Bonding and Flexibility: Employment Ordering in a Relationless Age

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I. INTRODUCTION

An advertisement that appeared in a recent edition of the Süd-deutsche Zeitung, a leading German newspaper, well-captures many of the themes integral to our topic. The advertisement announces the creation of new financial institution that has just come into being through the merger of two, large, Austrian banks. Much of the nearly half-page of newspaper-space that the advertisement occupies consists of a photograph of two very young boys, standing next to one another, confidently smiling. Each has one arm thrown around the other's shoulder, and their free hands are thrust out, thumbs-up, toward the camera. The brief caption next to the photograph introduces the boys as "Phillipp and Jacob Bachler. . .computer experts and business men" who in the year 2020 will register their first international patent in Alicante, Spain, and who within two years will have created one hundred and fifty new jobs.

Internationalization, financial restructuring, technology, forward-thinking entrepreneurship, job-creation, the growing irrelevance of national juridical boundaries and domestic legal schemes, this advertisement needs but few words to portray the trends and attitudes affecting—among other things—the employment relationship and its ordering. Thus, for example, while it lists the place where the patent application will be filed, the advertisement makes no mention of the place the presumably resulting jobs will exist—properly so, because as technology increasingly demonstrates, work is ever-more portable, and to the extent it becomes "virtual," many jobs will have no "location" in the sense that people, including lawyers, tend to think of it. Similarly, while the number of jobs to be created is mentioned, it may well be that none of the people who
eventually will perform them will be employees of the Bachler brothers—or of anyone else.

Of course, some of the developments affecting work and its ordering presently are as immature as the supposed Bachler boys. Thus, predictions about matters such as the extent to which work will be performed by networks of people who meet only in cyberspace ultimately may prove to be as fanciful as the story the advertisement tells. Similarly, the familiar patterns of employment bonding may show themselves to be far more durable than some suspect. On the other hand, like the advertisement’s prognostications about the Bachlers, these forecasts do not lack substantial plausibility.

Tellingly, although this advertisement was published in a German newspaper, it could have appeared nearly anywhere. Its topics and iconography universally are recognizable and evocative. Employment has become a—if not the—ubiquitous preoccupation of our time. For better or worse, people are tied to the workforce and to the market in a way never before seen. The worldwide increase in labor force participation, particularly among women, constitutes one of the most striking social developments of the past thirty years.

At the same time that the numbers of persons entering into remunerative employ steadily has swelled, the systems by which work relationships are ordered have come under tremendous pressure, and many existing schemes slowly are collapsing. Labor law, particularly in the form of collective labor law, represents a legal category that came into independent and relatively stable existence only within the past seventy or so years, and in many places, even more recently. The transformation and possible disappearance of this category, particularly as represented in the decline of collective ordering mechanisms around the world, signifies that some fundamental changes are going forward in societies themselves. New patterns of acting and cooperating are being worked-out and are finding acceptance. These patterns reflect fresh conceptions and understandings about the constitution of our lives in common, and how the ends toward which our activities are directed might best be achieved. More significantly, the growing acceptance of these changes reflects the cumulative judgment that they are desirable, and that they establish sensible schemes to obtain goals that are in themselves worthwhile. In brief, the “new order” entails the establishment of a new set of meanings, and thereby, a new way of being.

There is a strong tendency, perhaps especially among labor scholars, to conceive of changes in employment ordering systems as being driven chiefly by technology, and to regard the implications of these transformations in the narrowest of economic terms. While the present format precludes more than a brief mention of these themes, it is important to keep in mind that there is far more at stake in what
is going forward than we often are accustomed to think. Humans are self-constituting beings. We make ourselves to be what we are through the activities in which we habitually engage. In other words, it is the seemingly insignificant things we regularly do that count most. Our daily routines quietly carve their grooves in us, almost without our notice, thereby steadily fashioning who we are, and subtly establishing the horizons by which we take our bearings and establish our meanings. As noted, more people are spending more of their time performing paid work than ever. Consequently, employment and the manner of its ordering has assumed a greater, if often overlooked, significance for the character of human beings.¹

