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The Four Pillars of Work Law

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EMPLOYMENT RELATIONS IN THE UNITED STATES: LAW, POLICY, AND PRACTICE. By *Raymond Hogler*. Thousand Oaks, California; London; and New Delhi: Sage Publications. 2004. Pp. ix, 301. $44.95.

FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE. By *Katherine V.W. Stone*. New York: Cambridge University Press. 2004. Pp. vii, 300. $29.

In our contemporary legal landscape, a student wishing to study the law of the workplace has scarce opportunity to encounter an integrated body of scholarship that analyzes the labor market as the subject of government regulation, contractual duties, collective action, and individual rights. Work law developed in the American legal system as a patchwork of common law doctrine, federal and state statutes, and evolving social norms. Typical law school curricula often include courses relating to the four pillars of work law: "employment law," "labor law," "employment discrimination," and some variation of a tax-oriented "employee-benefits law." Employment law, in most categorizations, studies the boundaries of the individual employment contract, including contractual limitations, tort liabilities, and minimum protections. Labor law is the subject of collective bargaining between unions and employers, statutorily framed by the National Labor Relations Act ("NLRA"). Employment antidiscrimination law is the subject of status-based unequal treatment in the workplace, including on the basis of gender, race, national origin, disability, or religion. Lastly, the fourth category, employee-benefits law, involves the standards controlling the administration and taxation of social welfare attached to the work cycle, including unemployment benefits, pensions and ERISA,[1] health insurance and COBRA,[2] disability benefits, and worker compensation plans.

More than simply substantive divisions, these four categories are also stacked as historical developments in the regulation of work and vary in the public and private mechanisms each undertakes as means for social control. In other words, the subfields of work law correspond with ideas about

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* Assistant Professor of Law, University of San Diego. LL.B. 1998, Tel-Aviv; LL.M. 2000, Harvard. —Ed. This review essay is dedicated to the memory of Harvard Law Professor David Charny, whose brilliant understanding of work law transcended disciplinary and conceptual boundaries.

1. Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. §§ 1001–1461 (2000 & Supp. II 2002).

2. Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985, 29 U.S.C. §§ 1161–1169 (2000 & Supp. II 2002).

modes of effective and legitimate social regulation, creating contrived form-substance alignments. While some questions have been resolved through legislation, other areas developed through ad hoc adjudication. Similarly, while some areas are federally regulated, other areas are controlled by state law. And while issues such as workplace safety are enforced by a public administrative agency, other issues, such as antidiscrimination claims, are enforced primarily by private litigation. Although the four pillars of work law have developed relatively independently from one another, the realities of contemporary work defy this fragmented structure and its conceptual satellites. The subjects and regulatory tools of all four subfields overlap significantly, and it is increasingly problematic to study them separately. In reality, legal disputes do not originate carrying a tag of one category or another. Workers experiencing dislocation or mistreatment seek assistance that transcends these divides and requires a more expansive outlook.

In search of an updated vision of institutional and policy reform that will match market realities, regulators and activists are increasingly skeptical of the fit between existing laws and categories and the new world of work. While many commentators have recognized the mismatch between existing policies and contemporary market realities, few have attempted to offer a restructured vision for the twenty-first-century law of the workplace. There are, however, two new books that envision updating employment and labor laws to match the new realities of work and welfare. The two books are innovative and original attempts to rethink public policy and the possibilities for collective and individual action for the twenty-first-century world of work, a reality very different from that which the New Dealers had in mind. Together, the two works enable readers to recognize patterns of policy reform as they unfold in reaction to changes in production and technology.

Professor Raymond Hogler's *Employment Relations in the United States: Law, Policy, and Practice*[3] (hereinafter *Employment Relations*) maps contemporary employment relations from a historical perspective. The book begins with a description of the evolution of collective bargaining from 1880 through the New Deal era, followed by an account of the shift from collective action to individual employee rights throughout the second half of the twentieth century. Hogler describes the major political and legislative events in these decades, including the passage of the Civil Rights Act, OSHA, ERISA, and the FMLA.[4] Each of these acts signified the transition

3. Raymond Hogler is a Professor of Management, Colorado State University.

4. There are over two hundred statutes that regulate the workplace at the federal level alone. *See, e.g.*, Labor Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. §§ 141–197 (2000) (limiting the scope of collective bargaining: excluding, for example, supervisory workers); National Labor Relations (Wagner) Act (NLRA), 29 U.S.C. §§ 151–169 (2000) (setting the regime for collective bargaining and founding the National Labor Relations Board to check disputes); Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. §§ 201–219 (2000 & Supp. II 2002) (setting minimum-wage, overtime, and child-labor restrictions); Equal Pay Act of 1963, 29 U.S.C. § 206 (2000 & Supp. II 2002) (amending the FLSA); Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, 29 U.S.C. §§ 401–531 (2000) (amending the NLRA); Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. §§ 621–634 (2000); Occupational Safety and Health Act (OSHA) of 1970, 29 U.S.C. §§ 651–678 (2000 & Supp. II 2002); Employee Retirement Income

from a concept of collective self-governance by workers to that of individual protections commanded by the federal government and enforced by administrative agencies and courts. *Employment Relations* analyzes the limits of these existing laws in the new political economy and suggests that in order to rebuild sustainable and just employment environments, a revival of worker collective action is crucial. Hogler's underlying political goal is to frame employment and labor laws in a way that illuminates their inherent connection to wealth distribution, status, and security.

Professor Katherine Stone's *From Widgets to Digits: Employment Regulation for the Changing Workplace*[5] (hereinafter *From Widgets to Digits*) analyzes the shift from twentieth-century industrial production to a twenty-first-century digital era. In this ambitious book, Stone sets out to interweave developments in production, technology, and globalization with changes in American labor and employment law. Written by one of the country's leading labor law scholars, the book provides an original and rich vision for the new frontiers of work law. Drawing on sociological studies, empirical data, and contemporary organizational behavior theories, the book proposes legal and institutional reforms that will address the challenges of increased flexibility, decreases in employee benefits, new forms of inequality, and worker representation. The book includes both a general framework for understanding the changing workplace and a study of particular areas in which existing regulation must be revised, including human capital ownership, employment discrimination, labor unionism, and benefit portability in social insurance. Stone successfully paints a picture of the new realities of work and their significant implications for public policy. Stone envisions a regulatory regime that will ensure the continuity of wages, sustainable and transferable skills, unambiguous ownership of workers' human capital and intellectual property, portable health and retirement benefits, and state-funded training and career transitions. Together, this updated set of policies and programs forms an updated progressive agenda for workplace justice.

