There is a serious problem with the labor and employment law system in the United States today. Unions have declined to the point where they represent less than 8 per cent of the private sector workforce, employee wages have stagnated for more than three decades, employers are cutting back on workers’ health insurance and pensions, and there is a dramatic growth in the numbers of the working poor. At the same time, there has been a rising chorus of complaints from labor scholars that the labor law has become ‘ossified’ (Estlund 2002), that the law is failing to offer meaningful worker protection (Summers 1993), that the courts and Labor Board have abandoned the ‘core values of labor law’ (Dannin and Bonier 2006), and that Congress has defunded the labor protective agencies such as the National Labor Relations Board (NLRB or the Board), the Occupational Safety and Health Administration (OSHA), and the Hour and Wage Division that administers the Fair Labor Standards Act (FLSA) (Dannin 2004; Brudney et al. 1999; McGarity 1996).

Indeed, some have contended that over the past two decades, there has been a passive repeal of the employment statute (Hiatt and Becker 2005; Brudney 1996; Dannin and Bonior 2006; Stone 1992).

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

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

The American system of employment regulation is a two-track system. ‘Labor law’ provides the mechanism for collective bargaining and other forms of employee collective action, while ‘employment law’ sets minimal employment standards for all employees. Employment laws set minimum wages, establish safety and health standards, provide old age assistance, require unemployment insurance, compensate industrial injuries, mandate child care and medical leave, and establish other minimal terms of employment. Because the employment law standards are generally meant to be floors, they do not obviate the need for workers to bargain, whether individually or collectively, for employment standards above the set minima. Hence the two-track system of regulation reflects the American labor law’s commitment to settling distributional issues through private bargaining and removing such issues from the political process. While such a bifurcated approach may have been justified in an era of stable industrial production in which strong centralized unions and strong management were both committed to industrial peace and stability, it does not adequately address the needs of the working population today.

The basic framework of today’s labor and employment law originated in the New Deal period and was tailored to the job structures of that era. In that era, which I call the ‘industrial era’, large firms organized their workforces into a set of practices that has come to be termed ‘internal labor markets’ (Doeringer and Piore 1971). The term ‘internal labor market’ is used to distinguish these practices from the neoclassical ideal of a large impersonal external labor market in which buyers and sellers contract freely and repeatedly for jobs of all types (Kaufman 1988).

The internal labor market job structures of the industrial era developed in the early and mid-twentieth century, based on the teachings of the scientific management and personnel management schools of thought (Stone 1975). In internal labor markets, jobs are organized along rigidly defined lines of promotion, called job ladders. Workers are hired at the lowest rungs and then advance, step by step, throughout their careers. The internal labor market job structure assumed a long-term relationship between the employee and the firm. It also assumed that job tasks were minutely delineated and carefully arranged so that each job provided the training for the job on the next rung. Workers tended to stay within a particular department and on a single promotion line, and had little lateral mobility within or between firms. They were rewarded with longevity-based pay and benefits, and their seniority defined both their bidding rights for higher jobs and their bumping rights in case of reductions in force (Doeringer and Piore 1971; Stone 2004; Stone 1975; Osterman 1984).

By the 1930s, internal labor markets had become prevalent in large...
industrial firms. In that decade, the three most significant labor statutes were enacted and two major Supreme Court opinions were issued that together established a framework for governing labor relations that persists to this day. This framework was based upon assumptions rooted in the employment relationship that prevailed during the New Deal period. It was a framework that was appropriate to long-term employment relationships in stable work environments, but it is becoming increasingly out of date.

A The three new deal labor statutes

In 1932, Congress enacted the Norris-LaGuardia Act, which declared it to be the public policy of the United States to support workers’ right to organize and engage in collective bargaining (29 USC 101–15). The Act made it unlawful for federal courts to issue injunctions in most labor disputes. In 1935, Congress enacted the National Labor Relations Act (NLRA), which gave workers an enforceable right to engage in concerted action for mutual aid and protection, to organize unions of their own choosing, and to engage in collective bargaining (29 USC 151–69). The NLRA also established an administrative agency, the National Labor Relations Board (NLRB), to enforce those rights. In 1937, Congress enacted the Fair Labor Standards Act, which established a federal minimum wage and set maximum hours for employment (29 USC 201–19). These three statutes, taken together, established a two-tiered system in which labor and management were encouraged to bargain to establish the terms of the employment relationship, while, at the same time, individual employees not covered by collective bargaining were guaranteed certain minimal employment terms.

In the same decade, the Supreme Court decided two cases that greatly expanded the power of the federal government to regulate private employment. In 1937, in *West Coast Hotel v. Parrish* (1937), the Supreme Court held that it was constitutional for a state to enact legislation setting minimum wages for women’s labor. In so holding, the Court overturned a previous decision, *Atkins v. Children’s Hospital* (1923), which held that a state maximum hour law was an unconstitutional infringement on the right of freedom of contract and hence a violation of the Due Process Clause. The Court justified its reversal in *West Coast Hotel* by declaring that there is a public interest in ensuring an adequate level of wages for working people. The *West Coast Hotel* decision opened the door for state and federal governments to enact a host of statutes regulating the terms of the employment contract.