What follows is something in the nature of a report from the front. The exceptionalism that marks so many social practices and legal arrangements in the United States probably demonstrates itself nowhere more starkly than in the area of employment. Succinctly stated, the United States is the home of flexibility. What once might have been regarded as exotic about the ordering of working life in America increasingly has become accepted as the universal standard. The influence of our financial institutions, the size of our internal markets, and the power of our productive capacity all play obvious roles in the creation of the challenges faced by many employment-ordering systems. Although typically forgotten, more subtle factors should not be overlooked. For example, management theories and business-school graduates represent two of the most successful American exports of the past decade. These theories, and not the law or "indigenous" patterns of institutional ordering, increasingly constitute the reference-points for business and governmental decision-making about employment-ordering. Likewise, while the ramifications of its diffusion are difficult to quantify, the peculiar style of American individualism, and the attitudes it engenders, have increasing influence among the social elites of the world. As Tocqueville pointed out, peoples' mores, their "habits of the heart", are more important than their law in influencing their attitudes and governing their behavior. Increasingly, the mores of the world—through markets, ideas, the images of popular culture, and language itself—are being shaped by the United States.

Because it stakes-out a place at the far end of the spectrum of employment ordering systems, we turn next to a cursory overview of the current structure of American employment law. This summary will be followed in the third section by a discussion of one of the most striking of all recent judicial developments: the movement toward

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the "privatization" of employment law through the use of arbitration tribunals outside of the collective-bargaining context, in which arbitration originated as a means of interpreting and applying the terms of the collective agreement. The fourth section will set forth a brief summary and evaluation of legislative and judicial trends concerning the theme of flexibilization. The fifth portion will provide an overview of the present character of and trends in working life in the U.S. The conclusion will seek to contextualize these trends, and make some brief suggestions about their broader significance.

II. THE STRUCTURE OF EMPLOYMENT LAW IN THE UNITED STATES

The law of employment in the United States proceeds out of a culture that believes in the efficiency of private ordering, that is skeptical (or suspicious) of public intervention and generally resists direct regulation preferring "individual initiative and limited government." This cultural background may partially explain three features key to comprehending the contemporary American legal scene:

First, the terms of the employment relationship are taken to be the fruits of freedom of contract. The product of that freedom tends accordingly to be treated positivistically, i.e., even if the terms are stated unilaterally by the employer, they are considered to be freely assented to by the employee, even, at times, to the point of employing a legal fiction — that the terms were "bargained-for." Consequently, the courts tend parsimoniously to apply such doctrines as economic duress or unconscionability that would limit the terms or conditions stated by the employer.

Second, the law resonates against a deeply entrenched rule: that absent express or implied agreement either party may terminate the relationship at any time for any reason, even a "bad" or morally repugnant reason. This "at-will" rule, originally only a default rule in the face of contractual silence, continues to be invoked as a principled basis against public intervention even though it no longer serves (as it once did) as a constitutional shield against such action. As a result, the vast majority of state courts decline to recognize any implied covenant of good faith and fair dealing on the employer's part as inherently inconsistent with an "at will" relationship.3

Third, the pervasive belief in individualism coupled with rigorous anti-union campaigns by non-unionized employers, with a general ineffectiveness of the labor law,4 and with a more general falling

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off of engagement in voluntary sodalities,\textsuperscript{5} have contributed to the decline in union density, currently at about 11%-12% of the civilian, non-agricultural workforce. In view of the low level of union density, this survey will not treat the body of law dealing with the role of collective bargaining and the enforcement of collective bargaining agreements.

In sum, unless limited by labor protective legislation or by judge-made law, i.e. of tort or contract, most employers are free to hire and fire at-will, and to adopt, modify and abandon terms and conditions of employment. These legislative and judicial constraints are briefly surveyed below.

\textbf{A. Statutory Employment Protections}

1. \textit{Coverage}

Virtually transecting all labor protective law is the distinction between employees and independent contractors.\textsuperscript{6} There are a variety of tests to determine the latter status; these commonly turn on the degree of control exercised over the individual’s work, but may include as well as such other considerations as the individual's opportunity for profit or loss, relative investment in equipment, degree of specialized skill, and the extent to which the person works exclusively for the alleged employer (and for what period of time). Suffice it to say, independent contractors, as distinguished from employees, are covered neither by the National Labor Relations Act, and so are ineligible to engage in statutorily protected unionization and collective bargaining, nor by the Fair Labor Standards Act, providing for a minimum wage and, more important, overtime work compensation; nor are they covered by any anti-discrimination in employment legislation. Moreover, welfare and pension benefits need not accrue to an independent contractor under the federal Employee Retirement Income Security Act, nor are Social Security taxes paid or unemployment and workers’ compensation provided for.