These two bodies of work on the new labor market engage central debates about the relevance of the National Labor Relations Act to collective action in today's economy, the changing nature of rights at work—including

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Security Act (ERISA) of 1974, 29 U.S.C. §§ 1001–1461 (2000 & Supp. II 2002); Job Training Partnership Act (JTPA) of 1982, 29 U.S.C. §§ 1506–1781 (2000); Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001–2009 (2000) (limiting use of lie detectors at work); Workers' Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §§ 2101–2109 (2000) (requiring notice to employees in major layoffs and plant closures); Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. §§ 2601–2654 (2000 & Supp. II 2002) (providing unpaid leave of up to twelve weeks for sickness or dependent care); Workforce Investment Act (WIA) of 1998, 29 U.S.C. §§ 2801–2945 (2000); Mine Safety and Health Act (MSHA) of 1969, 30 U.S.C. §§ 801–962 (2000 & Supp. II 2002); Drug-Free Workplace Act of 1988, 41 U.S.C. §§ 701–707 (2000) (requiring large employers to have substance-abuse programs); Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, 42 U.S.C. §§ 601–619 (2000); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000) (creating the Equal Employment Opportunity Commission (EEOC)); Americans with Disabilities Act (ADA) of 2000, 42 U.S.C. §§ 12101–12213 (2000). For additional authorities, see generally the environmental, consumer, and food and drug regulations of the civil rights and Great Society eras of the late 1960s and early 1970s.

5. Katherine Stone is a Professor of Law, UCLA School of Law.

antidiscrimination, unjust termination, and social benefits (social security, pensions, health care)—and the role of the state in regulating the labor market as it becomes increasingly global. Both authors offer evolutionary and doctrinal explanations for the changing nature of employment relations and provide a lens through which we can understand and address the limits of existing policies. Both books will prove valuable for policymakers, activists, and students of the workplace.

I. THE TWENTY-FIRST-CENTURY WORKPLACE AND ITS DISCONTENTS

The books trace the evolution of work relations through different periods, leading up to the contemporary workplace. In *From Widgets to Digits*, Stone divides the past centuries into three distinct eras: nineteenth-century artisanal production ("craft"), twentieth-century industrial production ("widgets"), and twenty-first-century digital production ("digits"). The American employment system originated from British master-and-servant law. During the eighteenth and early nineteenth centuries, work relations were based on the idea of prolonged status-based, and in some cases involuntary, servitude. Legal historians of the pre-industrial era describe employment as akin to family relations, in which status defined and determined relationships and powers.[6] Craft workers often self-organized as both producers and merchants, allowing them to operate in guild-like associations (Stone, pp. 13–26).

In the late-nineteenth century, the labor market underwent profound changes as the economy moved to mass industrialization. The shift from small-scale craft and agrarian production to large-scale manufacturing and commerce meant that employment relations became more complex and impersonal, with layers of managers and supervisory positions. Work became organized in large assembly-line factories, and the modern corporation became the prevalent form of economic organization. Industrial production was characterized by narrowly defined menial jobs, strict managerial supervision, and centralized control over workers. Both books describe in some detail the origins of scientific management in the early twentieth century, a period that Hogler appropriately terms the "Era of Management" (Hogler, pp. 35–62). Work relations in the Era of Management were based on a social contract that promised secure, long-term, and full-time work. Promotion was made internally, assuring long-term job security and progressive seniority-based compensation structures. The post-war New Dealers relied on these assumptions of lifetime employment as they instituted a regime of collective bargaining and social security (Hogler, pp. 99–132; Stone, pp. 27–61).

In recent decades, and accelerating in the 1990s, a new competing model of production has become at least as prominent as the industrial-management model. According to Stone, a new digital model is in fact rapidly replacing twentieth-century forms of work. Digital production refers to

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6. *See, e.g.*, IRVING BROWNE, ELEMENTS OF THE LAW OF DOMESTIC RELATIONS AND OF EMPLOYER AND EMPLOYED (1883); JAMES SCHOULER, LAW OF THE DOMESTIC RELATIONS EMBRACING HUSBAND AND WIFE, PARENT AND CHILD GUARDIAN AND WARD, INFANCY AND MASTER AND SERVANT (1905).

a shift to advanced technologies, complex coordination among firms, lean production, and flexible relationships between employers and their employees. As Stone acknowledges, it is difficult to speak of historical shifts in the midst of their occurrence. Yet, Stone argues that the changes in the workplace in the past decade have been as momentous as those that took place at the turn of the last century (Stone, p. 289). She describes the new digital workplace as "boundaryless," referring to the fact that work is increasingly contracted out, outsourced, and part-time. Workers can no longer expect that they will stay at the same worksite or with the same employer for more than a short period of their work cycle. The boundaryless nature of the firm also refers to the fact that production occurs over long chains of subsidiaries, often taking place in a number of countries around the world.[7] As a result, today's workplaces promise far less stability and long-term job security.

Work relations have become casual in the sense that there is a reduced expectation for continuity and commitment on the part of each side.[8] As businesses seek more flexibility in their hiring and production practices, they increasingly utilize a variety of subsequent firms to meet their changing employment needs.[9] Workers increasingly turn to labor-market intermediaries—such as temporary help agencies, vocational training institutes, and community-based networks—in order to find jobs. From a managerial perspective, a key phenomenon of the last decade has been the rapid rise of a "non-employee workforce," including part-time, temporary, leased, subcontracted, and seasonal workers, all of whom disproportionately include women, minorities, and immigrants.[10] These workers are often excluded from standard company benefits and from labor and employment law protections. While the casualization and informalization of work relations have decreased the likelihood of lifetime, full-time employment by a single employer, existing policies still assume such long-term employment, with a focus on a peripheral set of safety nets in case of sudden rupture. The increased contingency of work has revealed the lack of institutional responsiveness for linking a series of short-term employment opportunities to a continuous career cycle. Moreover, the decline of the industrial workplace setting challenges the institution of traditional labor unionism as the paradigm of workplace democracy.