Two years later, in 1937, the Supreme Court held, in *Jones and Laughlin v. NLRB* (1937), that the NLRA was a constitutional exercise of Congress’ power under the Commerce Clause. In so holding, the Court rejected
previous interpretations of the Commerce Clause that had placed severe limits on Congressional power to legislate regarding the private sector. The Jones and Laughlin decision signified a monumental shift in the power of the federal government in all fields of regulation. The legislative and judicial developments of the 1930s provided the legal infrastructure for the two-tiered labor law regime of the postwar era – legal support for collective bargaining and mandated minimum terms of employment. While there have been many developments in the interpretation of the NLRA, and many new employment protections enacted by both national and state legislatures, this basic structure has survived to this day.¹

B The operation of the collective bargaining laws

The labor laws of the 1930s use industrial era labor relations as the template for the employment relationship. They assume that workers are employed in stable jobs by corporations that value long-term attachment between the corporation and the worker, and that workers are employed in narrowly defined jobs with pre-determined lines of promotional opportunities that build upon the firm-specific skills acquired in their current positions. Some of the respects in which the labor laws were tailored to the industrial era workplace are discussed below.²

(i) The concept of the bargaining unit

Under the NLRA, collective bargaining is organized around the concept of a ‘bargaining unit’. If there is a sufficient showing of interest by workers in a particular workplace, the NLRB determines the ‘appropriate unit’ and conducts an election among employees working in the unit to determine whether a majority favor the union (29 USC 159(b)). If the union wins the election, the union is certified and becomes the exclusive representative of the unit for purposes of collective bargaining (NLRB v. Gissel Packing Co. 1969). Once certified, the employer and the union have a duty to bargain for a collective agreement that will govern the terms and conditions of employment for all workers in the unit, regardless of whether the employees are union members or not (Steele v. Louisville & Nashville Railroad Co. 1944). Any contract concluded between the union and the employer applies to all jobs in the unit. The terms and benefits apply to the job – they do not follow the worker to other jobs when they leave the unit. At the same time, the employees in the unit lose their right to take collective action apart from their certified

¹ For an overview of labor law in the United States, see generally, Stone (2000).
² For more detail on the ways in which labor laws assume an internal labor market arrangement of jobs, see Stone (2004).
representative (*Emporium Capwell Co. v. Western Addition Community Organization* 1975), and the union has a duty to represent fairly all employees in the unit – those that support the union and those that do not (*Vaca v. Sipes* 1967; *Steele v. Louisville & Nashville Railroad Co.* 1944).

The bargaining unit is thus an integral part of the statutory scheme of the NLRA. The agency that administers the Act, the NLRB, determines on a case-by-case basis what constitutes an appropriate bargaining unit. The Board does so by attempting to define units of employees who share a ‘community of interest’. Some of the factors the Board uses to determine whether there is a community of interest are: similarity in kinds of work performed, similarity in compensation, types of training and skills required, integration of job functions, and commonality of supervision (*NLRB v. Action Auto.* 1985; *NLRB v. Purnell’s Pride, Inc.* 1980; *Getman et al.* 1999). Under the community of interest test, bargaining units tend to have static job definitions and clear department boundaries. The community of interest test assumes a functionally delineated workplace in which work tasks are continuous and well defined. In addition, the NLRB has a preference for worksite-specific bargaining units and has adopted a presumption in favor of single facility units (*Charrette Drafting Supplies Co.* 1985; *Haag Drug Co.* 1968; *Metropolitan Life Insurance Co.* 1966; *Dixie Belle Mills, Inc.* 1962; *Wial 1993*). Yet, much of today’s work involves networks across multiple establishments or multi-employer tasks, defying traditional bargaining unit definitions. Thus the NLRB’s approach to bargaining unit determination is in tension with cross-utilization and the blurring of boundaries typical of work practices today (Colvin 1998).

The bargaining unit focus of the NLRA also means that terms and conditions negotiated by labor and management apply to the jobs in the unit rather than to the individuals who hold the jobs. As individual workers move between departments, units, or firms, their labor contracts do not follow them. Yet, today individuals experience considerable movement in their work lives, both within firms, between firms, and in and out of the labor market. As a result, in today’s world of frequent movement, union gains are increasingly ephemeral from the individual’s point of view.

(ii) **Secondary boycott prohibitions** Another feature of the NLRA that assumes the existence of bounded job definitions and internal labor markets is the prohibition on secondary boycotts. For a hundred years, courts have been hostile to efforts by unions to exercise economic pressure against entities that are not involved in an immediate dispute (*Plant v. Woods* 1900; *Bowen v. Matheson* 1867; *Lowe v. Lawlor* 1908; Frankfurter and Greene 1931). Congress has visited the issue of secondary boycotts repeatedly. In 1914, Congress enacted the Clayton Antitrust Act, (Public Law No.
106–274, codified in scattered sections of 15 USC) which purported to legalize peaceful secondary pressure. However, in 1921, in *Duplex Printing Co. v. Deering* (1921), the Supreme Court gave the Clayton Act an extremely restrictive interpretation that effectively nullified its labor-protective provisions. Subsequent pressure by organized labor and progressives induced Congress to enact the Norris-LaGuardia Act in 1932 (Public Law No. 106–274, codified at 29 USC 101–15 (1994)), in which Congress again attempted to legalize peaceful secondary conduct by unions. The Norris-LaGuardia Act was upheld and interpreted broadly by the Supreme Court in the *United States v. Hutchenson* (1941), but the legality of secondary conduct remained controversial. In 1947, Congress enacted section 8(b)(4) in the Taft-Hartley amendments to the NLRA, which rendered secondary boycotts unlawful under the NRLA (see 29 USC 158(b)(4)). The scope of section 8(b)(4) and the larger issue of the lawfulness of peaceful secondary conduct remain controversial issues to this day.

The labor law’s ban on secondary activity assumes that union economic pressure and collective bargaining should take place within a discrete economic unit – the bargaining unit – and should be confined to the immediate parties in a bounded arena of conflict. Within the unit, economic pressure is seen as potentially effective, yet comfortably containable. The effort to limit economic warfare to ‘primary’ participants assumes that the unionized workplace has static borders and that disputes within the entity between the firm and its workers affect only those immediate and identifiable parties.