2. \textit{Hiring and Discharge}

a. anti-discrimination laws

Under a variety of federal laws, employers are prohibited to refuse to hire or to discharge on discriminatory grounds; viz. for union activity, on grounds of race, sex, religion, national origin, citizenship, physical or mental disability, and age. State law and, in some cases,

\textsuperscript{5} On the link between union decline and the general decline in mandatory groups, see Kohler, “The Overlooked Middle,” supra n. 1, at 229-34.

municipal ordinances may expand these protected categories; thus
discrimination on the basis of marital status is prohibited in some
states and, rarely, on grounds of sexual orientation as well.

b. anti-retaliation laws

Anti-discrimination statutes commonly include express prohibi-
tions on retaliation for opposing unlawful practices or for seeking
statutory relief. Moreover, a variety of federal and state
"whistleblower" laws permit employees to complain of statutory vi-o-
lations concerning working conditions, environmental controls, or
other specific statutorily protected actions usually implicating public
health and safety. In addition, federal pension protection law forbids
the discharge of an employee in order to avoid the accrual of a future
statutorily-covered pension or welfare benefit.

c. wrongful termination

Only the state of Montana has enacted a general statutory prohi-
bition on wrongful termination of otherwise at-will employees. It
contains a relatively modest remedial scheme.

d. statutory notice and severance payment

The federal Worker Adjustment and Retraining Notification Act
(WARN) requires covered employers to give employees and the local
government unit sixty days' advance notice of: a) shut downs of a
single employment facility resulting, for at least 50 full time employ-
ees, in termination or long term layoff or reduction of work hours by
more than half, and b) long term layoffs affecting the lesser of at least
a third of the work force or 500 employees. Generally, employers
with less than 100 full time employees are excluded from the Act. An
employer that fails to give the required advance notice is liable to the
employees for backpay equal to the normal weekly compensation, in-
cluding benefits and contributions to benefit funds, they would have
received during the notice period. In effect, the Act provides the em-
ployee with mandatory severance pay in lieu of the advance notice.
The Act's provisions do not apply to situations in which the employ-
ees knew when they were hired that the employment would be for a
limited duration; and it contains a number of other significant ex-
ceptions, e.g., in case of plant relocation, where the employer has
sought capital or business, or where the closure was unforeseeable.
Not surprisingly, some commentators have concluded that the Act
has had little practical impact.7

7. Addison & Blackburn, “The Worker Adjustment and Retraining Notification
A very few state laws address the question of notice and severance, i.e., a Maine statute provides for mandatory severance pay in the event of plant closing; and a statute in Puerto Rico provides for a scheduled severance payment for at-will employees discharged without good cause.

3. Wages and Hours: Benefits, Vacations and Leaves

The federal Fair Labor Standard Act is a lengthy and complex law. In a nutshell, it provides for a minimum wage and time-and-a-half compensation for overtime, i.e., hours worked in excess of forty hours per week. Even these do not apply to over twenty exempt categories, notably including those employed in a "bona fide executive, administrative, or professional capacity."

The federal Employee Retirement Income Security Act (ERISA) regulates both "welfare" benefits, such as medical insurance, death or disability benefits, and "pension" benefits applicable to any plan that provides retirement income. The significant difference between them is that the former do not vest as a statutory matter while the latter do; but, more important for present purposes, the law does not require that any employer provide any such benefit. Only if the employer has chosen to adopt a benefit plan does ERISA come into play.\(^8\) This is a rather typical feature of the U.S. scene. So, for example, no statute requires employers to offer any period of paid vacation; only if the employer has a paid vacation policy would federal law and, depending upon the policy, state law regulating wage payment, apply.

