especially important to ensure social justice in the emerging regime of work. The new workplace threatens to exacerbate problems of income inequality and employment discrimination, and unions are also the only significant organized group that can combat these problematic tendencies.⁷⁰ They are the only group that has an interest in pressing for social legislation to regulate employment, promote protective measures, and ease transitions between jobs. Unions can and do advocate income redistribution, press for social insurance, promote industrial health and safety protections, and encourage equal employment opportunity both at the workplace and at the legislative level.

In addition, unions have a crucial role to play—both in the workplace and in the legislature—in protecting social welfare benefits, particularly health insurance and old age assistance. The old regulatory system erected a system of employment-based social insurance, which provided health insurance, old age assistance, workers' compensation, and unemployment insurance for those employed within the primary sector. Through collective bargaining, unions helped to create this private welfare state. But with boundaryless careers instead of job security, many of the workers who have

PARTICIPATION AND OPPOSITION 20 (1971).

68. See DAHL, *supra* note 67, at 20; see also Thomas C. Kohler, *Civic Virtue at Work: Unions as Seedbeds of the Civic Virtues*, 36 B.C. L. REV. 279, 300–32 (1995).

69. RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 67 (1999).

70. See Stone, *Psychological Contract*, *supra* note 9, at 597–614.

employer-provided insurance could lose their health and long-term disability insurance, as well as unvested pension benefits, each time they move from one employing establishment to another. Furthermore, the decline of unions means that union-negotiated benefit packages are becoming scarce. The disintegration of the private social welfare system imposes potentially enormous private and social costs. As an increasingly large number of workers who formerly had employer-provided health insurance and pension plans no longer do, it becomes important for unions to pressure employers to continue to provide those benefits and to seek legislative solutions to the problems of old age assistance, health care, and income security.

Despite the dramatic decline of unions in the past decade, survey evidence suggests that most employees want some form of representation in their workplace.⁷¹ According to Charles Heckscher, “polls show that people want unions but not the unions we have now.”⁷² This Section explores the prospects for employee representation in the new boundaryless workplace. It asks: Are unions fundamentally incompatible with the new employment relationship? If not, what kinds of practices by unions could be compatible with the boundaryless workplace? What features of the current labor laws are rooted in the old employment relationship and therefore inappropriate for large sectors of today’s work force?

1. Can Unions Function in the Boundaryless Workplace?

In assessing the prospects for unionization in the boundaryless workplace, it is necessary to first consider why the new workplace is so overwhelmingly nonunion. One view holds that both the rise of the new employment relationship and the decline of unions are independent results of a single cause—employers’ increased power vis-à-vis labor.⁷³ In the 1980s and 1990s, employer power increased as a result of many factors, including increased global competition in product and labor markets,⁷⁴ the growing acceptability of neoliberal

71. FREEMAN & ROGERS, *supra* note 69, at 147 (reporting on a survey finding that 87 percent of American workers want some form of representation in their workplace).

72. *Statement of Charles Heckscher, Century Foundation Frontiers Task Force on the Future of Unions, What’s Next for Organized Labor?* 53 (1999).

73. See PAUL OSTERMAN, *SECURING PROSPERITY* (1999) (arguing that the balance of power between management and labor shifted toward management in the 1980s and 1990s).

74. Katherine Van Wezel Stone, *To the Yukon and Beyond: Local Laborers in a Global Labor Market*, 3 J. SMALL & EMERGING BUS. L. 93 (1999) [hereinafter Stone, *Yukon*]; Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT’L LAW 987, 990 (1995) [hereinafter Stone,

ideology,⁷⁵ and changes in public policy that were disadvantageous to unions.⁷⁶ Consistent with this view, some scholars and practitioners have argued that there is no necessary incompatibility between new workplace practices and unionism. To the contrary, they contend, unions can help instill the necessary elements of employee cooperation and trust that enable the workplace to be restructured and improve its functioning.⁷⁷ In this regard, some scholars have demonstrated that team production and other high-performance work practices are most effective when they operate in a union environment.⁷⁸

Eileen Appelbaum and Rosemary Batt were among the first scholars to make the case that workplace restructuring is compatible with unionism. In the early 1990s, Appelbaum and Batt studied the development of a nonunion "human resource model" of industrial relations that they found was quickly replacing the previous union-centered model.⁷⁹ The human relations model was characterized by quality circles, self-managed teams, skill-based pay, and other high-performance innovations in human resource policies. Appelbaum and Batt identified two variations of high-performance work practices. One, "lean production," utilized Total Quality Management ("TQM"), re-engineering of workflows, and performance measurement in an attempt to centralize decision-making and to align a vision of goals between the company and its employees.⁸⁰ The other, "team production," utilized autonomous work teams and emphasized decentralized decision making, employee involvement, and employee

Global Economy] (discussing impact of global competition on union bargaining power).

75. H.W. Arthurs, *Globalization of the Mind: Canadian Elites and the Restructuring of Legal Fields*, 12 CAN. J.L. & SOC'Y 219 (1997).

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

77. See, e.g., JEFFREY PFEFFER, *THE HUMAN EQUATION* (1998); EILEEN APPELBAUM & ROSEMARY BATT, *THE NEW AMERICAN WORKPLACE* (1994).

78. See, e.g., Saul A. Rubinstein, *The Impact of Co-Management on Quality Performance: The Case of the Saturn Corporation*, 53 INDUS. & LAB. REL. REV. 197 (2000); Maryellen R. Kelley & Bennett Harrison, *Unions, Technology and Labor-Management Cooperation*, in UNIONS AND ECONOMIC COMPETITIVENESS 247 (Lawrence Mishel & Paula Voos eds., 1992); BARRY BLUESTONE & IRVING BLUESTONE, *NEGOTIATING THE FUTURE: A LABOR PERSPECTIVE ON AMERICAN BUSINESS* 15-30 (1992); see generally John Godard & John T. Delaney, *Reflections on the "High Performance" Paradigm's Implications for Industrial Relations as a Field*, 53 INDUS. & LAB. REL. REV. 482, 493 (2000).

79. APPELBAUM & BATT, *supra* note 77, at 60-68.

80. *Id.* at 125. TQM is a management system based on the principle of maximizing the participation of all employees in improving the process, products, services, and culture associated with their workplace.

participation. Team production, they noted, was more likely to be found in unionized settings.⁸¹ Appelbaum and Batt compared the performance results of the two approaches at the unionized firms of Corning, Saturn, and Xerox with other nonunion firms. They found that the programs yielded efficiency and quality gains where unions participated in making the programs work.⁸² They concluded that the two approaches produced equivalent results in terms of reducing defects and increasing efficiency.⁸³

Jeffrey Pfeffer has also argued that the new work practices can be implemented successfully with unions because unions can provide the necessary trust and cooperation to enable them to function.⁸⁴ In one example, Pfeffer describes an LTV galvanized steel plant in which the local union played a major role not merely in organizing production, but also in human resource functions. With union support, the plant adopted many features of the boundaryless workplace, such as flattened hierarchies, elimination of executive perks, and pay for skills compensation systems.⁸⁵ Pfeffer reports that the company elicited the union's cooperation by committing to job security and promising not to avoid the union.⁸⁶

While Batt, Appelbaum, Pfeffer and others convincingly demonstrate that some forms of workplace restructuring can occur with a union present, they do not prove that traditional unionism is compatible with many of the practices that characterize the boundaryless workplace of the 1990s. Most of their examples come from companies that adopted a team production approach. While team production is a significant departure from the hierarchical command-and-control workplaces of the Taylorist era, it is a system that also retains an implicit commitment to job security. Autonomous team production involves the use of groups of nonsupervisory workers to handle tasks of work allocation, job assignment, intragroup compensation, and internal conflicts.⁸⁷ Autonomous team production was introduced in many manufacturing firms, particularly in firms in the auto,

81. *Id.* at 125–27.