Despite its goal of limiting the scope of economic conflict, secondary boycott law has never been able to formulate a precise principled distinction between who is an insider and who is an outsider to a labor dispute (*NLRB v. Fruit & Vegetable Packers & Warehouse Men, Local 760* 1964; *Local 761, International Union of Electrical Workers v. NLRB* 1961; Lesnick 1965). In today’s network production, the assumption that there can be discrete, bounded conflict with clear insiders and outsiders is becoming less plausible than ever. Rather, unions are finding with increased frequency that efforts to bring economic pressure to bear transverses traditional bargaining unit and corporate boundaries. As they seek to apply pressure on suppliers, joint venturers, co-employers, network partners, and subsidiaries, they are finding that the secondary boycott laws are a

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3 Courts continue to enjoin secondary activity in disregard of specific statutory directives and precedent to the contrary. See, for example, *Burlington NRR Co. v. Bhd. of Maint. of Way Employees*, 481 US 429, 437–40 (1987) (criticizing lower courts for enjoining secondary conduct by railroad workers who were not subject to the NLRA’s secondary boycott prohibitions).

(iii) The definition of employee and employer The NLRA only provides protections for those individuals who fall within the statute’s definition of an ‘employee’. Individuals who work for multiple employers or the wrong kind of employer can easily fall outside the protection of the statute. Agricultural laborers, domestic workers, supervisors, and independent contractors are explicitly excluded from the Act, as are government employees and employees covered by the Railway Labor Act (29 USC 152(2) and (3)). There are additional NLRB-made exclusions for managerial and confidential employees (NLRB v. Hendricks County Rural Electric Membership Corp. 1981; NLRB v. Bell Aerospace Co. 1974; In re Ford Motor Co. 1946). Furthermore, employees who have some supervisory authority over others, or who have managerial decisions delegated to them, are excluded from coverage (NLRB v. Health Care & Retirement Corp. 1994; NLRB v. Yeshiva University 1980). In today’s workplace, in which hierarchies have been flattened and decision-making authority has been delegated downward, the supervisory and managerial exclusions deprive many low-level employees of the protections of the Act (NLRB v. Kentucky River Community Care 2001).

The exclusion for independent contractors has become particularly problematic. Because the test for independent contractor status is broad, many who are dependent on a particular employer for their livelihood are nonetheless classified as independent contractors and deprived of all labor law protections (Stone 2006b). Increasingly, employers attempt to reclassify employees and to vary their employment practices so as to transform their former ‘employees’ into ‘independent contractors’ (Brustein 2005; Ball 2003; Graditor 2003). Many low-paid employees such as janitors, truck loaders, typists, and building cleaners have been redefined as independent contractors even when they are retained by large companies to work on a regular basis.

The independent contractor exclusion also eliminates coverage for many part-time and short-term temporary workers. Such workers often work for more than one employer at a time, but are dependent upon and subject

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4 In the 1947 amendment to section 2(2) of the NLRA (29 USC 152(2)), Congress rejected an ‘economic reality’ test in favor of a common law test for determining independent contractor status. However, the Board and courts of appeal have often differed as to what that test requires.
to the supervision of each employer for the time they are at work. Yet, when a worker has multiple employers, each employer will often claim that the worker is an independent contractor rather than an employee. Courts often accept the employer’s own definition of a temporary worker’s status, thereby excluding a fast-growing portion of the workforce from unionization altogether (Clark v. E.I. DuPont de Nemours & Co. 1997; Abraham v. Exxon Corp. 1996; Vizcaino v. United States District Court 1999).

(iv) The act’s de facto exclusion of temporary workers One area in which the bargaining unit focus of the NLRA has been particularly out of step with labor market reality concerns the Act’s treatment of long-term temporary employees. Indeed, the evolving law of temporary workers illustrates the difficulty of applying static notions of bargaining units to the complex employment relationships that arise with today’s peripatetic workforce.

Since the 1980s, temporary employment has been the fastest growing portion of the labor market. According to the US Department of Labor, between 1982 and 1998, the number of jobs in the temporary help industry grew 577 percent, compared to a 41 percent increase in jobs in the labor force generally (GAO 2000, p. 16). In 1999, the Bureau of Labor Statistics reported that nearly 2 million employees worked for temporary-help agencies or contract labor provider firms (BLS 1999). Temporary employees who work for staffing agencies are often given long-term placement at particular user firms. There, the user firm supervises the work of the temp on a day-to-day basis, and the temp works alongside the firm’s regular employees, with the same skills, duties, and job classifications. In this triangulated employment relationship, the NLRB has considered both the temporary agency and the user firm to be joint employers of the temporary employee.

In 1990, the NLRB ruled that long-term temporary employees could not be included in a bargaining unit with a user-employer’s regular employees unless both the provider-agency employer and the user-employer consented (Lee Hospital 1990). Thereafter, the Board refused to consider any unit that combined temporary and regular employees, absent consent of both employers (International Transfer of Fla 1991). Because it is highly unusual for an employer to consent to its employees forming a union, the dual consent requirement made it virtually impossible for temporary workers to unionize.

In 2000, the NLRB reversed its former position and held that regular employees and temporary employees could be in the same bargaining unit so long as they shared a community of interest (Sturgis & Textile Processors, 331 NLRB 1298, 165 LRRM (BNA) 1017 (2000)). The Board also stated that temporary employees could unionize in a bargaining unit of all the employees of a single temporary work agency. As a result, the
NLRB began to permit temporary employees to be included in bargaining units that are comprised of temporary and regular employees of a single employer, or that are comprised of all employees of a single temporary agency. This ruling greatly expanded the possibilities for temporary workers to claim the protection of the labor law. However, in 2004 the NLRB again reversed itself in the case of *Oakwood Care Center and N & W Agency*, and reinstated the dual consent requirement for temporary worker organizing efforts (176 LRRM (BNA) 1033 (2004)). As a result, temporary workers are not able to organize in units with the permanent workers they work alongside. Rather, if they want to unionize, they must do so together with the other workers employed by their temporary agency. Yet agency temporary workers are dispersed and have little contact with each other. Thus, as a practical matter, temporary workers lack representation or a collective voice under the labor law.