A singular exception is the federal Family and Medical Leave Act (FMLA) of 1993. It requires employers to allow employees to take up to twelve weeks of unpaid leave per year: within twelve months following the birth of a baby or adoption of a child; when a serious health condition renders the employee unable to perform the job; or in order for the employee to care for a spouse, parent, or child who has a serious health condition. To be covered by the Act, an employer must have fifty or more employees; an employee to be eligible must have worked for at least twelve months or have provided at least 1,250 hours of service during that period. Even here, the statute has been read narrowly as a limited exception to the at-will rule; thus, a federal district court found no violation of the law in the discharge of an employee who absented himself from work without authorization in order to appear in court to gain custody of his daughter.\(^9\) As the court explained:

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8. Because of ERISA's sweeping pre-emption clause, state-mandated employer-provided medical insurance would require a statutory exemption which has been enacted by Congress only with respect to Hawaii.

[A] minor ailment that keeps a child home from school with no help immediately available, or a personal crisis in the life of a child or a parent may cause a severe conflict for an employee between work and family responsibilities. None is covered by the FMLA. It is not a general grant of leave protection covering all family crises.  

B. Common Law Constraints on the Employment Relationship

1. Contract

The growth of large scale enterprise was accompanied by the development of corporate personnel departments and by a concomitant bureaucratization of the employment relationship, i.e., by the adoption and promulgation of work rules and employment policies governing benefits, discipline, compensation, leave and the like. By 1948, 30% of industrial firms had promulgated employee handbooks to their work forces. A 1979 survey of 6,000 companies revealed that employee handbooks were distributed by approximately 75% of the companies responding: the employer’s personnel policies were included in 85% of the handbooks given to production workers, and in 90% of those given to office, clerical, and lower level exempt employees. Not uncommonly, these policies contain rules governing classification as “probationary” or “permanent,” provide for progressive discipline or otherwise assure procedural or substantive safeguards for employment security. Consequently, a question pressed to the fore starting in the 1980s was of the contractual status of these documents.

A majority of the courts to have considered the matter have held these manuals or handbooks to be capable of rising to contractual status, though they have differed significantly as to the terms they must contain and the circumstances of their issuance, i.e., to greater or less textual specificity and to greater or less willingness to imply acceptance from the issuance of the document alone. A minority of jurisdictions has rejected the contractual claim — absent express offer, acceptance and consideration — some relying upon the fact, stated in the text of the manual or implied by the court, of the employer’s power to alter or abrogate the manual at any time.

Illustrative of the strongly positivist nature of American employment law, all the courts that have accorded contractual status have said that a sufficiently conspicuous and unambiguous disclaimer of contractual status should be given effect. This proposition is illustrated in a recent and otherwise unremarkable decision of the

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10. Id. at 1048.
Supreme Court of Wyoming in which the employee signed the following—in boldface print in a separate box on the employment application form:

I understand that my employment and compensation with [the employer] can be terminated, with or without cause, and with or without notice, at any time, at the option of either the company or myself. I also understand that an employee handbook is not an employment agreement, either expressed or implied, and that no employee or manager of [the employer] except the Director of Human Resources has any authority to enter into any agreement for employment for any specified period of time, or to make any agreement contrary to the foregoing.12

The Court held the disclaimer to preclude any suit for breach of any promise of job security made by any manager (other than the specified officer) then or subsequently and in spite of the employee’s claim of reliance on just such a promise. Even so, whether or not the disclaimer was sufficiently conspicuous, unambiguous or assented-to under the circumstances has been held to present issues for jury determination in some jurisdictions.13

2. Tort

Unlike a contractual obligation, which an employer voluntarily assumes (or disclaims), the law imposes non-consensual societal obligations which, in the U.S., are frequently developed and applied in suits for damages in tort. A variety of so-called “dignitary torts” — defamation, invasion of privacy, infliction of emotional distress — are potentially applicable to employer treatment of employees. For example, the law of “sexual harassment,” especially the creation of intolerable working conditions by supervisors and co-workers by speech, gestures, the display of photographs and even by physical assault, has taken on a considerable legal texture. In addition, a majority of jurisdictions to have considered the matter have held that a discharge for a reason that violates an important public policy is actionable; but, there is a wide variety of judicial views on what counts as such a proscribed purpose.14