82. *Id.* at 139–43.

83. More recently, Appelbaum and her coauthors have argued that the combination of union-abetted restructuring and negotiated job security agreements can have fruitful results. *See, e.g.,* EILEEN APPELBAUM ET AL., *MANUFACTURING ADVANTAGE: WHY HIGH-PERFORMANCE WORK SYSTEMS PAY OFF* (2000).

84. PFEFFER, *supra* note 77, at 234–48.

85. *Id.* at 234–35.

86. *Id.* at 236.

87. KOCHAN ET AL., *supra* note 59, at 99–100.

steel, and apparel industries in the 1980s, often with union cooperation.⁸⁸ Teams require employment stability so that team members can learn the techniques and develop the trust essential to teamwork. Also, team production involves significant engineering changes in physical equipment and human attitudes—it signifies management's long-term investment in equipment and employees. For these reasons, researchers have found that production teams work best where there is an enterprise-level commitment to job security.⁸⁹

Paul Osterman surveyed over five hundred firms that instituted at least one of four types of high-performance work practices ("HPWO") between 1992 and 1997: job rotation, team production, TQM, and quality circles.⁹⁰ He found that in the five-year period, the use of all forms of high-performance work practices increased *except* the use of teams, which showed a slight decline. He concluded, "teams are probably the most difficult work innovation to implement and the one that is most likely to be disrupted by turnover and restructuring."⁹¹

Osterman also found that firms using HPWOs provided less employment stability than other firms of their type. He found that by the late 1990s, those firms that used HPWOs in 1992 experienced more layoffs by 1997 than those that did not. Yet he also found that the layoffs were not accompanied by overall downsizing.⁹² The constant turnover in the HPWO firms suggests that those firms are not engaged in downsizing, but in building a boundaryless workplace.⁹³ In such a setting, autonomous teams—with or without a union—cannot flourish.⁹⁴

88. See APPELBAUM, ET AL., *supra* note 83, at 39–142. As the new-wave automobile plants of Saturn and Nummi demonstrate, when teams and unions blend their roles, the productivity results can be impressive. Rubinstein, *supra* note 78, at 200–01.

89. Kelley & Harrison, *supra* note 78, at 250–51; see also OSTERMAN, *supra* note 73, at 96–97 (noting that because teams require relatively stable memberships, they are unlikely to survive when there is considerable turnover and job bumping).

90. Paul Osterman, *Work Reorganization in an Era of Restructuring: Trends in Diffusion and Effects on Employee Welfare*, 53 INDUS. & LAB. REL. REV. 179 (2000) [hereinafter Osterman, *Work Reorganization*].

91. *Id.* at 186.

92. *Id.* at 190–91.

93. *Id.* at 192.

94. Other scholars have also found that autonomous production teams frequently failed to live up to their promise of enhancing employee loyalty or morale. For example, in an in-depth study of fourteen firms, Charles Heckscher found that middle managers and white-collar employees in troubled companies were critical of cross-functional teams on the grounds that they compelled consensus decision-making, undermined authority, and destroyed accountability. CHARLES HECKSCHER, WHITE-COLLAR BLUES: MANAGEMENT LOYALTIES IN

The failure of autonomous teams to expand in boundaryless workplaces is not altogether surprising. Autonomous teams require workforce continuity. Employees who work in teams are often given training in cooperation and teamwork skills that an employer is loathe to lose. Also, teams only work when team members trust each other—a process that requires multiple interactions between team members. Teams thus rely upon the very factor that the new workplace repudiates—workforce continuity.

Osterman found that those high performance practices that survived and grew throughout the decade of the 1990s were quality circles, job rotation, and TQM.⁹⁵ Unlike teams, these three practices are compatible with the new employment relationship because they involve “up-skilling,” and enhanced opportunities for networking, but do not require long-term employment. Osterman’s findings suggest that the new workplace is not made up of practices that simply add a cooperative face to the command supervision of the past; rather, it is a major break from the past.

If it is true that only those HPWOs that retain a commitment to job security are compatible with unionism, then arguably unions should oppose the adoption of broad-banding, flexible staffing, outsourcing, and other practices that erode the boundaries of the traditional work unit. Many unions have adopted such a stance. However, like the railroad unions’ demands for featherbedding in the 1960s, opposition to innovation earns unions a bad name but does not stop the train of progress. Another approach, and the one advocated here, is to identify the ways in which traditional union practices are at tension with the boundaryless workplace, and then try to imagine a form of unionism that is compatible with the new workplace and capable of providing protection for the labor standards of employees who work there.

2. Union Practices and the Old Psychological Contract

Many traditional union practices are incompatible with the boundaryless workplace. For example, two central practices—seniority and narrow job definitions—are flatly inconsistent with the new psychological contract. Seniority was a practice that companies such as Westinghouse, General Motors, and Ford initiated in the

AN AGE OF CORPORATE RESTRUCTURING 85–87, 110–11, 130–31 (1995).

95. Osterman, *Work Reorganization*, *supra* note 90, at 186.

1920s in order to build loyalty and encourage attachment as part of the establishment of internal labor markets.⁹⁶ The practice spread, so that by the 1930s, seniority became a central demand cry for industrial unions trying to counteract job insecurity. Today, seniority has become so entrenched that, in the words of David Montgomery and Ronald Schatz, “many workers today find it difficult to imagine any other principle as just.”⁹⁷

Narrowly defined job classifications were also union responses to scientific management. At the turn of the century, when management tried to repudiate the notion of a standard rate and to individualize wages instead, craft workers responded with a call to return to the standard rate. After World War I, when Westinghouse, General Electric, and other industrial establishments sought to introduce “scientific” payment schemes, their workers struck. However, unlike their craft predecessors, these strikers did not seek a return to a standard single rate, but rather they sought a series of standard rates, graduated according to well-defined job definitions.⁹⁸ For the unions, graduated rates pegged to specific job classifications were a means to provide orderly advancement and constrain foreman favoritism.

Seniority and job classification are instances of labor-management accommodation to scientific management.⁹⁹ They are practices that encourage long-term worker-firm attachment. The new employment relationship de-emphasizes attachment, and instead stresses flexibility and cross-utilization, features that are the very opposite of narrow job classifications and seniority-based assignments.

Other practices of unions that are antithetical to the new work practices are job-bidding systems that require employers to rely on internal promotion to fill openings, and bumping rights along prespecified demotion paths for employees during downsizing. Like seniority, these practices discourage cross-utilization within firms or divisions.

In addition to insisting on the use of seniority and hierarchical progressions, unions bargain for compensation structures that base pay on three factors—job definition, hierarchical role, and length of

96. DAVID MONTGOMERY, *WORKERS' CONTROL IN AMERICA*, 139–41 (1980).

97. *Id.* at 143.

98. *Id.* at 113, 122–24.

99. For a detailed description of labor-management efforts to construct a scheme of job classifications and wage differentials consistent with scientific management, see Stone, *Job Structures*, *supra* note 8, at 65–70.

service. These three factors are aimed at ensuring uniformity between similarly situated workers, and they seem fair to most workers. In the past, corporations utilized these same three factors to determine pay rates in internal labor markets, with or without unions present.¹⁰⁰ However, none of these factors is compatible with the new workplace. Formal hierarchy is waning, strict job definitions are disfavored, and longevity is no longer valued. Further, uniformity in compensation is no longer perceived as desirable. Today's managers want to base pay on performance or productivity, not on job title or length of service.¹⁰¹

Modern compensation theory seeks to tie compensation to the person, not to the job. In the past, job evaluation was the most common method of determining compensation, and it was a means to devise a pay rate for each job. Job evaluation used factors like hierarchical role, difficulty, skill requirement, dangers, and so forth to set a pay rate for the job.¹⁰² The rate then went to whichever worker held it. Unions, almost by definition, continue to insist on job-based pay rates and reject individual-based rates and, in so doing, encounter fierce employer resistance.