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7. For an organizational description of the related idea of a new "boundaryless career," see THE BOUNDARYLESS CAREER: A NEW EMPLOYMENT PRINCIPLE FOR NEW ORGANIZATIONAL ERA (Michael B. Arthur & Denise M. Rousseau eds., 1996).

8. SASKIA SASSEN, GLOBALIZATION AND ITS DISCONTENTS 34 (1998).

9. Orly Lobel, *The Slipperiness of Stability: Contracting for Flexible and Triangular Employment Relationships in the New Economy*, 10 TEX. WESLEYAN L. REV. 109 (2003) [hereinafter Lobel, *The Slipperiness of Stability*]; Orly Lobel, *Class and Care: The Roles of Private Intermediaries in the In-Home Care Industry in the United States and Israel*, 24 HARV. WOMEN'S L.J. 89, 96–98 (2001) [hereinafter Lobel, *Class and Care*].

10. Lobel, *Class and Care*, *supra* note 9.

II. THE LABOR/EMPLOYMENT DIVIDE AND INSTITUTIONS OF WORKPLACE DEMOCRACY

The shift from domestic industrialism to global digital production is closely related to a decline in the traditional model of collective bargaining. During the industrial era, unionism was the principal institution for enabling worker voice and ensuring equitable and fair industrial relations. Moreover, Keynesian economics of the time understood labor unions and collective bargaining to be promoting economic growth, and thus, the goals of efficiency and legitimacy in market relations could both be attained. Based on these assumptions, the NLRA was the main New Deal labor market legislation, passed in 1935, with substantial amendments in 1947 and 1959.[11] Hogler follows chronologically the events leading to the creation of the industrial collective bargaining system. He perceptively threads historical events, including many of the major labor unrests of the nineteenth and twentieth centuries, into the book. He describes the effects of the federal regime on real-wage and benefit gains in the following years until the 1970s, when the country experienced a massive decline of union membership. Both Stone and Hogler view the decline of unionism as a complex development, which should be linked to both the changes in market production and the inadequacies of the legal regime.

In the decades following the NLRA's enactment, the courts struggled to balance the rights of workers to engage in concerted activities with the rights of owners to manage their firms. Often, the courts, the National Labor Relations Board (NLRB), and other administrative bodies interpreted and implemented the statutory regime narrowly.[12] As Stone has shown in her earlier work, the courts based these promanagement decisions on the false assumption that the NLRA framework had equalized the bargaining power of workers with that of management. Subsequently, the courts found no particular rationale for encouraging collective bargaining.[13] For example, the courts developed a narrow definition of "employer," which has made it difficult to organize in the context of multiple worksites, subsidiary employers, and long chains of production. The NLRB has also narrowly defined the permissible bargaining unit in a way that fragments employees into small static departmental units and requires worksite-specific bargaining (Stone, pp. 206–09). As a consequence, when a worker is relocated or reassigned to another department, the collectively bargained contract does not follow the

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11. Labor Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. §§ 141–197 (2000) National Labor Relations (Wagner) Act (NLRA), 29 U.S.C. §§ 151–169 (2000); Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, 29 U.S.C. §§ 401–531 (2000).

12. *See* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 251 (1997); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 281–85 (1978); Orly Lobel, *Agency and Coercion in Labor and Employment Relations: Four Dimensions of Power in Shifting Patterns of Work*, 4 U. PA. J. LAB. & EMP. L. 121 (2001).

13. Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1511 (1981) (arguing that the post-war model was based on "a false assumption"—that workers and management had equal power).

worker to her new position. Similarly, labor law doctrine excludes from the bargaining unit "non-employee" workers, such as independent contractors, apprentices, interns, and students as well as "supervisory" and "managerial" employees (Stone, pp. 214–15). Another important way in which labor law doctrine has narrowed the scope of collective bargaining is by offering a narrow set of economic "weapons" available for workers, prohibiting, for example, secondary boycotts and closed-shop provisions (Hogler, pp. 150–54; Stone, pp. 209–12). In fact, given these limits on the actions of unions, often a group of workers operating outside the formal NLRA framework can gain the advantages of a broader range of possibilities in acting collectively. The difficulty that unions have in mobilizing around social justice issues has, in turn, contributed to the discord between the traditional labor movement and other social movements, including the 1960s civil rights movement and the feminist movement. As Hogler describes, these newer social movements broke away from the New Deal's labor law regime and focused their struggle on individual employment rights, primarily on antidiscrimination claims under Title VII (Hogler, pp. 179–207).

A final set of legal impediments to collective bargaining has to do with the scope of remedies available under existing labor laws. The remedies for the infringement of labor protections have been highly limited, reducing the appeal of the labor regime. In the case of infringement of existing labor protections by employers, the NLRB can only grant back pay and reinstatement.[14] By contrast, in employment law claims, for example under Title VII antidiscrimination litigation, an employee who proves mistreatment can receive punitive damages. In part a result of these legal impediments, in part a result of other factors—including increased competitive pressures, shifts in management strategies, organizational failures of the American labor movement, and negative public attitudes toward unionism,—collective bargaining has sharply declined. Today's private-sector workforce is over 90 percent nonunionized. The industrial era's principle that collective bargaining and employment protections will sustain adequate social protections and voice for workers has proved inconsistent with current realities of the political economy and contemporary social life. Unions today are viewed as an obstacle to flexibility, adaptability, and competitiveness.