14. See e.g., Gardner v. Loomis Armored, 913 P.2d 377 (Wash. 1996), in which the discharge of an armored car employee, who left his truck in violation of company rule to come to the aid of a woman being assaulted with a lethal weapon, was held to violate the state’s public policy; but two Justices concurred only the special facts presented, and one Justice submitted a vigorous and lengthy dissent on the ground that no public policy was implicated at all.
III. Contracting Around the Law: The Privatization of Public Law

The cultural commitment to "freedom of contract" often leaves scope for employers to condition employment on terms that contract around the law. It is possible, for example, for an employer to secure a release (sometimes called a "waiver") of many statutory and common law claims even in advance of the claim being made so long as the claim arose before the execution of the release and so long as the release is knowing, voluntary, and in return for consideration. Not uncommonly, employers "downsizing" their workforces will offer a voluntary severance incentive conditioned upon such a release, especially for claims of age discrimination, the terms of which in the latter instance are governed by the federal Older Workers Benefit Protection Act. Where these conditions are met, however, the courts tend to give effect to the release as to both the particular statutory as well as to common law claims — contract and tort — that were not necessarily expressly before the parties at the time.15

One of the most hotly contested contemporary questions concerns the ability of employers to condition employment on the execution of a form whereby the applicant agrees to submit all future claims arising out of employment or the termination of employment, including potential claims of violation of federal and state antidiscrimination law as well as claims in contract and tort (for defamation, emotional distress, or violation of public policy), to an arbitrator whose conclusion will be final, binding, and preclusive of future litigation. The issues presented were presaged in the decision of the United States Supreme Court in Gilmer v. Interstate/Johnson Lane Corp.,16 applying the Federal Arbitration Act to a stock broker's securities registration application requiring employment disputes with his employing brokerage company to be submitted to an arbitration system established by the relevant stock exchange. The Court held the rule to include the broker's claim of a violation of federal age discrimination law. The Court's opinion has been taken to encourage a more general promulgation of arbitration systems by employers.17

Both the terms of and the legal effect to be given to such a system are illustrated in Cole v. Burns Int'l Security Services.18 The company required applicants for the position of security guard to sign a "Pre-Dispute Resolution Agreement" that provided for arbitration by an arbitrator selected under the rules of the American Arbitration Association. The agreement covered

15. See e.g., Howlett v. Holiday Inns, 120 F.3d 598 (6th Cir. 1997).
18. 105 F.3d 1465 (D.C. Cir. 1997).
all matters directly or indirectly related to . . . [the employee's] recruitment, employment or termination of employment by the Company; including, but not limited to, claims involving laws against discrimination whether brought under federal and/or state law, and/or claims involving co-employees but excluding Worker's Compensation Claims.

When the employee later brought suit for race discrimination, for retaliation in having complained of the sexual harassment of another employee, and for infliction of emotional distress, the complaint was referred to arbitration. The appellate court concluded that arbitration could be an adequate substitute for litigation where the arbitration system:

(1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.

The court also opined that judicial review after an award has been rendered should be "sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law."

This nascent area bristles with both legal and practical issues: On the former, for example, of what constitutes a knowing and voluntary waiver of the employee's right resort to a judicial forum and under what circumstances; of who will be considered an adequate neutral to hear these cases and subject to what procedures. On a practical level, at least two questions are immediately presented: (1) of how fairness can be assured in a system where the employer is a repeat player in the future selection of arbitrators; and, (2) of whether a heightened standard of judicial review will deter employers from promulgating such systems, i.e., the more the courts require due process (pre-arbitration discovery, written opinions, a more searching judicial review), the more they require the arbitration system to resemble a judicial proceeding, the less advantageous such systems become for the swift, inexpensive and final disposition of employee claims. But if less is to be required, the less fair the system appears from the perspective of assuring compliance with public law, and the less worthy its results would appear to be for judicial deference. The debate on these (and related) questions has grown

22. See generally, George Nicolau, The Challenge and the Prize (Presidential Address before the National Academy of Arbitrators) (May 23, 1997).
pace even as the courts have tended to refer public law claims to privately-selected arbitrators.

IV. LOOSENING THE EMPLOYMENT BOND—Legislative and Judicial Trends and the Growing Instability of the Statutory Structure

A. Legislative Developments

As the noted German commentator, Dieter Reuter, once observed, when it comes to labor law, the United States represents something of a developing country. Certainly in comparison to most other jurisdictions, the amount of federal legislation regulating the employment relationship in the United States is relatively small, and, as seen above, constitutes something of a patchwork as opposed to a built-out, articulated whole. Nevertheless, there are several legislative initiatives being pursued at the federal level that have significant implications for the topic of flexibilization, and whose passage would work important changes in long-standing statutory schemes.