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

In addition, two key features of most union collective bargaining agreements are clauses requiring just cause for dismissal, and arbitration systems to enforce them. Such provisions hinder the smooth functioning of the boundaryless workplace. In the new workplace, decision makers need to move people around, and remove people, based on the decision maker's assessment of the individual's

100. See, e.g., *id.* (describing development of pay structures at US Steel in the postwar era).

101. CAPPELLI, *supra* note 37, at 232–33 (describing contemporary compensation practices that are not based on seniority or hierarchy premiums and reporting that they seem unfair to many workers).

102. For a discussion of job evaluation, see EDWARD E. LAWLER III, *THE ULTIMATE ADVANTAGE: CREATING THE HIGH-INVOLVEMENT ORGANIZATION* 145–47 (1992).

current and future value and contribution to the firm or department. Lacking job definitions and orderly progression charts, these judgments are necessarily subjective, ad hoc, and often difficult to justify to third parties. Thus, union job security efforts make flexible staffing and workforce churning difficult.

Unions traditionally bargain for longevity-linked pay and bonuses, such as step raises, back-loaded pensions, length-of-service-based vacation benefits, and other means to reward long-term service. These types of union pay and benefit practices encourage longevity; they are the antithesis of a just-in-time work force.

Thus, it is evident that many of the traditional union bargaining goals are incompatible with the essential features of the boundaryless workplace. Union-promoted job structures like hierarchical job ladders, the use of seniority in promotions and downsizing, "just cause for dismissal" provisions, and longevity-based pay and benefits were features of the old internal labor markets, but now operate to impede the flexibility that employers seek. As a result, it is understandable that many employers find these features of unionism burdensome. Employers are increasingly bargaining for—and unions are increasingly conceding—work rule flexibility,¹⁰³ but unions remain committed to seniority, just cause, and other features of the old employment relationship.¹⁰⁴

The current disjuncture between entrenched union practice and the emerging job structures finds a parallel in the 1920s. In that decade, employers aggressively attacked the AFL craft unions in order to keep them out of the mass production industries where the unions were trying to gain a foothold. As a result of the employer offensive, union membership declined from 5 million in 1920 to under 3.5 million by 1930, a drop in union density from 19.4 percent of the nonagricultural work force to 10.2 percent.¹⁰⁵ The AFL's decline was in part the result of the employers' aggressive open shop campaigns, but was also due to the fact that nineteenth century craft unions had policies and programs that were not compatible with the internal labor market job structures of mass production firms. The AFL craft unions emphasized control of entry to crafts and apprenticeship—

103. According to a survey conducted by the Federal Mediation and Conciliation Service, by 1999 the subject of work rule flexibility had become the most important topic in labor-management negotiations after wages and benefits. Joel Cutcher-Gershenfeld, *Is Collective Bargaining Ready for the Knowledge-Driven Economy?*, 3 *PERSP. ON WORK* 20, 22 (1999).

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

105. IRVING BERNSTEIN, *THE LEAN YEARS* 84 (1996).

issues that were not particularly important in semi-skilled mass production jobs where job ladders ensured training and defined promotional opportunities. The craft unions were not agile at adapting to technological change. Their job security, as well as their union structure, was constituted by their knowledge of particular crafts.¹⁰⁶ At the same time, their power was linked to specific production methods. When employers changed production methods, many craftsmen found their skills obsolete and their power diminished. Thus, craft workers resisted technological change mightily, rather than seek an alternative form of job security and power with a particular employer.¹⁰⁷ It took the vision of industrial unionism and the formation of the CIO in the 1930s for unions to successfully organize mass production industries.¹⁰⁸ Today, unions need to develop a new vision akin to, but different from, the vision of the CIO in order to address the problems of the new workplace and play a meaningful role in solving them.

B. The Boundaryless Workplace and the National Labor Relations Act

In addition to the disjuncture between union practice and the boundaryless workplace, there is a disjuncture between the new workplace and existing labor law. There are several respects in which the rights created and duties imposed by the National Labor Relations Act ("NLRA")¹⁰⁹ do not comport with the workplace of today.

First, under the NLRA, unions exist only as representatives of a bargaining unit. If there is a sufficient showing of interest in a workplace, the National Labor Relations Board ("NLRB") determines the "appropriate unit" and conducts an election of those working in the unit to determine whether the union represents a majority.¹¹⁰ If the union wins, it is certified and becomes the exclusive representative of the unit.¹¹¹ Once certified, the employer and the

106. See, e.g., Stone, *Job Structures*, *supra* note 8, at 30–33.

107. See, e.g., MONTGOMERY, *supra* note 96, at 105–07 (giving examples of craft workers' resistance to technological change that threatened not merely their jobs, but their way of life).

108. See NELSON LICHTENSTEIN, *THE MOST DANGEROUS MAN IN DETROIT* 65–83 (1995); STEVEN FRASER, *LABOR WILL RULE* 63–75 (1991).

109. 29 U.S.C. §§ 151–169 (1988).

110. See *id.* § 159.

111. 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 (1969). But certification as a result of an election is the most common and generally preferred method of obtaining

union have a duty to bargain for an agreement that will govern the terms and conditions of all workers in the unit, regardless of whether they are union members or supporters of the union.¹¹² Any collective agreement the union negotiates applies to all jobs in the unit. Also, the union has a duty to fairly represent all employees in the unit, whether they support the union or not.¹¹³ The employees in the unit lose their rights to take collective action apart from their certified representative.¹¹⁴

The bargaining unit concept is thus an integral part of the statutory scheme of the NLRA. The NLRB determines a bargaining unit by finding a “community of interest” amongst the employees. 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, training, and skills; integration of job functions; and commonality of supervision.¹¹⁵ The community of interest test thus assumes an insular and functionally delineated workplace—assumptions that do not pertain to many of today’s work practices.

Bargaining units imply static job definitions and clear boundaries, and thus are in tension with cross-utilization and the blurring of department boundaries typical of work practices today.¹¹⁶ In addition, the NLRB has a preference for worksite-specific bargaining units and has adopted a presumption in favor of a single facility.¹¹⁷ Yet, much of today’s work involves networks across multiple establishments or multiemployer tasks, thus defying traditional bargaining units. Thus, the bargaining unit concept is at odds with many current employer practices.

representative status under the Act. *See id.* at 596.

112. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 204 (1944).

113. *Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *Steele*, 323 U.S. at 204.

114. *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50 (1975).

115. *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).

116. *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).

117. *Charrette Drafting Supplies Corp.*, 275 N.L.R.B. 1294 (1985); *Haag Drug Co.*, 169 N.L.R.B. 877 (1968); *Metro. Life Ins. Co.*, 156 N.L.R.B. 1408 (1966); *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).

The bargaining-unit focus of the NLRA also means that terms and conditions negotiated by labor and management apply to jobs in the defined unit rather than to the individuals who hold the jobs. Yet, as discussed above, the new workplace is not job-centered. Rather, firms engage in practices such as cross-utilization, broad banding, and other features of boundarylessness. Bargaining-unit-based collective bargaining means that as individual workers move between departments, units, and/or firms, their labor contracts do not follow them. The result in today's world of frequent movement is that bargaining-unit-based unionism means that union gains are increasingly ephemeral from the individual's point of view.