The decline of traditional labor law requires alternative models of employee voice and workplace democracy. One of the authors' most important insights is that collective action does not have to be in the form of traditional unionism. Here, however, we encounter the effects of a problematic fragmented system of work law. The NLRA, which prohibits employers from interfering with any form of labor organization, inhibits the development of new forms of employee participation while the realm of traditional collective

14. Moreover, in the case of immigrant workers, the Supreme Court has recently denied access to even this limited remedy. Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Bd., 535 U.S. 137 (2002).

bargaining continues to shrink out of existence.[15] As Hogler recalls, Senator Wagner prohibited company unions as a reaction to their rapid spread in the 1930s, emerging from John Rockefeller's declaration that capitalists, workers, and shareholders are to be partners in economic ventures. At the time, Rockefeller devised a worker-participation plan in reaction to pressures from President Woodrow Wilson and public calls to resolve labor conflicts. The New Dealers sought to protect independent labor organization by limiting such participatory plans and creating a sphere of autonomy for industrial unions. As work relations changed over the decades, however, the historical prohibition has become increasingly outdated. Reformers and management theorists have sought new models of employee voice. Increasingly, firms are experimenting with new forms of employee involvement, such as self-management teams, Quality Circles,[16] and employee-action committees, ranging from shop-floor operational consulting to strategic policymaking.[17] These participatory schemes and traditional collective bargaining are mostly understood by both management and labor as mutually exclusive strategies, more or less aligned with "new" and "old" patterns of production.[18] In industrial-relations jargon, there are even different terms to describe people who work in unionized settings ("workers") and people who work in nonunionized settings ("employees"). The divisions between the four pillars of work law have contributed to this understanding of the incompatibility of unionism and employee participation. Scholars argue that there would be a need to "[turn] the Wagner Act upside down" in order to allow participatory schemes.[19] Numerous reformers have described the NLRA prohibition on cooperative employee-management as critically impeding the growth of contemporary management strategies and suggested revising the NLRA to allow cooperative programs.[20] And in fact, in the mid-1990s, a major attempt for legislative reform of the NLRA was undertaken with the goal of facilitating the growth of employee involvement.[21] The TEAM Act, which would have repealed the historical prohibition on company unions, was passed by both houses but vetoed by President Clinton.[22] The Act was resisted in part

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15. National Labor Relations (Wagner) Act (NLRA) § 8(a)(2), 29 U.S.C. § 158(a)(2) (2000).

16. A Quality Circle ("QC") is a small group of employees that meets regularly to identify, analyze, and solve product- and work-related problems. Lobel, *supra* note 12, at 151–52.

17. *Id.* at 142–43.

18. Thomas A. Kochan et al., *Worker Participation and American Unions*, *in* CHALLENGES AND CHOICES FACING AMERICAN LABOR 271 (Thomas A. Kochan ed., 1985); Lobel, *supra* note 12, at 142–43.

19. CHARLES C. HECKSCHER, THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION 254–56 (1988).

20. *Id.*

21. COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, U.S. DEP'T OF LABOR & U.S. DEP'T OF COMMERCE, REPORT AND RECOMMENDATIONS (1994).

22. Teamwork for Employees and Managers Act of 1995, S. 295, 104th Cong. (1996); Teamwork for Employees and Managers Act of 1995, H.R. 743, 104th Cong. (1996); COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, U.S. DEP'T OF LABOR & U.S. DEP'T OF COMMERCE,

because unions feared it did not adequately ensure that workers would still be able to institute independent union representation. As Stone describes, many digital-era workplaces regularly utilize teamwork and involve some form of employee participation in a wide range of decisionmaking processes.[23] Yet, subverting the existing employment and labor law divisions today mostly occurs privately under the shadow of illegality.

The opposition between labor law and employment law results in an "on/off" construction of collective action at work. Workers have limited options for workplace democracy, and the continuing divide between labor and employment law poses difficulties in a variety of contexts. For example, the NLRB has recently held that nonunionized employees do not have a right to have other employees accompany them during disciplinary procedures.[24] Another example, in the case of occupational safety regulation, is the failure of OSHA to promote worker involvement in safety-regulation compliance, despite strong evidence on the success of worker safety committees in reducing risk.[25] If Hogler and Stone are correct in their call for an updated concept of collective organization, the New Deal distinctions between protected concerted activity by unions and nonprotected associations in the nonunionized context must be rethought. From a policy perspective, what form, then, should new institutions of workplace democracy take? While Hogler remains vague in his call for new forms of collective action, Stone moves beyond a critical analysis of the decline of traditional unionism to a vision of alternative forms of collective organizing. Here, Stone is particularly thought provoking in identifying new roles for unions and exploring practical examples of what she terms "new craft unionism" and "citizen unionism." Stone envisions new craft-like associations that are industrywide and occupation-based, with the goals of establishing minimum standards, providing information, and facilitating ongoing training (Stone, pp. 220–27). As Stone and Hogler both recognize, the new economy has shifted many of the risks of economic vulnerability from the firm to the individual worker. Stone therefore envisions the new digital-era workplace as replacing the promise of job security with the promise of training, networking, and opportunities for human capital development. She claims that *employability*

FACT FINDING REPORT (1994); Rafael Gely, *Whose Team Are You on? My Team or My TEAM?: The NLRA's Section 8(a)(2) and the TEAM Act*, 49 RUTGERS L. REV. 323, 366–69 (1997).

23. Stone, p. 202; *see also* EDWARD E. LAWLER III ET AL., EMPLOYEE INVOLVEMENT AND TOTAL QUALITY MANAGEMENT: PRACTICES AND RESULTS IN FORTUNE 1000 COMPANIES 119 (1992) (showing that over 80 percent of large companies have one or more forms of an employee-involvement program); Lobel, *supra* note 12, at 149–53. Richard Freeman and Joel Rogers found that over half of the workplaces they surveyed had some form of employee-involvement program and over a third had an established employee-participation committee to discuss problems with management on a regular basis. Freeman and Rogers find that a large proportion of nonunionized committees regularly discuss issues such as wages and benefits. RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 147 (1999).