The first of these initiatives, the so-called Teamwork for Workers and Employers bill (TEAM), would amend a key provision of the Nation's basic labor-relations law: Section 8(a)(2) of the National Labor Relations Act (NLRA). Although Section 8(a)(2) is but one-sentence long, it was the most controversial portion of the statute at the time of the NLRA's framing in 1935. Consequently, the lion's share of the Congressional debate over the Act was devoted to its terms. Succinctly stated, Section 8(a)(2) requires that any form of group-dealings between an employer and its employees occur through bod-


26. 29 U.S.C. § 158 (1973), which in pertinent part provides that "It shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."

The term "labor organization" is defined (29 U.S.C. § 152(5) (1973)) as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

ies that are structurally independent of the employment-relationship. The statute thereby made unlawful an extensive variety of employer initiated and sponsored worker-participation schemes whose development had been spurred in part by, and which represented conscious attempts to develop alternatives to, collective bargaining through autonomous unions. These employer-sponsored schemes had come into widespread use in the period between World War I and the passage of the NLRA in 1935, and the Congressional choice, as embodied in Section 8(a)(2), was understood and intended to settle the contest between these competing models of worker-participation. The language of this provision anchors the statute's core goals, which consist in the protection and enhancement of individuals' status through the defense and maintenance of freely-formed employee groups.

For many years after its enactment, Section 8(a)(2) attracted very little comment or notice. The confluence of a variety of factors, including the spectacular decline in union-membership and the practice of collective bargaining during the past decade,28 a renewed interest in integrative methods of employee-involvement,29 and growing international economic competition—and the perceptions flowing therefrom—once-again have made this provision a matter of intensive debate and discussion. Briefly stated, the language of Section 8(a)(2) casts doubt on the legality of many of the participative devices that have been widely instituted in non-unionized settings, which the TEAM bill would remove. These devices include joint employer-employee committees, quality circles, and similar employee-involvement devices. Like the provision it would amend, the TEAM bill is controversial.30 Unions strenuously have opposed its passage, and a bill similar to the one presently pending before the Congress was vetoed last year by the President.

The previously described31 Fair Labor Standards Act of 1938 (FLSA),32 represents a second piece of New Deal era labor legislation whose provisions have come under scrutiny as part of the movement for flexibilization. Unlike countries such as Germany which rely on

28. The ILO recently reported that union membership declined by 21% during the past decade in the United States, which gives the U.S. one of the lowest union density rates among industrialized nations. See, I.L.O. World Labor Report, 1997-98.


30. Academic opinion over the advisability of amending Section 8(a)(2) is split. In light of the low levels of union organization, many academics and some Democrats in Congress support some sort of amendment of its terms to permit and encourage some form of employee participation in management. For some views on the issue, see the essays in The Legal Future of Employee Representation (Matthew W. Finkin, ed. 1994).

31. See supra at Part II A. 3.

collective bargaining between the social partners\textsuperscript{33} to set minimum standards, the U.S. long has used federal legislation to establish wage and hour floors. This reliance on legislation in part reflects the fact that collective bargaining in the U.S typically occurs at the plant or company level, rather than on an industry or regional basis. The legislative establishment of minimum standards also mirrors the historically uneven union density rates across industries and geographical sectors within the country.

Among the proposed amendments to the FSLA are bills that would affect the provision of statutorily required overtime pay. As presently formulated, the FLSA requires affected employers to compensate covered employees “at a rate not less than one and one-half times the regular rate”\textsuperscript{34} for time worked in excess of forty hours per week. Various legislative proposals would amend the FLSA to allow employers to offer hourly employees covered by the Act a choice between overtime pay or uncompensated time off at the rate of one and one-half hours for each hour of overtime worked (“comp time”). Presently, only public employers may use such comp time arrangements in lieu of overtime pay for employees covered by the FLSA. Another proposal, known as “flexible credit hours”, would permit employees to work more than forty hours at their regular rate of pay in exchange for an equal amount of time off.\textsuperscript{35} Support for these legislative proposals in Congress largely has followed party lines. Organized labor opposes them, and the present Administration has stated its opposition to these and related flexibility proposals that might affect the ability of employees covered by the terms of the FLSA to receive overtime pay. Backers of these proposals argue that they would give employers greater ability to accommodate employees’ desires for time-off to care for their families.