The NLRB permits unions and employers to engage in multi-employer bargaining when all parties agree. However, the collective agreements that are negotiated in multiemployer bargaining are typically adopted separately by each employer, and often with local supplements. Each contract typically has an employer-specific seniority list, with employer-specific job bidding and bumping rights. The multiemployer bargaining rarely produces a multiemployer contract that enables individual workers to move between employers in the industry. Instead, each contract establishes bounded seniority districts and job classifications for each separate employer.

There are other respects, too, in which current labor law assumes clear and well-defined boundaries. For example, courts have given grievance and arbitration a central role under the collective bargaining laws in order to create a system of labor-management self-regulation.¹¹⁸ Unions and management are encouraged to engage in "industrial self-government"¹¹⁹ within a legal framework that has been termed "industrial pluralism."¹²⁰ The self-government model of collective bargaining, like the bargaining unit concept, requires a strict boundary around the unionized workplace.¹²¹ In the industrial pluralist system, collective bargaining establishes a mini-democracy, embedded within, but entirely separate and apart from, the external democracy in which the firm operates. In this system, unions and

118. Under the prevailing judicial interpretation of the NLRA, once labor and management establish internal arbitration systems for resolving disputes concerning contract interpretation and enforcement, the courts accord these tribunals great deference. See Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1529-41 (1981) [hereinafter Stone, *Post-War*]; Stone, *Legacy*, *supra* note 61, at 622-25.

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

120. Stone, *Post-War*, *supra* note 118, at 1514-15.

121. Stone, *Legacy*, *supra* note 61, at 628.

firms draw a tight circle around themselves and cordon themselves off from the rest of society.¹²² Thus, the unionized workplace is shielded from outside scrutiny and largely exempt from external employment law.¹²³ Like the primacy of the bargaining unit concept in defining representation rights, industrial pluralist bargaining and arbitration practices embody and reflect the single-employer-long-term employee model of industrial relations.

Another feature of the NLRA that assumes the existence of bounded careers and internal labor markets is the rules governing economic weapons. Since the early days of unionism, courts have attempted to place limits on the scope of economic warfare to ensure that unions did not utilize their economic clout to harm innocent third parties.¹²⁴ Yet determining who is a party and who is an outsider to a labor dispute has proven to be highly controversial.¹²⁵ Congress responded to the judiciary's animosity toward collective labor action by enacting the Clayton Act of 1914¹²⁶ and the Norris LaGuardia Act of 1932,¹²⁷ both of which attempted to legalize peaceful secondary pressure. However, despite these enactments, courts continue to enjoin union activity that is taken against an entity that the court considers an "outsider" to a dispute.¹²⁸ In 1947 Congress enacted the Taft-Hartley amendments to the NLRA, adding section 8(b)(4), which rendered secondary boycotts unlawful.¹²⁹

The ban on secondary activity is based on the assumption that collective bargaining takes place within a discrete economic unit—the bargaining unit—and should not spill beyond its boundaries. In today's world of network-production and boundaryless practices, this

122. Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 954–55 (1999) (describing arbitration under collective bargaining as one of several examples of legally-empowered self-regulating systems).

123. Stone, *Legacy*, *supra* note 61, at 624. There is an exception for certain external employment laws, most notably the antidiscrimination laws, which have been held to be nonwaivable by a union. Thus, when a union employee alleges unlawful racial or gender discrimination, the courts do not defer to the union's negotiated arbitration procedure. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

124. See, e.g., *Plant v. Woods*, 176 Mass. 492 (1900) (holding pressure on employer by rival union unlawful); *Bowen v. Matheson*, 96 Mass. 499 (1867) (holding boycott of shipping agency that did not compel ship owners to pay union's standard rate for seamen unlawful).

125. See, e.g., *United States v. Hutcheson*, 312 U.S. 219 (1941); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921); *Loewe v. Lawlor*, 208 U.S. 274 (1908).

126. 15 U.S.C. §§ 12–27 (1988).

127. 29 U.S.C. §§ 101–115 (1988).

128. See *Burlington Northern R.R. v. Bhd. of Maint. of Way Employees*, 481 U.S. 429, 437–40 (1987) (criticizing lower courts for enjoining secondary conduct by railroad workers).

129. 29 U.S.C. § 158(b)(4).

assumption is no longer tenable. Rather, unions are finding, with increased frequency, that efforts to bring economic pressure to bear must transverse traditional bargaining-unit and corporate boundaries. Unions are increasingly seeking to apply pressure on suppliers, joint venturers, co-employers, and network partners, and are finding the secondary boycott laws a serious hindrance.¹³⁰

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

IV. RE-IMAGINING EMPLOYEE REPRESENTATION IN THE BOUNDARYLESS WORKPLACE

Although unions are an important institution for employee protection and representation in the workplace and in the political process generally, we have seen many respects in which current labor law and union practice are in tension with the new workplace. If we want to preserve institutions for employee representation, we need to imagine a new model of unionism and a new legal structure to support it. Below are suggestions for means by which unions can reinvent themselves in order to play a role in the new workplace.

One hundred years ago, Beatrice and Sydney Webb posited that there were three different goals of working-class collective action and three corresponding roles for labor organizations.¹³¹ They were to (1) form mutual benefit associations, (2) create organizations to engage in collective bargaining for job-related protection, and (3) create

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

131. See SIDNEY & BEATRICE WEBB, *THE HISTORY OF TRADE UNIONISM* svii, xxii–xxiii, 1 (Longmans Green & Co. 1911) (1894).

organizations that lobby for legislation favorable to employees. At different times in English history, English unions performed each of these roles.

In the twentieth century, American unions have also played all three roles, but with pronounced emphasis on the second. The AFL and the CIO, prior to their merger in 1955, each saw their primary function as bargaining for job-related protections for their members. And post-merger, they have engaged in collective bargaining on an industrial basis, often achieving impressive gains for workers inside internal labor market job structures.

Today, unions need to develop strategies that operate at the other two levels mentioned by the Webbs. As careers become boundaryless, and work becomes detached from a single employer, unions need to become boundaryless as well. They need to develop strategies, skills, and strengths that go beyond single contracts with single employers. They need to expand their focus upward into the political domain and outward into the community. In the political domain, unions need to expand their reach so that they speak for a wider sector of the workforce in the political process on issues of broad social concern such as health care and income distribution. The AFL-CIO has already been increasing its efforts in the political and legislative arenas in recent years, and has proven to be an effective voice on those social issues.

To expand into the community, unions need to operate on a multiemployer basis, across localities and/or regions. To address concerns of workers in today's workplace, unions need to develop programs that help workers obtain skills, opportunities for retooling, portable benefits, and childcare. In addition, unions need to work at the political and legislative level to enact employment protections and high labor standards for workers in transition.

There are two different models emerging for unionism in the new workplace, each of which attempts to protect workers in the boundaryless workplace, but in different ways. The first, *new craft unionism*, engages in a form of collective bargaining that ensures minimum standards and training for workers in the occupations or industries to which they are attached, but enables them to engage in individual bargaining for standards that exceed the minimum. The second, *citizenship unionism*, pressures corporations to be good social citizens of their locality in order to protect workers in the geographic area in which they live. Below, I describe some examples of these evolving

practices as they are found in some craft unions and emerging geographically based worker rights groups.