24. IBM Corp., 341 N.L.R.B. 148 (2004) (overruling Epilepsy Found. of Ne. Ohio, 331 N.L.R.B. 676 (2000)).

25. Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071 (2005).

rather than *stability* is the new value that workers can gain from the employment relationship. Stone focuses on a term she borrows from organizational psychology, the "psychological contract," to explain how workers are expected to accommodate change rapidly and manage their own careers.[26] These developments have sharpened the divisions between *skilled* (rather than stable or secure) upward-mobility workers and low-skilled workers. Therefore, skill creation, professional networks, and other ways to manage career-cycle issues—such as child care resources—are the key issues for digital-era unions.

Another role for new unionism is facilitating the portability of employee benefits. In light of the changes in typical career cycles, professional-worker associations can play a particularly important role as labor-market intermediaries that provide continuity in welfare benefits. The American social welfare regime has been intimately tied to the workplace. In the industrial era, workers expected to receive their social benefits through the employment relationship. Welfare capitalism meant that fringe benefits were administered through attachment to the workplace rather than the state.[27] The provision of benefits by firms in the industrial era was a way to stabilize the labor force and prevent high worker turnover. It was also understood by some employers to be a way of opposing unions (Hogler, pp. 78–79) and resisting direct government intervention (Hogler, p. 80). While the New Deal established the Social Security Act ("SSA"), creating a universal retirement scheme and an unemployment insurance system, it continued the strong link between income security and the industrial work cycle. As is clear from current political debates about social security and health care reforms, the regulatory system heavily relies on privately provided benefits; this explains why health and pension coverage in today's more dynamic and less stable work relations is dramatically reduced. Labor-market intermediaries, such as industrywide worker associations, can link together shorter attachments of workers to any single employer.

Outside of the single workplace, Stone further identifies efforts to build membership in worker organizations as "citizen unionism," referring to community efforts that pressure employers to be responsive to local or regional needs (Stone, p. 219). The steady decline of unionism has pushed traditional unions and the labor movement at large to become more sophisticated about their own practices and internal democratic processes, reenvisioning the role of labor representation in the new economy.[28] The recent strife within the labor movement is centered on these questions of alternative strategies. For example, the AFL-CIO's associate membership

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26. Stone, pp. 92–96; *see also* Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 (2001).

27. David Charny, *The Employee Welfare State in Transition*, 74 TEX. L. REV. 1601 (1996).

28. David G. Blanchflower & Richard B. Freeman, *Unionism in the United States and Other Advanced OECD Countries*, 31 INDUS. REL. 56 (1992) (advocating a "new brand of unionism" that gives greater emphasis to worker voice).

program enlists nonunion workers and offers them a variety of services. These organizations operate across trades and industries but are usually community based and locally grounded, linking workplace rights to broader economic, social, and political interests of their members.[29] The goals of these organizations focus on fighting particular instances of exploitation by employers as well as triggering long-term structural change in the new world of work.[30] A work law framework that enables rather than prohibits collective efforts of nontraditional worker organizations will better fit these goals of the twenty-first-century workforce.

III. REJUVENATING THE STUDY OF WORK LAW

An underlying lesson from Hogler's and Stone's analyses of contemporary workplace challenges is that our present regulatory system lacks coherence and is conceptually and effectively fragmented. Two new casebooks were published in 2005, and each bears in its title the term "work law."[31] The books present themselves as "paradigm-shifting introduction[s] to the field of labor and employment law," as "different from others of the genre in [focusing] on both individual and collective law and legal power in our society,"[32] and as "opportunit[ies] to assess critically what form enforcement of rights should take."[33] Taken together with Stone's and Hogler's valuable contributions, at the center of these new scholarly approaches stands an innovative way to engage work-related debates and to study the disciplines of "labor law" (collectively bargained agreements), "employment law" (administratively enforced protections), "employment discrimination law" (judicially enforced individual rights), and "benefits law" (a work-cycle-based welfare system). These areas have traditionally been kept separate and have been studied and taught in legal academia as discrete subject matters. Pedagogically, there are casebooks and courses in each, but rarely are they integrated. Each concept has been tailored with a particular era in mind and, in their disconnected form, all are currently outdated. In the early twentieth century, labor law was a major field through which constitutional principles were studied. For example, the "Lochnerism" debate—embodying normative questions that span from constitutional theory, freedom of contract, the

29. *See* JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS (2005).

30. A recent example is the "Stamford organizing project," a multi-union drive in which the AFL-CIO offered to use up to $50 million in finance capital from its pension funds to match state spending dollar-for-dollar on affordable-housing programs. Another example is the National Employment Law Project, geared towards systematic and structural impact, low-income and minority workers, impact litigation, national advocacy, partnership building, and creative lawyering. Such efforts link the local and the national levels and bridge the union/nonunion divide. Janice Fine, *Building Community Unions*, NATION, Jan. 1, 2001, at 18.

31. *See* KENNETH M. CASEBEER & GARY MINDA, WORK LAW IN AMERICAN SOCIETY (2005); MARION G. CRAIN ET AL., WORKLAW: CASES AND MATERIALS (2005).

32. Carolina Academic Press, WORK LAW IN AMERICAN SOCIETY, http://cap-press.com/books/1445 (describing CASEBEER & MINDA, *supra* note 31) (last visited March 28, 2006).