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

Over the past 30 years, the employment laws have expanded in number and scope as the extent of the collective bargaining system has contracted. In the 1970s, individual employment protections were expanded by national legislation to provide occupational safety and health protection (Occupational Safety and Health Act (OSHA) of 1970), pension insurance (Employment Retirement Security Act (ERISA) of 1974), expanded protection against discrimination for government employees (Rehabilitation Act of 1973) and pregnant women (Pregnancy Discrimination Act of 1978), and protection for federal employee whistleblowers who report employer wrongdoing (Civil Service Reform Act of 1978). In the 1980s, Congress enacted the Worker Adjustment and Retraining Notification Act (WARN) requiring employers to give their employees advance notice of plant closings and mass layoffs (Worker Adjustment and Retraining Notification Act (WARN) of 1988), and the Employee Polygraph Act (Employee Polygraph Act of 1988) to provide protection for worker
privacy interests. In the same period, numerous states enacted legislation to protect the job security, privacy, dignity, and other concerns of employees. Thus as union density has declined in the private sector, statutory protections have become the main source of worker rights. Yet most of those statutory protections are only available to workers who have an ongoing relationship with a specific employer.

In addition to the legislative developments described above, in the 1980s some state courts began to imply exceptions to the at-will employment doctrine, thereby giving workers in those states judicial protection against unfair dismissal. The exceptions were not uniform – some states recognized a tort of unjust dismissal, some imposed implied terms of good faith and fair dealing on employment contracts, and some expanded the situations in which courts would enforce implied contracts for job security. Some courts also became more receptive to the application of conventional torts to workplace harms. Thus, for example, some courts permitted workers to recover for mistreatment under theories of the tort of intentional infliction of emotional distress or defamation in job references. Despite these exceptions, however, the bulk of American nonunion workers remained subject to the at-will doctrine and basically unprotected for their job-related grievances.

Even with the expansion of individual worker statutory and judge-made rights, in many important respects the employment laws remain tailored to the industrial era workplace and are thus less effective in the workplace of today. For example, the New Deal social security and unemployment insurance programs were not universal in their coverage. Rather, they tied crucial social insurance protections to employment, thereby reinforcing the bond between the employee and the firm. Furthermore, they did not provide mandatory and universal health insurance. Thus workers were left to obtain health insurance from individual employers, usually as a product of labor-management negotiations.

Other types of employment law protections also assume an employment relationship and hence are not available to persons designated ‘independent contractors’. Unlike Europe and Canada, in the United States there have not been legislative efforts to create an intermediate category between ‘employee’ and ‘independent contractor’ that would give atypical workers some of the employment protections available for standard workers. Rather in the United States there are only two categories – employee and

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5 For an analysis of the use of the intermediate category in the UK, see Guy Davidov (2005). See also, Befort (2002) (discussing the development of an intermediate category of dependent independent contractors in Canada, Sweden and Germany).
independent contractor – where the former gets a variety of employment law protections and the latter gets none. Independent contractors are not covered by minimum wage, workers’ compensation, unemployment compensation, occupational safety and health laws, collective bargaining laws, social security disability, anti-discrimination laws, or any of the other employment protections discussed above (Stone 2006b; Barton 2002).

2 The demise of the new deal system and the state of labor and employment law today

Because the labor and employment laws were tailored to the job structures of the industrial era of the 20th century, they have become obsolete as internal labor markets have declined in importance and new ideas about how to organize work have generated new work practices that are proliferating throughout American enterprises. Job security in the private sector, in the form of long-term attachment between a worker and a single firm for the duration of the worker’s career, is rapidly declining.6 Today, workers expect to change jobs frequently and employers engage in regular churning of their workplace, combining layoffs with new hiring as production demands and skill requirements shift. In addition, there has been an explosion in the use of atypical workers such as temporary workers, on-call workers, leased workers, and independent contractors. Furthermore, ‘regular’ full-time employment no longer carries the presumption of a long-term attachment between an employee and a single firm with orderly promotion patterns and upwardly rising wage patterns. No longer is employment centered on a single, primary employer. Instead, employees now expect to change jobs frequently. At the same time, firms now expect a regular amount of churning in their workforces. They encourage employees to manage their own careers and not to expect career-long job security.7

A new employment relationship is emerging to replace the industrial era internal labor markets. Today’s world of specialty production and knowledge work has spurred the development of new job structures, the

6 According to the United States Department of Labor’s current Population Survey, job tenure for men between 55 and 65, measured as the average time with a given employer, declined from 15.3 to 10.2 years between 1883 and 2002. For men between 45 and 54, it declined from 12.8 to 9.1; for men between 35 and 44, it declined from 7.3 to 5.1 (BLS News Releases, Employee Tenure in 2002 (9/25/02)). Several economists who have analyzed this and other data sources have concluded that since 1980 there has been a significant decline in job tenure. See Jaeger and Stevens (1999) and Valletta (1999) (citing numerous studies).

7 For a detailed description of the changing workplace, see Stone (2004).
job structures of the ‘digital era’. In the new digital era, theoretical and experimental approaches, such as total quality management (TQM), competency-based organizations, and high performance work practice programs, are transforming business practices. The advocates of the competency-based organization emphasize skill development by insisting that employees be paid for the skills they have, rather than according to lock-step job evaluation formulas (Lawler 1992). Skill-based pay, they claim, will give employees an incentive to acquire new skills and also make it incumbent upon employers to provide training and career development opportunities (Lawler 1992; Stone 2001). Advocates of TQM, meanwhile, counsel firms to involve every employee, at every level, in continuous product and service improvement. Some of the specific recommendations of TQM are to provide continuous training and opportunities for individual improvement, and to give workers direct contact with customers, external suppliers, and others who do business with the firm (Rosett and Rosett 1999; Anschutz 1995).

Despite differences in emphasis, the various approaches that comprise the new employment relationship share several common features (Roehling et al. 1998). A defining characteristic of the new employment relationship is that employees do not have long-term job security with a particular employer. Employees have episodic jobs, sometimes as regular employees, sometimes as temporary workers, and sometimes as independent contractors. Employment relationships are complex, without any one-size-fits-all model of what it means to be a worker.