A. *New Craft Unionism and Embedded-Contract Bargaining*

Some traditional craft unions have taken steps to respond to the emerging boundaryless workplace. One of the most interesting examples can be found in the trades associated with the film and television industries. Known as the “below-the-line crafts,” the workers who perform lighting, sound, camerawork, props, costuming, equipment loading, driving, and other tasks associated with the entertainment industry have long been organized into two competing unions.¹³² The National Association of Broadcast Employees and Technicians (“NABET”) organizes employees on an industrial basis, and seeks to conclude collective bargaining agreements between the various below-the-line crews and the major motion picture and television studios.¹³³ The International Alliance of Theatrical and Stage Employees (“IATSE”) is organized on a craft basis. The two unions function very differently and accordingly have had very different rates of success in the new workplace.

NABET began as an independent union in the 1930s and joined the CIO in the early 1950s. It is a typical industrial union that negotiates for long-term, continuous employment by the major producers. Its collective agreements contain standard seniority, job-bidding, just-cause-for dismissal, and grievance-arbitration provisions.¹³⁴ In the 1960s and 1970s, NABET developed a reputation for militancy after conducting numerous strikes and contentious arbitration contests.¹³⁵ Since the 1980s, NABET-organized film and television companies have bristled under the terms of the NABET agreements.

Production work is often intermittent and unpredictable, so film and television companies do not want to support full complements of

132. The International Brotherhood of Electrical Workers (“IBEW”) also represents broadcast engineers and technicians in the industry, but they are omitted from this discussion because they do not have a major presence in the other below-the-line crafts.

133. John Amman, *The Transformation of Industrial Relations in the Motion Picture and Television Industries: Craft and Production*, in *UNDER THE STARS* 113, 118–21 (Lois S. Gray & Ronald L. Seeber eds., 1996).

134. *See id.* at 120–21 (commenting on the gains made by unions with respect to wages, benefits, and union security, and noting the increase in the unions’ countrywide collective bargaining power).

135. *Id.*

craft workers on a year-round basis. Even in the relatively stable environment of television, the major networks do not want to pay idle crewmembers during summer rerun periods. Therefore, those film and television employers have tried to cut staff by substituting temporary per diem workers for permanent workers at lower pay and benefit levels. The use of per diems became highly controversial in the industry.

In the 1970s and early 1980s, network executives repeatedly sought to negotiate for the right to use per diems, but NABET consistently refused. In 1987, NBC renewed their efforts to utilize per diem and freelance workers, but NABET refused to discuss it. Eventually, NBC implemented its demands unilaterally, and NABET responded with a strike. After eighteen weeks—during which the network operated with supervisors, clerical staff and strikebreakers—the union capitulated and granted the network every major concession it sought, including the right to use temporary workers.¹³⁶

The NBC strike emboldened CBS and ABC to pursue their demands to use unlimited numbers of per diems. In 1987, CBS bargained hard and won its objective.¹³⁷ In 1999, after escalating about the utilization of per diems, ABC initiated a lockout and eventually won the right to do so. As a result, since the early 1990s, NABET membership has been declining.

IATSE operates in a manner that is very different from its industrial union counterpart.¹³⁸ IATSE engages in a modern variation of the nineteenth-century insider-contractor system, in which lead skilled workers hire their own crews on a job-by-job basis. For example, if a film producer wants to produce a film in New York, he calls up a lighting technician, sound engineer, or other craft worker in New York and asks him to put together a crew. The person called becomes the head lighting technician or head sound engineer for the job, and then contacts others to assemble a crew. Each individual in the crew makes his or her own contract with the employer-producer within the framework of the local IATSE's Basic Agreement.

IATSE engages in a form of collective bargaining that combines collectively negotiated terms with individually negotiated ones. In

136. *Id.* at 134–35.

137. *Id.* at 135–36.

138. Interviews with Franklin Moss, Esq., IATSE Counsel, Lipton, Watanabe, Spevak & Moss, in New York, N.Y. (May–June 2000) [hereinafter Moss Interviews]. Much of the information that follows comes from a series of interviews.

this embedded-contract bargaining model, the union negotiates a Basic Agreement that sets certain minimal terms and also provides for individually negotiated agreements consistent with its terms. For each craft, the Basic Agreement sets forth some terms of the labor-management relationship and requires employees covered by it to establish other terms through individual contracts with the employer. For example, the typical IATSE Basic Agreement provides for union recognition, as well as terms requiring certain health and safety protections at theater workplaces, employer provision of housing during out-of-town production assignments, transportation costs for out-of-town locations, and employer contributions to the joint pension and health funds. It also sets minimum pay per day worked. However, the agreement contains no seniority, just cause, or arbitration provisions; in fact, it provides no provision for job security at all. To the contrary, it contemplates that workers will be hired on an “as-needed” basis, working from job to job, sometimes more than one job at a time.¹³⁹

The most significant aspect of the IATSE Basic Agreement is that it includes another embedded agreement between the employee and the employer. It specifies that all workers hired will sign a specific individual employment contract, called a Cover Sheet, that is set forth as an appendix to the Basic Agreement. The Cover Sheet is a one-page agreement, negotiated between the theater-employer and the individual employee, that sets the level of pay and other terms relating to compensation for the specific job. The Cover Sheet also authorizes a dues check-off on behalf of the relevant IATSE local.¹⁴⁰

Embedded-contract bargaining has proven to be an effective way for unions to provide minimum terms and protections and yet be compatible with the new boundaryless workplace. Because it is an arrangement that permits employers to reward superior performers, it is used for the talent groups in the entertainment industry as well as for professional athletes.

Because of its embedded-contract bargaining, the use of temporary and per diem workers that posed a serious threat to NABET did not pose a similar threat to IATSE. Instead, the IATSE insider-contracting system and its bargaining structures offer employers the flexibility to use temporary workers without having to go outside the

139. *See, e.g.*, United Scenic Artists Local 829 Agreement with the League of Resident Theaters (Sept. 1, 1992–Aug. 31, 1996) (copy on file with author).

140. *Id.*

union. Indeed, under an IATSE contract, all employees are hired temporarily, and an employer pays for exactly the amount of labor it needs, hired on a job-for-job, or even day-by-day, basis. As a result, IATSE has been growing rapidly in the industry and many NABET workers have shifted to IATSE.

IATSE has also solved the problem of benefits. It has fully portable pension and health funds, into which employers contribute on the basis of hours worked, and the worker gets to accrue benefits from all area-wide employers for which she works.¹⁴¹

Overall, IATSE's new craft unionism, its embedded-contract bargaining structure, and its job-to-job insider contracting employment system is better suited to the modern workplace than is the industrial union model. However, this form of unionism does not solve all the problems of the boundaryless workplace. First, while it is inclusive rather than exclusive, the insider-contract form of job placement favors insiders and reinforces cliques. The other limitation of the new craft unionism in the new workplace is that it may only be suitable for types of work involving some skill. Otherwise employers would have no incentive to turn to the union to staff their projects.

IATSE is not the only union that has developed mechanisms for dealing with the boundaryless workplace based upon traditional craft union models. Labor historian Dorothy Sue Cobble found examples of similar practices in early-twentieth-century waitress unionism.¹⁴² Cobble studied the Hotel Employee and Restaurant Employees Union's all-female waitress locals that existed from 1900 until the 1950s. These unions combined conventional practices of highly skilled craft unions with practices developed by nonfactory, unskilled workers such as longshoremen and teamsters.¹⁴³ Like the longshoremen, the waitress unions established hiring halls and used closed-shop agreements in order to obtain employment security, benefits, and minimal standards in restaurants in their locality. Like the craft unions, the waitress unions attempted to define occupational standards for waitressing. The waitress locals developed work rules, set craft standards, and established training and apprenticeship programs. By maintaining standards of competence, the union hiring halls gave employers a source for obtaining "good and reliable"

141. Moss Interviews, *supra* note 138.

142. See Dorothy Sue Cobble, *Organizing the Postindustrial Work Force: Lessons from the History of Waitress Unionism*, 44 INDUS. & LAB. REL. REV. 419, 421-23 (1991).