33. CRAIN ET AL., *supra* note 31, at xiv.

role of state regulation, federalism, and judicial review—centered on the legality of maximum work hours, a question with its basis in work law. Consequently, as Cynthia Estlund has pointed out, not so long ago, labor law experts were among the most acclaimed scholars in legal academia, including such prominent figures as Felix Frankfurter, Robert Hale, and other leading legal realists, as well as Archibald Cox and Derek Bok. Estlund comments further that

> [t[he stature of labor law within the academy was bolstered by the romance of the labor movement and the New Deal breakthrough. The Wagner Act was born in a moment of high drama, complete with heroes and villains and plenty of suspense at all levels. The Act was enacted in 1935 in the wake of a sweeping electoral mandate for government intervention in the economy and a wave of militancy on the shop floor.[34]

Estlund attributes the interest labor law generated within the legal academy to the integrity of the New Deal NLRA—a complete quasi-constitutional framework—"a beautiful system."[35] Yet with the changing political economy, the prestige and size of the field of labor law have declined, and today it is not unusual for labor law to be taught by an adjunct faculty or not to be taught at all in a law school. Since the 1960s, as unionism rapidly declined, individual employment law expanded. As labor law is seen in the United States as less and less relevant, labor scholars have been less present in the legal academy, some retiring, some readily transforming themselves into employment law scholars. As for law students, a decline in demand for a labor law course and a rise in the demand for courses in employment law and employment discrimination law are reasonable in light of the dramatic decline of unionization. Unlike the core traditional labor law course, however, employment law has no obvious organizing principle or a central federal source of legislation. Today there are over two hundred statutes at the federal level alone that involve the regulation of the workplace, and much of employment law is defined through state regulation and common law doctrine. The body of employment law is therefore found in hundreds of separate statutes and thousands of court decisions: "Because the U.S. employment system evolved through social practice, judicial doctrine, and statutory enactment, it has overlapping and contradictory features that extend across a number of intellectual disciplines."[36]

Mathew Finkin has similarly described American employment law as "a hotchpotch of constitutional provisions, legislative dictates, administrative rules, and common law—of tort and contract—that varies widely from state

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34. Cynthia Estlund, *Reflections on the Declining Prestige of American Labor Law Scholarship*, 23 COMP. LAB. L. & POL'Y J. 789, 790–91 (2002). Estlund also points out that "[o]ne major law school, the University of Pennsylvania, even put labor law in its required first-year curriculum; no respectable law school could neglect the area." *Id.* at 789.

35. *Id.* at 791.

36. Hogler, p. 5. Employment law emanates from different sources and different legal authorities, and those rules often conflict with each other because they arise from various policy concerns.

to state."[37] When courses are designed to only include the fragmented principles of common law individual employment doctrine, legal education neglects the broader quasi-constitutional principles that guided the New Deal labor system. The curriculum loses an important piece of American regulatory-design history and institutional possibilities. Moreover, the separation between policy fields and the rigid, yet contingent, division of labor among administrative agencies, state and federal regulators, and labor and employment laws have created unnecessary overlaps and disincentives for systemic improvements. Indeed, more than simply creating overlaps, blind spots, and inefficiencies, the fragmented nature of work law inhibits innovation and entrenches outdated regulatory schemes. The gray area of worker participation is just one example of such disincentives for innovation. Another example in the context of federalism is the separation between occupational risk prevention as a federal matter (OSHA) and worker-injury compensation and insurance as a state-by-state responsibility. This separation has limited the ability of public policy to improve work environments.[38]

Yet another example is that of discrimination regulation. In the context of antidiscrimination policies, the evolution of strategies is a key example of how the regulation of work cannot be fragmented into narrow subtopics. It also exemplifies how the moment for an integrated framework of work law is ripe.

Employment discrimination policies have largely been based on the civil rights model of the 1950s and 1960s—a rights-based regime enforced by individual case-by-case litigation in the case of illegal consideration of gender and race in hiring and promotions decisions.[39] While this approach has been relatively effective in eliminating the most obvious forms of discrimination, it has not successfully targeted more complex discriminatory practices. In Stone's words, the boundaryless workplace has a "diffuse authority structure ... [that] makes discrimination hard to identify and difficult to challenge" (Stone, p. 125). Discrimination in the digital labor market can be embedded in networks, corporate culture, informal norms, labor-market intermediaries, structural biases in recruitment (such as work-family barriers and ethnic networks), and gaps in access to information and vocational associations.[40] These instances of discrimination resist "definition and resolution through across-the-board, relatively specific commands and an after-the-fact enforcement mechanism."[41] As a result, activists, policymakers, and firms are increasingly interested in reflexive problem-solving

37. Matthew W. Finkin, *Second Thoughts on a Restatement of Employment Law*, 7 U. PA. J. LAB. & EMP. L. 279, 279 (2005).

38. In the federal OSH Act, the prohibition on OSHA to promulgate rules that can affect worker compensation regulation is inherently inefficient. *See generally* Lobel, *supra* note 25.

39. *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 469 (2001).

40. *See* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 420 (2004).

41. Sturm, *supra* note 39.

efforts to eliminate workplace discrimination. Such efforts—including diversity training of team leaders and members—involve cooperation with workers themselves and emphasize learning and continuous improvement. Privately initiated internal-compliance strategies are thus becoming increasingly common; for example, Wal-Mart, the reigning largest American employer, has responded to various legal challenges by implementing a corporate-compliance program that would systematically implement changes in the workplace.[42] Courts generally have been receptive to these developments in antidiscrimination strategies. For example, courts are allowing a demonstration of involvement of workers in diversity training, the adoption of equal-employment corporate codes, and the implementation of internal grievance procedures as defenses against liability or against the grant of punitive damages.[43]

A similar shift in prevention strategies has been taking place in the context of workplace safety. As more studies point to the effectiveness of diversifying regulatory strategies, OSHA and other public-prevention agencies are relying on voluntary compliance programs to replace their traditional enforcement inspections.[44] A positive aspect of these new governance approaches is that they address not only the existence of protective labor standards on the books, but also the question of compliance. A major problem with these new efforts, however, is that they have been mostly voluntary initiatives or initiatives made in the shadow of a litigation threat, rather than systematic strategies supported, guided, and required by law. While some of these efforts have been effective in promoting equality, the risk in moving to a regime of private compliance is that there will be no mechanisms to ensure adequate commitment to internal norms. When such efforts are merely cosmetic, these new governance strategies potentially form a liability shield.[45] Here is the point where employment law and labor law productively meet. The robust critique of command-and-control has created renewed interest in the foundations of collective-labor laws.[46] In both private and public management strategies, the demands for flexibility and dynamic learning in preventing discrimination, reducing risks, and promoting efficiencies in work relations represent a third way between private markets and centralized public rules. In turn, the role of networks and col-

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42. Wal-Mart Litigation Project, http://www.wal-martlitigation.com (last visited Oct. 12, 2005).

43. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 542–44 (1999); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764 (1998); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 504–05 (2003).

44. Lobel, *supra* note 25.

45. Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 9–10 (2001); Krawiec, *supra* note 43.

46. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319 (2005); Orly Lobel, *Orchestrated Experimentalism in the Regulation of Work*, 101 MICH. L. REV. 2146 (2003) (book review).

lective organizing around workplace issues, including monitoring compliance initiatives and collaborating in problem-solving tasks, is at the forefront of scholarly and practical inquiries.[47] These efforts have the potential to bridge the gap between those who focus on regulating the workplace through individual rights and minimum protections and those who support a traditional collective-bargaining framework. Rather than resisting the interpenetration of these branches of law, policy reformers should aim to rejuvenate the laws of work through new forms of workplace governance and experimentation with institutional design. The new scholarly attempts to study work law as an integrated framework should be understood as a product of this paradigm-shifting debate. As this period of rapid economic transition unsettles conventional notions about the regulation of markets, increasingly most areas of workplace concerns—including employability, workplace conditions, equality, benefits, and safety—involve a blend of strategies of collective and individual action, private dispute resolution, and public oversight. Viewed in this light, it is more logical to look at the social problems related to work and begin by asking about the forms that law assumes in solving each problem. In other words, the starting point for integrating the fragmented areas of work law is the inquiry on whether the legal system provides a statutory response, a regulatory bureaucratic regime, a collective empowerment framework, or individual rights and remedies developed through the common law. In most cases, the answer will be that there is a matrix of responses that form the legal regime.

IV. Work Law and Political Will

Both Hogler and Stone adopt new institutional approaches to the study of work relations, recognizing that the organization of the workplace is key to understanding the employment contract. The two books adopt an interdisciplinary approach to the field of employment relations, an approach that includes psychology, history, political science, economics, management, public policy, and law.[48] Because most areas of work law involve questions about how to balance managerial interests and the rights of workers, perhaps the most basic set of doctrinal questions for all four pillars of work law is the relational definition of "employment." In both employment and labor laws, rights and duties regularly turn on the basic definition of whether the provider of a service is an employee and whether the consumer of labor is an employer. The common law doctrine of defining an employee (versus, for example, an "independent contractor") is decidedly vague, with over a

47. *See generally* Ian Ayres & John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (1992); John Braithwaite, Restorative Justice & Responsive Regulation (2002); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum. L. Rev. 267 (1998); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. Rev. 1 (1997); Lobel, *supra* note 40.

48. Interestingly, both Stone and Hogler have criss-crossing biographies as industrial-relations historians. Hogler holds a J.D. but teaches at a school of industrial relations; Stone is a law professor who has long been affiliated with an industrial relations school.

dozen factors to weigh and balance.[49] Moreover, there is a myriad of exclusions of certain categories of "employees." For example, the FLSA includes a long list of noncovered employees, including executive, administrative, and professional employees.[50] The NLRA similarly excludes managerial employees and supervisors. Workers' compensation state laws typically exclude "casual employees."[51] Yet, if policymakers take seriously the notion that work relations have changed since the industrial period, redefining the categories of protected work relations is crucial. Today, the Bureau of Labor Statistic's category of supervisory employees, entitled "managers, professional and related occupations," consists of over one-third of the workforce.[52] In the mid-1990s, the Dunlop Commission on the Future of Worker-Management Relations called for "the definition of employee in labor, employment, and tax law [to] be modernized, simplified, and standardized."[53] It recommended that, instead of the multifactored control test of master-servant common law, courts and regulators should move to economic realities.[54]

There have been ad hoc and context-based attempts in such modernization. For example, the IRS specifically requires leased employees to become full employees if their relationship extends for over a year. Some court decisions have extended protections to nonemployees such as First Amendment protections extended to independent contractors with public contracts.[55] A first step toward a more integrated field could be a congressional standardization effort of the definitions of employment. Creating a one-size-fits-all-contexts definition would help promote analytical coherence and certainty, yet it has the disadvantage of lacking differentiation between different statutory purposes. The question is whether variability is so great as to prevent a coherent framework of work law.[56] While the chronological descriptions in *From Widgets to Digits* and *Employment Relations* are viable, it is important to remember that the economy continues to be a mixture of workplaces, combining elements of the artisanal, industrial, and digital eras. Risks, interests, and expectations vary greatly among industries and across contexts. For example, should the context of employee noncompetition clauses be controlled by the same definitions as tort liability for accidents? These are difficult questions that are left open by Hogler and Stone. The reader bene-

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49. *See* Lobel, *The Slipperiness of Stability*, *supra* note 9.

50. Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. § 213(a)(1) (2000).

51. National Labor Relations (Wagner) Act (NLRA), 29 U.S.C. § 152(3) (2000).

52. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, THE EMPLOYMENT SITUATION: SEPTEMBER 2005, at tbl.A-10 (2005),

http://www.bls.gov/news.release/archives/empsit_10072005.pdf.

53. COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, *supra* note 21, at 36.

54. *Id.*

55. O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712 (1996).

56. On this question of diversity and coherence in workplace regulation, see Lobel, *supra* note 46.

fits, however, from the opportunity to consider these questions, rather than overlook them in fragmented courses.