When employees are with a firm in an employment relationship, they are given implicit understandings that provide a substitute for the job security of the past. Many employers explicitly or implicitly promise to give employees not job security, but ‘employability security’ – that is, opportunities to develop their human capital so they can prosper in the external labor market (Kanter 2001).

Another feature of the new employment relationship is that it places emphasis on the worker’s intellectual and cognitive contribution to the firm. Unlike scientific management, which attempted to diminish or eliminate the role of workers’ knowledge in the production process, today’s management theories attempt to increase employee knowledge and harness their knowledge on behalf of the firm (Stewart 1997; Davenport 1999).

The new employment relationship also involves compensation systems that peg salaries and wages to market rates rather than internal institutional factors. The emphasis is on offering employees differential pay to reflect differential talents and contributions (Kanter 1997).

As part of the new employment relationship, firms now also provide employees with opportunities to interact with a firm’s customers, suppliers
and even competitors. Regular employee contact with the firm’s constituents is touted as a way to get employees to be familiar with and focused on the firm’s competitive needs, and at the same time to raise the employees’ social capital so that they can find jobs elsewhere.

The new relationship also involves a flattening of hierarchy, the elimination of status-linked perks (Klein 1994), and the use of company-specific grievance mechanisms (Greenberg 1996; Colquitt et al. 2001).

While the new employment relationship does not depend upon long-term employment, attachment or mutual loyalty between the employee and the firm, it also does not dispense with the need for engaged and committed employees. Indeed, firms today believe that they need the active engagement of their employees more than ever before. They want not merely predictable and excellent role performance, but what has been described as ‘spontaneous and innovative activity that goes beyond role requirements’ (Deckop et al. 1999). They want employees to commit their imagination, energies, and intelligence on behalf of their firm.

Today’s valuation of employees’ cognitive contribution stands in direct contrast to the scientific management approach. Under scientific management, workers were not expected to gain or use knowledge in their jobs. Knowledge was a monopoly tightly held by management. Today, firms believe that they can acquire a competitive advantage by eliciting and harnessing the knowledge of their employees. According to Fortune magazine editor, Thomas Stewart, ‘Information and knowledge are the thermonuclear competitive weapons of our time’ (Stewart 1997).

The emerging employment relationship has two diametrically opposed consequences. On the one hand, it creates a more interesting work environment and offers workers more autonomy and freedom than did the industrial era job structures. Yet on the other hand, for many it creates uncertainty, shifts risk, and fosters vulnerability. Some of the groups that are disadvantaged in the new work regime are easily identified. For example, older workers caught in the transition are heavy losers. Having been led to expect a good job and a secure future, they have instead discovered that their expectations were chimeral. Another group that has not fared well is the low-skilled – those who have neither the necessary

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8 For example, one of the most touted practices of Total Quality Management is that management should seek to create conditions whereby every worker, at least from time to time, sees and talks with real customers, with actual users of the company’s products or service (Anschutz 1995).

9 For example, a case study of white-collar workers laid off at IBM and Link Aerospace in Binghamton, New York, two companies known for their paternalistic long-term employment relationships, concluded that downsizing and displacement
training nor the ability to reinvent themselves, retool, and adapt to new labor market demands. A third group is the risk-averse – those who were comfortable in internal labor markets and lack the desire or initiative to seek out opportunities, to network, and to build their own careers.

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

3 Labor law and employment protection in the future

The foregoing historical perspective returns us to the question, what will the labor and employment law look like in the future? In the past, labor and employment laws were enacted as the result of pressure from organized labor and social reformers to ameliorate the vulnerabilities and injustices that occur in the operation of the labor market. The labor and employment laws in effect today share that origin. The problem for the future is that the labor and employment laws no longer provide redress for the most pressing problems of workers. The changing nature of work has caused new problems to arise in the operation of the labor market, problems that call for new kinds of regulatory interventions. Today workers move frequently between firms and within firms, so bargaining-unit-based unionism gives little protection. And the employment laws do not give adequate protection to individuals who move in and out of the labor market, or who do not have a typical relationship with a single employer.

There are two possible scenarios for the future of labor law. One scenario is that labor law will continue to atrophy, unions will continue to decline, and individual employee rights will be chipped away through the combined processes of narrowing judicial construction of existing rights, the development of a robust waiver doctrine whereby employees will have rights on paper but not in practice, pressures from globalization for lower labor standards, and a slow erosion of specific monetary standards through inflation. This scenario is a likely one given the declining power of unions at the legislative level that results from labor’s declining numerical strength. Union political power is necessary to pressure politicians to maintain employment standards at current levels or raise them higher. In change the expectations about the relationships among workers and between employers and workers (Koeber 2002).
this first scenario, workers’ rights will decline in all the respects just mentioned, and we will see a return to the laissez-faire labor regulation of the pre-Wagner Act era.

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

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

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

A Collapsing the distinction between labor and employment law

As stated above, the US system of employment regulation has maintained a distinction between collective bargaining rights for unionized workers and individual employment rights for other workers. Though this distinction sounds fixed in theory, there has in fact always been a permeable boundary between these bodies of regulation. The labor law section 301 preemption doctrine serves as the primary traffic cop that directs individuals with work-related disputes to one body of law or the other. However, the preemption doctrine itself has been an evolving and changing set of rules, so that some individual rights can be vindicated by individuals who have union contracts, and some cannot (Stone 1992).10

10 The general principle of section 301 preemption, subject to some exceptions, is that if vindication of an individual employment right requires a court to interpret a collective bargaining agreement, the action is preempted and left to be decided in
Recent developments have challenged this distinction. Increasingly, workers with individual employment law claims have brought their claims in a collective form, either as class actions under most employment statutes, or as ‘collective actions’ under the Fair Labor Standards Act. Class actions have long been a feature of employment discrimination litigation, but now they have spread to other types of alleged employment law violations. Collective actions under the FLSA are similar to class actions, but in some respects, the requirements for a ‘collective action’ are easier for plaintiffs to satisfy than those for a class action under rule 23 of the Federal Rules of Civil Procedure. Collective employment disputes have been brought in both state and federal courts, alleging violations of both state and federal labor laws.