143. *Id.* at 420-21.

workers, while at the same time giving the union control over the labor supply.¹⁴⁴

Waitress unionism was occupationally based rather than employer or worksite based, and it had many similarities to IATSE.¹⁴⁵ For example, like IATSE, the waitress union contracts did not provide protection against layoffs or unjust dismissal.¹⁴⁶ Also, the collective agreements of the waitress unions occasionally contained embedded contract provisions that permitted individual employees to negotiate their own bargains.¹⁴⁷ And like IATSE and other craft unions, the waitress unions had portable union-run benefit funds.¹⁴⁸ But unlike IATSE, the waitress workers had no identifiable skill, so the success of their union depended upon their ability to maintain a closed shop.

Occupational waitress unionism atrophied in the 1950s and 1960s. In part, the rise of large hotels with unions organized on an industrial union model undermined the union's power. In addition, the union's fate was sealed by a 1955 Supreme Court decision that held that hotels and restaurants fell under the NLRA.¹⁴⁹ Thereafter, the Act's prohibition on closed shops and its ban on supervisors in bargaining units spelled the demise of the union's essential practices. By 1970, the International Union merged the craft- and gender-specific locals, ending the tradition of occupational unionism in the industry.¹⁵⁰

Cobble uses history to argue that occupationally based craft unionism could be a successful form of representation today.¹⁵¹ And indeed, several contemporary unions have adopted some of the practices of the new craft unionism described above. For example, the Service Employees International Union ("SEIU") initiated a "Justice for Janitors" program in 1985 to organize janitors on a geographic basis and to attempt to induce employers to commit to a standard agreement.¹⁵² The union has since developed a referral

144. *See id.* at 426–27 (describing the development of control programs, training, and work guidelines by waitress locals).

145. *See id.* at 432.

146. *See id.* at 425 (commenting on employment agreements that allowed employers to discharge employees for "just cause," thereby protecting employers but not employees).

147. *See id.* at 427 (describing a wage scale that did not limit waitress compensation).

148. *Id.* at 425.

149. *Hotel Employees Local No. 255 v. Leedom*, 358 U.S. 99 (1958); *see Floridian Hotel of Tampa, Inc.*, 124 N.L.R.B. 261, 263–64 (1959).

150. Cobble, *supra* note 142, at 430.

151. *See id.* at 431–35.

152. *See* Elise Blackwell, *A Commitment to Organizing: Justice for Janitors*, BEYOND BORDERS, Spring 1993, at 16.

service for janitors and has successfully organized janitors in twenty cities.¹⁵³

Several unions have also adopted some of the attributes of new craft unionism with regard to training. For example, construction unions have negotiated training programs in which employers contribute to funds for apprenticeship programs that are administered by joint union-employer boards.¹⁵⁴ These training programs are designed to enable workers to keep their skills up-to-date. Similarly, in 1993, the unions at twelve hotels in the San Francisco area set up a joint training fund administered by unions and employers to upgrade their workers' skills.¹⁵⁵ The Philadelphia chapter of the hospital workers' union, District 1199, has a training program designed to give entry-level hospital employees the skills necessary to move up to higher occupational levels.¹⁵⁶ In 1992, the Wisconsin Regional Training Partnership was formed of approximately forty unionized manufacturing firms and their unions in the Milwaukee area to provide training for the firms' current workers and workers who were laid off.¹⁵⁷ These union-sponsored training programs have differing goals, from job performance improvement to individual career development. But these examples demonstrate that some unions understand the necessity of training as a matter of employee survival in a world in which neither work nor skills are steady.

Overall, then, nonexclusive craft unionism, with embedded-contract bargaining and a job-to-job insider contracting employment system, is better suited to the modern workplace than is the industrial union model. It can provide some protection for certain workers in the boundaryless workplace. Although union members are not guaranteed jobs, they are able to develop networks within which to find them. Similarly, union members are not guaranteed income, but there are minimal terms set that ensure a living wage. Most significantly, members are not guaranteed permanent skills, but the union tries to provide a mechanism for continual learning.

153. See Wial, *supra* note 117, at 701-02.

154. See STEPHEN A. HERZENBERG ET AL., *NEW RULES FOR A NEW ECONOMY* 131-33 (1998).

155. *Id.* at 134-35.

156. See Joan Fitzgerald & Virginia Carlson, *Ladder to a Better Life*, *AM. PROSPECT*, June 19, 2000, at 54, 56-57.

157. HERZENBERG ET AL., *supra* note 154, at 135-36.

B. Citizenship Unionism

In the boundaryless workplace, employees have a need for an organization to represent their collective interests, but not necessarily on a single-employer basis. They need organizations that can bargain with groups of employers for living wage rates, adequate and portable benefit packages, training, childcare, and other protections and services workers need to survive in the boundaryless workplace. One method of providing these has been the new craft unionism described above. Another is geographically based rather than workplace or skill based unionism. I call these latter types of organizations “citizen unions” because they address workers’ concerns in their roles as citizens as well as in their roles as employees.

Some issues on which geographically based citizen unions could be effective are the following:

(1) Benefits

Unions could pressure employers in a given locality to provide portability and uniformity in their pension and health benefit offerings. Or, unions could operate their own pension and benefit plans that provide uniform benefits and portability and that do not impose waiting periods or sanctions for job-hopping. Unions could also monitor employer efforts to redesign benefit plans to ensure that the plans are not restructured to the workers’ disadvantage. In addition, they could negotiate with benefit providers to ensure portability and satisfactory benefit levels.

(2) Training

Unions could pressure employers to pay for training and retraining throughout an employee’s lifetime. Additionally, unions could sponsor their own training programs to help employees learn job-related skills. An even more far-reaching approach would be for unions to help establish local and regional Training, Retraining, and “Up-skilling” Centers (“TRUCs”), paid for by employers, with a board of directors made up of area unions, employers, and members of community groups representing contingent workers and the employed. TRUCs would offer area residents training in those skills required by area employers. The purpose of the TRUCs would be to enable local employees to participate in the boundaryless workplace and to provide employers with the skills that their work requires.

(3) Childcare

Unions could encourage the creation of employer-financed, cross-workplace childcare centers akin to the TRUCs described above. Indeed, they could be part of the same program, a kind of “kids-TRUCs.” These, too, should be available free to all employees who are residents of the locality in order to enable them to participate in the boundaryless workplace. As employees move between jobs, they would not only have childcare ensured, but would not worry about displacing a child from its current childcare situation. Such centers could also provide after-school care programs, school vacation and snow day coverage, educational activities, and homework assistance.

(4) Wages

Unions could pressure local employers to adhere to a local wage schedule, or local minimum wages, for broadly defined categories of work. Unions could also monitor employers that pay substandard wages, and report violations of wage and hour laws to the appropriate governmental authorities.

(5) Legal Assistance to Individual Employees

Unions could help individuals vindicate their employment rights by helping to bring lawsuits to enforce worker protection laws relating to minimum wages, occupational safety and health, pension security, nondiscrimination, and so forth. In addition, they could represent employees in the nonunion dispute resolution procedures that have proliferated in the wake of the Supreme Court’s decision in *Gilmer v. Interstate/Johnson Lane Corp.*¹⁵⁸ that upheld the use of predispute arbitration systems to resolve employees’ discrimination complaints. Unions have great expertise in the area of arbitration, and they could use it to serve the broad community of workers and at the same time to ensure that legislative gains in employment standards are enforced.