Another key question that is merely raised by Hogler, and does not receive adequate attention from Stone, is the role of ideology and consciousness in the debates about workplace reform. From a policy perspective, all subjects of work law are attempts to strike a reasonable balance between market forces and government protections. Normatively, both Stone and Hogler view work regulation as promoting not simply economic efficiency but also the goals of social justice and participatory democracy. The authors share a concern about the distribution of productivity gains among owners and workers. However, while work, welfare, and social security reforms have been an important aspect in recent presidential and public debates, there is no emerging consensus on major reforms in workplace policies. There are examples of innovative thinking happening on the ground, but until a more orchestrated reform of work law takes place, these efforts are likely to remain small-scale and experimental.[57] While Hogler seems more attuned to political consciousness, Stone is more interested in legal opportunities. Stone's optimism about the possibilities of a new social contract for the digital workforce occasionally hinders a more complex discussion of the political energy that such developments might involve. While the paradigm shift described in the books has indeed occurred at least partially in many parts of the labor market, it is important to challenge some of these evolutionary accounts and understand how political interests, not simply economic realities, have narrowed the reach of traditional workplace protections. As Hogler recounts:

> In contrast to other industrial nations, the U.S. pattern of employment regulation evolved sporadically and unsystematically. One important reason was the absence of a strong working-class political movement to promote aggressive state intervention in labor markets. European countries adopted integrated approaches to regulation, driven in large part by powerful trade unions representing class interests . . . and living standards. . . .
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> . . . Americans have less inclination toward group action, such as unions, because we favor values of individualism and merit over collective action and social protections. (Hogler, pp. 3–5)

Hogler argues that American workers are not united by class sentiment and common goals, contrasting the broader notion of class consciousness with the narrower "job consciousness" characterizing the U.S. labor movement, which historically had fewer political objectives and focused on controlling wages (Hogler, pp. 4–5). Taking this viewpoint, Hogler is far less optimistic than Stone about substantial work law reform in the foreseeable future. For example, questions about reforming our social insurance systems, including social security, health care, and other benefits, have been at the core of political debates. But Hogler views the budget constraints and global deficits as restricting the possibilities of significant reforms to social

57. *See id.*

provision and employment security. He views unions or some form of employee representation as the preferred vehicle for increasing labor-management cooperation and facilitating justice outside what he calls "the disruptive route of court litigation." (Hogler, pp. 255–63). Yet organized labor in the U.S. is perceived by many workers as a highly problematic interest group, which excludes some groups of workers and acts as a protectionist faction in the face of globalization and liberalization of trade.[58] By contrast, employment discrimination law, historically taking the route of court litigation, is an area that receives greater attention in public consciousness and in scholarly inquiries than most other work-related issues. This is partly because it is a field controlled by federal law and in part related to the American emphasis on identity politics as motivating social movements. Moreover, even in this area of identity-based discrimination, as Stone is correct to point out, the Supreme Court decisions upholding mandatory arbitration agreements in the workplace, including in discrimination cases, risk adding an additional barrier to the coherent study of work law as well as to a vibrant public debate about avenues for policy improvement (Stone, pp. 212–14).

Globalization and the future of a domestic legal regime is another issue that the authors do not straightforwardly address. Controversies concerning the effects of outsourcing and globalization on wages, jobs, and security continue to occupy the nation and are expected to receive even greater centrality as the international community pushes for further liberalization of trade, opening borders, and augmenting competition. Global production has put into question not only the responsibility of the state to regulate the workplace but also its capacities to enforce existing regulations. Indeed, a growing number of multinational corporations have located most or all of their manufacturing plants offshore to economically developing regions in the search for a cheap labor pool and low regulatory costs. Moreover, widespread emigration and an increased demand for low-wage service labor, particularly in global metropolitan areas, have resulted in informal sectors, in which, again, the main challenge is not the lack of protective labor legislation, but the lack of enforcement of these standards. Referred to by some as "the third world within the first world," employers in the underground economy evade complying with employment laws without relocating to offshore production sites.[59] An oversight of both books is the growing significance of the international arena, including efforts to create transnational labor regimes via international organizations, regional trade agreements, such as NAFTA, and nongovernmental transnational activism.[60]

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58. *See* Orly Lobel, *Between Solidarity and Individualism: Collective Efforts for Social Reform in the Heterogeneous Workplace*, 14 RES. SOC. WORK 131 (2004).

59. The Government Accountability Office's definition of an American "sweatshop" is a workplace where there are violations of two or more work laws. On paper, even undocumented workers have employment protective rights. *See* GORDON, *supra* note 29.

60. *See generally* JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 237–44 (2000); Orly Lobel, *Sustainable Capitalism or Ethical Transnationalism: Off-Shore Production and Economic Development*, J. ASIAN ECON. (forthcoming 2006).

Although these books are intended for the American audience, the authors recognize the new labor market as global. The patterns of production that Stone describes as "digital" are inherently connected to the shift from domestically self-contained production to an international economy. It would have been more accurate to discuss the possibility of a nascent international labor system. Moreover, both books are written with largely the American labor market in mind, yet the comparative lessons are key. Globalization has affected labor markets all around the world, and countries with different histories of work regulation are rethinking their work and welfare systems. The European Union, for example, has a vibrant network of committees and programs motivated by the goal of introducing flexibility without risking a downward spiral of lowering labor standards to subminimum conditions.[61] Without considering the role of internationalization of labor and employment law practices, the books omit important challenges to work law reform. Despite these omissions, the books are rich in their subject matters and offer insightful analyses relevant to these emerging global dynamics.

CONCLUSION

The discipline of work law is in a state of flux. Rapid changes of the new economy have unsettled conventional notions about the regulation of markets. At the same time, public policy based on the assumptions of the industrial era no longer matches the realities of various employment settings. Hogler and Stone have written books that can serve as valuable guides to understanding the new world of work and help move forward the debates about the laws of the workplace. The books offer a historical appreciation of workplace contexts, conflicts, and democratic struggles that shed light on many of today's most challenging social issues. Hopefully, the emerging consensus on the disservice of a fragmented field of work law will generate timely debates in the legal community. The ways we organize legal spheres and areas of inquiry affect the ways we negotiate particular solutions and relate them to more general principles, including freedom of contract and the role of the state in regulation. The stakes are high and go beyond the context of work to fundamental questions about liberty, equality, privacy, democracy, and social justice. As first attempts to constructively address the mismatch between older policies and contemporary employment realities, Stone's and Hogler's books can inform practitioners, educators, and scholars in the timely discussion about the future of work law in the United States.

61. *See generally* JOEL F. HANDLER, CITIZENSHIP AND WORKFORCE IN THE UNITED STATES AND WESTERN EUROPE: THE PARADOX OF INCLUSION (2004).