Employment class actions occupy the vast majority of work of management-side employment law firms. As one observer writes, ‘A sample of 150 FLSA “collective action” cases prosecuted by the Department of Labor as of January 2005 reads like a Who’s Who of corporate America, including Wal-Mart (seven times in the previous five years); Bed, Bath & Beyond; Nortel Networks; Safeco Insurance Companies (twice); Pep Boys; Electronic Arts, Inc.; Minolta Business Solutions; Countrywide Credit Industries; Conseco Finance Corp.; NBC; Ameriquest Mortgage Co. (three times); First Union Corp.; and, Perdue Farms. Public entities being sued included the City of Louisville and the Chicago Transit Authority’. Most of these claims were misclassification cases in which workers sought unpaid overtime (Miller 2007).

Through consolidation of claims, employment law collective actions can result in sizeable damage awards. For example, in recent wage and hour suits in California alone, the Coca-Cola Bottling Company settled a case for $20.2 million, Bank of America settled for $22 million, and Rite Aid Corp. settled for $25 million (Hechler 2001). In 2002, United Parcel Service agreed to pay $18 million to settle a similar suit on behalf of misclassified supervisors (Ogletree et al. 2002). The same year, Starbucks Corp. also paid $18 million private arbitration. For a detailed discussion of how the preemption doctrine operates to mediate the boundary between labor law and employment law and how the doctrine has changed over time, see Stone (1992).

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

An example of a state law class action brought under a state employment law is Ammenta v. Osmose, 135 Cal. App. 4th 314 (2006) (California minimum wage law).
to settle two class action suits on behalf of current and former managers and assistant managers in California who claimed that they had been misclassified as ‘exempt’ employees and thereby denied overtime compensation.

Collective employment litigation, whether technically brought as ‘class actions’ or FLSA ‘collective actions’, are an expanding form of collective action in an era of declining union activity. While such actions do not create the experience of solidarity and collective empowerment that unionization efforts and strikes do, they share some features with other conventional forms of collective action. They reflect a shared sense of work-related wrong and they identify a group of workers – the class – as having a shared interest in correcting these wrongs. They also operate through representatives, the named plaintiffs and the class counsel, who speak to management for the workers and, at least in theory, represent the workers’ interests. Collective employment actions are greatly feared by management because, apart from their potential financial exposure, the suits are potentially poisonous to general workplace morale because they are ongoing disputes involving incumbent disgruntled employees.13

Class actions also have some obvious and significant differences with conventional unionization efforts. First, they do not involve the type of mobilization that typically occurs in a union drive. Furthermore, they do not aim to form lasting organizations nor do they offer the prospects of an ongoing bargaining relationship between workers and an employer over the whole range of issues involved in the employment relationship. They may take a long time to run their course, but essentially they are one-shot, single issue challenges to a company’s employment practices. And they also do not generally foster the type of bonds of solidarity on which conventional unionism relies.14 Finally, they seek to vindicate pre-existing statutory rights, not to define the normative rules that shall govern the workplace. That is, unlike collective bargaining, they are not an exercise in labor-management self-regulation.

It is interesting to note that the features of collective employment actions that distinguish them from collective bargaining parallel the broad changes in the workforce. In collective litigation, relatively atomistic employees come together to fight on one issue. Some class members may not be employed by the defendant at the time of the lawsuit, and the members of the class often have never met each other. Once the litigation is over, any

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

14 For an incisive account of the relationship between unionism and solidarity, see Offe and Weisenthal (1980).
bonds of solidarity dissolve. This is similar to the mobile, self-contained knowledge worker that is the paradigm of today’s worker. Hence it is possible that ex post single issue workplace governance is the form that collective action will increasingly take in the future.\footnote{I am grateful to Fred Tung for this insight}

Despite the differences between collective employment litigation and collective bargaining, as unions decline collective litigation has become an important venue for the protection of employment rights. Their profusion suggests that this may be an important form of employee collective action for the future. If that is the case, then the specific legal requirements of maintaining a collective legal action – whether a class action or a FLSA collective action – will come under increased scrutiny. For example, in some employment discrimination litigation, courts have begun to question the application of rule 23(b)’s commonality and typicality requirements to workplaces in which management authority is diffuse and delegated to lower-level supervisors.\footnote{Compare \textit{Allen v. Chicago Transit Authority}, 2000 WL 1207408 (ND Ill. 2000) (finding no commonality and hence refusing to certify class action where the company had neither a highly centralized nor entirely subjective method of determining promotions) with \textit{McReynolds v. Sodexho Marriott Services, Inc.}, 208 FRD 428 (DDC 2002) (certifying class action alleging employment discretion despite the company’s decentralized decision-making structure and lack of uniform promotion policy). See generally, Stone (2004), pp. 174–8.}

This issue is posed presently in the behemoth employment discrimination case, \textit{Dukes v. Wal-Mart Stores}, involving 1.5 million present and former Wal-Mart employees.\footnote{\textit{Dukes v. Wal-Mart Stores, Inc.}, 222 FRD 137 (ND Cal. 2004), aff’d \textit{Dukes v. Wal-Mart Stores, Inc.}, 474 F.3d 1214 (9th Cir. 2007), withdrawn and superseded by \textit{Dukes v. Wal-Mart Stores, Inc.}, 509 F.3d 1168 (9th Cir. 2007) (affirming lower court’s class certification).} There are similar debates about the requirement in FLSA collective actions that class members ‘opt in’ rather than ‘opt out’ as is permitted under rule 23 (see, for example, Ruckelshaus 2008; Lampe and Rossman 2005). As employment class actions continue to proliferate, these procedural requirements will take on added significance.