(6) Corporate Citizenship

Unions could act at the local and regional level to pressure corporations to become good corporate citizens. Because employers in a boundaryless workplace draw on the collective skills, knowledge, experience, and expertise of the local workforce, they should contribute to the welfare of that workforce generally. That is, employers should be encouraged to contribute to the local school system, libraries, museums, cultural programs, and sporting events, and to support the local hospital. They should also fund enrichment

158. 500 U.S. 20 (1991).

programs for children. Corporate contributions of this sort would benefit working people in the entire community in which a corporation operates. By raising these issues, unions could use their clout to induce employers to become corporate citizens at the local and regional level.

All of these proposals embody a vision for a type of unionism that is neither industrial- nor craft-based, but rather geographically based. Citizenship unionism envisions unions that can address concerns of citizens as well as concerns of workers.¹⁵⁹ By reconceptualizing workers as citizens of a locale who have a shared interest in the health, education, well-being, and employability of the entire local population, it is possible to transform narrow labor issues into general concerns. It becomes possible for workers to use their collective strength to press for issues that are of concern to them as citizens, as well as workers.

To be plausible, citizenship unionism has to answer two important questions: What kinds of power would local workers possess to compel corporations to comply with their demands? And, what is to prevent firms from evading demands of citizenship unions by relocating out of the locality?

1. Bargaining Power

The bargaining power of a citizenship union arises from several sources. First, the union can exert public pressure on local corporations through publicity campaigns, informational picketing, and shaming in the local press. It can publicize bad working conditions, breaches of implicit promises for training, and refusals to provide childcare or other basic benefits. Unions could publish an annual list of good corporate citizens and one of poor corporate citizens, and urge people to patronize the former and shun the latter. As part of the criteria for good corporate citizenship, unions could pressure corporations to contribute to local schools and hospitals, and publish each entity's ongoing donations. Local plant managers who live in a community are surprisingly vulnerable to pressures from their neighbors, colleagues, and fellow country club members.

159. Raymond Miles also calls for geographically based unionism, and many of his proposals parallel mine. However, his geographically based unionism is limited to addressing workplace issues rather than branching out to larger issues of concern to working families in their communities. See Raymond E. Miles, *Adapting to Technology and Competition: A New Industrial Relations System for the 21st Century*, 31 CAL. MGMT. REV. 9, 23-25 (1989).

Second, citizenship unions can organize boycotts of products or services produced by bad corporate citizens. The product boycott was labor's most effective economic weapon during the nineteenth century era of craft and geographic unionism, and it could be revived as a powerful tool. While many corporations do not produce products that consumers purchase, those that do are sensitive to changes in demand. Those that do not produce consumer products often operate in networks with corporations that do produce for direct consumption, or have buyers and suppliers that do so. Applying economic pressure on a buyer or supplier in order to affect labor conditions or corporate behavior of a target corporation would likely run afoul of the current secondary boycott laws, but part of the legislative program of citizenship unionism will have to involve advocating changes to the secondary boycott laws to permit such tactics.

Citizenship unions could use their pressure to induce corporations to sign codes of conduct in which the corporation pledges to abide by certain specified terms relating to employability, training, child care, and portable benefits. It would be possible to draft these codes so as to make them enforceable by the union in a state court.

In addition to direct pressure on area employers, a community union could also be a potent force in the political process. On the local level, it could run candidates and pressure for legislation that provided some of the protections mentioned above, including portability of benefits, a local minimum wage, publicly funded wage supplements,¹⁶⁰ publicly funded child care and training programs, and so forth. On the state and national level, a federation of such community unions could play a similar role in state and national politics.

None of these strategies depend upon having the union certified as a majority representative by the NLRB. Rather, it is a type of union that functions as a hybrid of a local civic association and a workers' lobbying group. Citizenship unionism would not preclude or supplant Wagner Act bargaining by individual unions in particular settings where they exist, but it is a form of unionism that could potentially have a broader appeal.

160. See Edmund S. Phelps, *REWARDING WORK* 106–09 (1997) (advocating public wage subsidies for low-wage employees to reflect the external productivity of the employee and the employee's contribution to society).

2. Citizenship Unions and Local Agglomeration Economies

One possible objection to the proposals for citizenship unionism is that the more that unions exert pressure on corporations at the local and regional level, the more temptation there will be for corporations to relocate to avoid union demands. This is the well-known danger of the race to the bottom, and it reflects the fact that capital is generally more mobile than people. Absent some particular reason for remaining in a particular locale, corporations will tend to move to locations that have the lowest labor costs.¹⁶¹

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.¹⁶² In addition, corporations often 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 Forty-seventh Street in New York City, or the clusters of used car lots found in most small cities.¹⁶³ This led economists to hypothesize that when certain types of firms were located in proximity to each other, 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 firms.¹⁶⁴ One well-known example is AnnaLee Saxenian’s description of the dramatic effects of agglomeration in the Silicon Valley computer industry.¹⁶⁵ The clusters of biotechnology firms around Princeton, New Jersey, of banking and

161. Stone, *Yukon*, *supra* note 74, at 96–98; Stone, *Global Economy*, *supra* note 74, at 992–95 (discussing the relationship between labor regulation and corporation flight).

162. See Stone, *Yukon*, *supra* note 74, at 97–98.

163. See generally John M. Quigley, *Urban Diversity and Economic Growth*, 12 J. ECON. PERSP. 127, 132–34 (1998) (describing studies).

164. See, e.g., Matthew P. Drennan, *National Structural Change and Metropolitan Specialization in the United States*, 78 PAPERS REGIONAL SCI. 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. ECON. PERSP. 139, 148–50 (1998) (citing studies).

165. ANNALEE SAXENIAN, *REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128* (1994).

financial firms in New York City, and of computer hardware manufacturing firms around Austin, Texas are other examples of successful localized agglomeration economies.

When firms' locations are influenced by the prospects of valuable agglomeration effects, those firms will be less likely to move overseas, or across the country, to escape rising labor costs. Indeed, many of the measures for which citizen unions might mobilize are measures that could enhance the value of the region's human capital, and thus increase the value of agglomeration. For example, corporate contributions to adult education and training programs 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 or ensuring that a competitor did not capture the benefits. But if a union induces all areawide 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 highly 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.

C. Examples of Citizen Unionism

There are some examples of geographically centered groups of workers that approach the citizenship unionism model presented above. For example, centers for contingent workers are appearing in many metropolitan centers to assist temporary workers with work-related problems. These centers address problems of contingent workers of all occupational types on an area-wide basis. For example, the Boston Center for Contingent Work ("CCW") uses media and other mechanisms to pressure companies that hire contingent workers to adopt a Code of Conduct that ensures minimum rights and benefits. CCW is also active in lobbying the state legislature to enact a Workplace Equity Bill that would end discrimination in wages and benefits for contingent workers. To date, the bill has garnered significant support. CCW also works with local area unions to

encourage them to provide wage and benefit parity for contingent workers in their collective bargaining agreements.¹⁶⁶

Another example of geographic multioccupational unionism is the Workplace Project in Long Island. Begun in 1992, the Workplace Project attempts to organize Latino immigrant workers on Long Island into membership organizations.¹⁶⁷ It seeks to bring together people at the grassroots level who work in multiple occupations to address their common economic, social, and political problems. The Workplace Project, like contingent worker centers, organizes across industry and occupational lines and exerts pressure within a single locality or region. Its long-term plans are to develop workplace committees in each of the industries in which its members work (such as the food service, landscape, and housecleaning industries) and to press for minimal wages and health standards in each type of work.¹⁶⁸ The Workplace Project has also been active in lobbying for state laws that positively affect immigrant workers.¹⁶⁹

There are also several examples of cross-workplace organizations that involve workers with different types of skills within the same general industry. For example, the Washington Alliance for Technical Workers ("WashTech") involves technical workers of all types in the Seattle Area. It is a community-based membership organization that addresses labor-related issues of high-tech firms by utilizing publicity and lobbying.¹⁷⁰ WashTech is notable because its goals address many of the issues raised for workers by the new psychological contract: benefit portability, the necessity of training, assistance with networking, concerns about human capital and noncompete covenants, and the problems of temporary workers. It is also notable because it is affiliated with a union, the Communications Workers of America ("CWA"). The IBM workers organization, initially formed

166. See Interviews with Tim Costello and Gail Nicholson, Director and Associate Director of Center for Contingent Work, in Boston, Mass. (May 2000).

167. Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 428-29 (1995).

168. *Id.* at 449. In 1997, together with other workers' rights groups, the Workplace Project secured the passage of New York State's Unpaid Wages Prohibition Act, N.Y. LABOR LAW § 196-a (McKinney 2002), the strongest wage enforcement law in the country.

169. See JENNIFER GORDON, THE CAMPAIGN FOR THE UNPAID WAGES PROHIBITION ACT: LATINO IMMIGRANTS CHANGE NEW YORK WAGE LAW 1-45 (Carnegie Endowment, Global Policy Program, Working Paper No. 4, 1999), available at http://www.ceip.org/files/Publications/imp_wp4gordon.asp?from=pubtype (web page provides abstract and link to PDF document).

170. Information about WashTech can be found at its website: <http://www.washtech.org>.

as a protest to IBM's pension restructuring plan, is also affiliated with the CWA.¹⁷¹

All of these efforts contain elements of the conception of citizen unionism described above. They all blur the line between worker and citizen, and are thus the beginning of an effort to create models of boundaryless unionism. Because citizen unionism involves cross-cutting coalitions around shared concerns, they do not pose the same dangers of exclusion by race, gender, or skill that are present in the new craft unionism. Citizen unionism is also compatible with traditional workplace-based local unions or with employer-specific employee caucuses. Such caucuses are emerging with increased frequency, usually around a single issue or comprising a specific racial or ethnic group.¹⁷² Such single-issue employee caucuses could easily become affiliates of a citizenship union in which workers could choose to participate in both.

D. Labor Law Reforms to Facilitate Boundaryless Unions

New forms of unions will require, and create, new types of labor laws. We have already seen some of the ways in which the NLRA embodies the old psychological contract's assumption of long-term, stable employment. The centrality of the bargaining unit in the labor law creates and reinforces hard boundaries between individual establishments or departments and the rest of the world. Other aspects of the labor law, such as the secondary boycott prohibition and the industrial pluralist treatment of arbitration, similarly reinforce separatism and discourage boundaryless organizational forms. As the workplace changes and new union practices emerge, there will have to be changes in the labor law to accommodate new forms of employee representation.

Reforming labor law in a way that would facilitate the formation of boundaryless unions would require abandoning those features of the law that treat the unionized workplace as an isolated and separate sphere. For example, to enable new craft unionism to expand, it would be important for the NLRB to abandon the presumption in favor of single establishments. It would also have to abandon the

171. For information and documents pertaining to the IBM pension conversion battle, see <http://www.cashpensions.com>, <http://www.bernie.house.gov/pensions/>, and <http://www.allianceibm.org/clevelandnews.htm>.

172. Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149, 149 (1993).

notion that it can identify a “community of interest” in a bargaining unit, and instead permit bargaining units to be determined according to the wishes of the employees involved.¹⁷³

Inclusive craft unionism would also require a change in the secondary boycott laws to permit unions to bargain for terms and conditions that affect workers at establishments within a production network, including an employer’s subsidiaries or its joint venture partners. Instead of banning closed shops, the law should permit unions that maintain nondiscriminatory hiring halls or other nondiscriminatory job referral systems to bargain for closed shops. Also, to support IATSE’s type of insider contracting system, it would be necessary to amend the definition of *supervisor* in section 2(11) of the NLRA so that lead workers can be union members when they play an inside contractor role.

A further reform that would assist in the formation of new craft unions is the modification of the independent contractor exclusion in section 2(3) by the adoption of an “economic realities” test for determining who is an employee.¹⁷⁴ This change would enable unions to organize workers who have employment relationships with multiple employers.

Other changes in the labor law would be necessary to facilitate the formation of citizen unions and to enable them to bargain with employers in a locality for area standards in compensation, benefits, health and safety, training, and childcare. Some of the legal reforms that would facilitate area-wide bargaining for area standards and portable benefits are (1) to require multiemployer bargaining when a union requests it, (2) to permit unions to engage in coordinated bargaining about the scope of the bargaining unit, (3) to adopt European-style extension laws that extend negotiated standards to all firms of the same type in the same locale, (4) to amend the Employment Retirement Income Security Act to require employer-funded pension and health benefit plans to offer portability and otherwise facilitate movement between employing units, (5) to overturn the *Beck*¹⁷⁵ decision that restricts union contributions to political and

173. Determining bargaining units by the wishes of employees would require a change in the statute. See 29 U.S.C. § 159(c)(5) (1994).

174. See *id.* § 152(3); *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 128 (1944) (adopting an “economic facts” test to determine whether an individual is an employee or an independent contractor for purposes of NLRA). Congress repudiated *Hearst* in the 1947 Taft-Hartley Amendment to section 23 of the NLRA.

175. *Communications Workers of Am. v. Beck*, 487 U.S. 735 (1988).

lobbying campaigns, (6) to change the definition of concerted protected activity so that workers are protected in their efforts to act collectively to affect legislation and politics, and (7) to repeal section 8(b)(4) of the NLRA and permit unions to engage in peaceful secondary activity.

Some of the foregoing suggestions have been proposed by others concerned with the growing representation gap and the lack of representation rights for atypical employees.¹⁷⁶ Some are minor revisions to existing rules, some challenge fundamental aspects of the conceptual scheme. None of the proposals will magically produce boundaryless unionism; rather, they are aimed at removing the legal obstacles to this goal. While attempts at labor law reform have not succeeded in the recent past, it is useful to articulate proposals for reform so that legal change can be envisioned. To actually produce a form of representation appropriate to the new workplace will require both a bold vision with broad reach and, at the same time, many small-scale experiments by many local unions, national unions, and other types of workers' groups.

CONCLUSION

In conclusion, there has been a fundamental change in the employment relationship, one that will have profound significance for employees and for society more generally. Long-term employment with a single employer and advancement up a single job ladder is no longer the predominant career trajectory. Rather, employees now operate in a boundaryless workplace, moving frequently across departmental lines and between firms. As a result, there has developed a new psychological contract between employees and firms in which employees are expected to take individual responsibility for their career development rather than provide long-term attachment and loyalty to a single employing unit for the duration of their work lives. In return, firms implicitly promise to provide employees with training, general skill development, networking opportunities, and individual market-based compensation.

Unions have a crucial role to play in the evolving workplace. Unions can enable workers to participate meaningfully in the boundaryless workplace and ensure that the workplace offers equity

176. See, e.g., HERZENBERG ET AL., *supra* note 154, at 161–66 (proposing wage parity for part-time workers and proposing legal changes that would favor multiemployer bargaining).

and dignity. But in the new workplace, workers' identities and concerns as workers meld into their identities as citizens. Boundaryless workplaces can and should give rise to boundaryless labor organizations—organizations that welcome the unorganized as well as the organized, the permanent as well as the contingent, the full-time as well as the part-time, and regular employees as well as atypical ones. In such an organization, the boundaries between industrial, corporate, and civic citizenship will also become blurred, making it possible to address not only issues of worker rights but also social rights more broadly.