Another feature of these new types of collective actions is the involvement of unions. More and more, unions are financing and otherwise assisting unorganized workers in mounting employment class actions. For example, the United Food and Commercial Workers Union has been actively involved in wage and hour suits against Alberton’s grocery chain, Tyson Foods, Perdue Farms, and the Nordstrom retail chain (Hechler 2001). The Writers’ Guild sponsored several wage and hour class action lawsuits against television reality shows, even though the employees involved were not represented by the union (\textit{Sharp v. Next Entertainment}, 2001).
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LASC Case No. BC 336170 and Shriver v. Rocket Science Labs., LLC, LASC Case No. BC 338746. Some have argued that by assisting these types of actions, unions can gain a foothold in unorganized workplaces that could lead to greater organizing success down the road. While there is no evidence to date that this has occurred, it remains a hopeful prospect for a labor movement that is experiencing hemorrhaging losses.

Before we can conclude that collective employment actions are either a substitute for actual unionization or a foot-in-the-door method to revitalize the union movement, it is necessary to look at some legal issues that are waiting in the wings. One issue that has arisen is whether a union, by giving unorganized workers financial assistance in the form of legal representation in employment litigation, is giving an unlawful benefit to improperly influence workers’ choice whether or not to unionize. Some court decisions have held that when a union finances employment litigation, it is an unlawful payment of benefits and hence grounds to set aside a union election.18 Another issue that might arise is whether a union that participates in the negotiation of a settlement of an employment class comprised of unorganized workers is acting in a representative capacity without having attained majority status. In such a case, its actions would also violate the statute. If union involvement in employment class actions is to be an important tactic in the future of the union movement, the labor law will need to address these issues.

B Shifting from collective bargaining to legislation to set employment conditions

As explained above, the New Deal system involved setting the core conditions of the employment contract by bargaining, whether collectively or individually, between the worker and the employer. The individual employment standards were set at a minimal level. For example, the minimum wage is so low that a worker working full time at minimum wage would not receive the poverty level wage for a family of four. The legislation anticipates that workers with sufficient bargaining power will bargain for wages above the set minimum. Similarly, state workers’ compensation

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18 See Freund Baking v. NLRB, 165 F.3d 928 (DC Cir. 1999); Nestle Ice Cream Co. v. NLRB, 46 F.3d 578 (6th Cir. 1995). But see Novotel New York, 321 NLRB 624, 152 LRRM (BNA) 1201 (1996) (refusing to find union’s conduct in bringing FLSA lawsuit on behalf of unorganized employees to be objectionable or grounds to set aside election). See also General Counsel Advice Memo, United Food and Commercial Workers Union, Local 120 (Wal-Mart Stores, Case 32–CB-5757–1 (October 13, 2004), 2004 WL 2414080 (NLRBGC). See generally Fisk (2002) (discussing legality of union representation of non-union workers in wage and hour litigation).
laws vary as to their adequacy, but none of them provides full income replacement for workers injured on the job.

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

This change in the nature of employment rights and the increase in rights for all employees represents a shift in the locus of employment regulation away from collective bargaining and toward the state. In a similar fashion, some legislatures and state courts have fashioned exceptions to the at-will rule – albeit generally narrow exceptions – which have come to supplant the just cause protection that previously were only found in union contracts. Some exceptions take the form of non-retaliation protection in employment law statutes, and some take the form of judicially created common law doctrines such as the tort of unfair dismissal. This is not to suggest that union contracts no longer offer job security protection nor that state and federal exceptions are ample or widespread, but rather that as unions decline, courts and legislatures have to some extent stepped in.

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

In terms of the future of employment law, we can expect not only more
employment laws, but also more controversy about them. We can expect an increased role of labor in politics and with it, increased litigation about union political expenditures. There is a storm of litigation about the Beck rules concerning which fees must be paid by individuals who are in union-ized bargaining units but have chosen not to be members. This issue and others resulting from unions’ involvement in politics will increase in their urgency (Masters et al. forthcoming; Masters and Jones 1999).

C Expanding collective bargaining to new groups, particularly geographically defined groups

There is evidence that employees feel they need unions, but not necessarily the unions that now exist (Freeman and Rogers 1984). Given the decline of worker-firm attachment, workers need organizations that further their joint interests but that are not pegged to a particular employer. Because workers move frequently within and between firms throughout their working lives, there needs to be a mechanism for workers to deploy their collective power to negotiate conditions across employers.

At the present time, some new types of organizations are emerging that attempt to engage in bargaining with multiple employers in different industries or that utilize workers with differing skills. For example, in many cities, unions have worked with community groups to enact living wage ordinances to improve labor standards for low-wage public sector employees (Stone 2006a). Presently there are city-wide living wage ordinances in Baltimore, Los Angeles, and other places as a result of area-wide political pressures by community and labor groups. Although such ordinances are limited to public sector employees, they suggest a new form of bargaining for workers across industries on a locality-wide basis. We could foresee city ordinances that set industrial safety codes, mandate paid family leave, require employers to provide health insurance, and address other issues that are part of the shared needs of all working people in the area.

In a similar vein, in Los Angeles, San Antonio, and some other cities, unions and community groups have worked together to negotiate community benefit agreements with city authorities and private investors to provide job creation, job training, affordable housing, social services, public parks, and other community improvements in exchange for support for development projects.19 There have also been multiple-employer organizing efforts

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19 For a detailed account of the union-community alliances and the negotiation of a community benefits agreement in Los Angeles, see Cummings (2006). On similar efforts undertaken by the Industrial Areas Foundation in San Antonio and other cities in Texas, see Paul Osterman (2002).
of immigrant workers within particular sectors (Milkman 2006). In many cities, worker centers have developed to inform low wage workers, often immigrants, of their legal rights (Fine 2006).

The present labor law does not easily accommodate area-wide multi-employer, multi-sector bargaining, particularly when it involves union-community partnerships on one side, and multiple employers and city agencies on the other. However, organizations that engage in such efforts could provide important benefits for workers in today’s labor market. Although workers change jobs more than in the past, they usually find new jobs in the same geographic area as their previous jobs. Hence it would be desirable for the labor law to facilitate area-wide bargaining on such issues as minimum pay levels, health and pension benefits, leave policies, safety standards, job training programs, job transfer rights, and employment benefits at the local and/or regional level. To do so, the labor law would have to expand the present notion of bargaining units, and devise another mechanism for determining legally sanctioned bargaining rights. Proposals for geographic unions such as put forward by Charles Heckscher, Raymond Miles, and this author can serve as a starting point (Heckscher 1988; Miles 1989; Stone 2004).

One objection to these initiatives is that the more that unions exert pressure on corporations at the local level, the more temptation there will be for corporations to relocate to avoid union demands. This is the well-known danger of the race to the bottom, and it reflects the fact that capital is generally more mobile than people. Absent some particular reason for remaining in a particular locale, corporations will tend to move to locations that have the lowest labor costs (Stone 1995; 1999).

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 (Stone 1999). In today’s world, often corporations want to be near others that produce in their field to take advantage of ‘agglomeration economies’.

In the 1980s, economists began to study the effect of agglomeration on economic growth. They found that firms producing certain types of goods and services were likely to locate near others of their type, such as the diamond district on 47th Street in New York City, or the clusters of used car lots found in most small cities (Quigley 1998). This led economists to hypothesize that when certain types of firms were located in proximity to each other, they all received value from the fact of agglomeration that was independent of any single firm’s contribution. Since then, a great deal of empirical work has confirmed the existence of localized agglomeration
economies that play a powerful role in the locational choices of firms (Drennan 1999, Glaser 1998). One well-known example is AnnaLee Saxenian’s description of the dramatic effects of agglomeration in the Silicon Valley computer industry (Saxenian 1994). The clusters of biotechnology firms around Princeton, New Jersey, of banking and financial firms in New York City, and computer hardware manufacturing firms around Austin, Texas are other examples of successful localized agglomeration economies.

When locational choices of firms are influenced by the prospects of valuable agglomeration effects, those firms will be less likely to move overseas, or across the country, to escape rising labor costs. Indeed, many of the measures for which geographic unions might mobilize are measures which could enhance the value of the region’s human capital, and thus increase the value of agglomeration. For example, corporate contributions to adult education and training programs make a locality’s workforce more flexible and skilled, thereby providing a benefit to all area employers. Yet no individual employer has an incentive to establish such programs unilaterally because it would have no means of capturing all the benefits and ensuring that the benefits were not captured by a competitor. If a union induces all area-wide firms to contribute jointly, then all local firms share in the benefit. Similarly, if enough corporations contribute to a local school system to raise the level of education attainment, that would help attract a high skilled workforce. In this way, the prospects of agglomeration economies combined with corporations’ increased reliance on human capital could provide the glue to keep corporations in place and prevent them from bolting each time a citizen union demands that local firms adopt good corporate citizenship behavior.

D Broadening the labor and employment law field

The field of labor and employment has until now been seen as narrowly related to issues that arise in the employer-employee relationship in the workplace. However, given today’s fluid and boundaryless workplace, issues concerning work and of concern to workers do not always involve their relationships to their immediate employer. Rather, issues concerning the employment relationship implicate many other areas of law, such as health insurance, training and education, welfare assistance, pensions and social security. Also, there are new issues that have arisen for workers in their capacity as workers as a result of the new employment practices.

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

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

E Creating a new type of safety net such as workplace sabbatical/social
drawing rights

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

To date, neither our welfare laws nor our labor and employment laws have focused on the problem of transition assistance. However, the issue has been actively considered in Europe. In 1999, a group of distinguished labor relations experts was convened by the European Commission to consider the implications of the changing nature of work. The group, chaired by Alain Supiot, was charged with considering the impact of changes in the workplace on labor regulation in Europe and to devise proposals for reform. In 2000, the group issued a report, known as the Supiot Report. The Report describes a changing employment landscape in Europe that mirrors changes that have occurred in the United States – a movement away from internal labor markets toward more flexible industrial relations practices. The authors found that the new work practices have entailed a loss of job and income security for European workers. The Report called for new mechanisms to provide workers with mechanisms that equip individuals to move from one job to another (Supiot et al. 2001).

The Supiot Report contained a number of suggestions for changes in the institutions regulating work to provide what they term ‘active security’. Their most visionary proposal was for the creation of ‘social drawing rights’ to facilitate worker mobility and to enable workers to weather transitions. Under the proposal, an individual would accumulate social drawing rights on the basis of time spent at work. The drawing rights could be used for paid leave for purposes of obtaining training, working in the family sphere, or performing charitable or public service work. It would be a right that the individual could invoke on an optional basis to navigate career transitions, thereby giving flexibility and security in an era of uncertainty. As Supiot writes, ‘They are drawing rights as they can be brought into effect on two conditions: establishment of sufficient reserve and the decision of the holder to make use of that reserve. They are social drawing rights as they are social both in the way they are established . . . and in their aims (social usefulness)’ (Supiot et al. 2001).

The concept of social drawing rights is related to existing arrangements in which workers have rights to time off from work for specified purposes, such as union representation, maternity leave, and so forth. The Supiot Report makes an analogy to sabbatical leave, maternity leave, time off for union representatives and training vouchers to observe that ‘we are surely witnessing here the emergence of a new type of social right, related to work
in general’ (Supiot et al. 2001). Social drawing rights, the Report contends, would smooth these transitions and give individuals the resources to retool and to weather the unpredictable cycles of today’s workplace.

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

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

4 Conclusion

The workplace is changing and the labor and employment laws will change as well. Workers today are forced to bear many new risks in the labor market – risks of job loss, of wage variability, of benefit gaps, of skill obsolescence, and of intermittent prolonged periods of unemployment. Currently our labor and employment laws do not address these problems, either for regular workers or for atypical workers. The changing nature of work has rendered much of the legal framework obsolete, and a new framework will be created to take its place. It remains to be seen whether the new framework will be a free market framework of laissez-faire capitalism, or
whether it will involve the creation of a new type of rights and a new type of safety net that enables workers to thrive in the new workplace.

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