Further federal legislative activity that touches upon the topic of flexibilization concerns the redefinition of the term “employee” for the purposes of the Internal Revenue Code. Legislation proposed in Congress would substitute a new, three part test for the twenty factor test which presently is used to distinguish employees from persons who constitute independent contractors for the purposes of the federal tax code.\textsuperscript{36} Supporters of the legislation contend that the current


\textsuperscript{34} 29 U.S.C. § 207(a)(1) & (2)(1978).

\textsuperscript{35} Family Friendly Workplace Act, S. 4, 105th Cong., and the Working Families Flexibility Act, H.R. 1, 105th Cong.

\textsuperscript{36} See e.g., Home-Based Business Fairness Act of 1997, S.460, and H.R. 1145, 105th Congress. (Although the provisions of these bills containing the new test were eliminated, their language has been continued in newly-introduced legislation. See H.R. 3722, 105\textsuperscript{th} Congress).
test, which embodies the indicia developed at common law to determine employee status, is unclear and generates substantial uncertainty among employers concerning their obligations under federal statutes\(^3\) such as the Employee Retirement Income Security Act of 1974 (ERISA),\(^3\) which, as mentioned above, governs obligations created pursuant to employee benefit programs.\(^3\) The Secretary of the Treasury has criticized the House bill containing the revised test in part because it too easily would permit employers to define workers as independent contractors, thereby excluding them from eligibility for pensions and other benefits. The Secretary also expressed concern that the definitional change would have the effect of excluding the affected employees from the scope of other worker protection legislation.\(^4\)

37. Part of the impetus to revise the test for employee status grew out of the facts giving rise to the case of Vizcaino v. Microsoft Corp., 120 F.3d 1006 (9th Cir. 1997) (described infra, text at n. 43) and similar situations. For background concerning this issue and the movement to reform the definition of employee for the purposes of the tax code, see "Contingent Workforce: Microsoft Case Spotlights Issue of Benefits for Contract Workers," Pensions & Benefits Daily d-3 (March 5, 1997). For the reaction of the Internal Revenue Service to employee classification problems, see "Contingent Workforce: IRS Deals with Employee Classification in Midst of Microsoft Case," Pensions & Benefits Daily d-3 (March 5, 1997).

38. 29 U.S.C. §§1001-1461, described supra at Part II A. 3.

39. This list of factors is "generally used to decide whether a person is an independent contractor or an employee" for the purposes of legislation such as ERISA. "That there should be a congruence of approaches is not surprising. As the Supreme Court has pointed out, when Congress uses the word 'employee', courts 'must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning' of that word." Vizcaino v. Microsoft Corp., 120 F. 3d 1006, 1009, (9th Cir. 1997) quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322, 112 S.Ct. 1344, 1348 (1992).

40. See "Independent Contractors: Redefinition of 'Employee' Status Contained in Tax Bill Passed by House," 125 Daily Labor Rep. a-4 (June 30, 1997); "Independent Contractors: Labor Department Official Sees Danger in Shifting Worker to Independent Contractor," 145 Daily Labor Report a-6 (July 29, 1997). Another provision of federal law, Section 530 of the Revenue Act of 1978, (P.L.95-600, as amended by P.L.96-167, P.L.96-541, P.L.97-248, P.L.99-514, and P.L.104-188), also has a role to play in the discussion of "flexibilisation", particularly as it has affected the ability of individuals involved in information technology (IT) fields to act as independent contractors. Section 530 was enacted in reaction to several instances where the federal Internal Revenue Service had successfully reclassified workers regarded by their employers as independent contractors through use of the common law independent contractor status tests discussed above. These reclassifications resulted in substantial employment tax liabilities for the affected employers. Section 530 permits an employer to treat a worker as an independent contractor for employment tax purposes, regardless of the workers status under the common law tests, so long as the employer has a "reasonable basis" for so treating the worker. The statute sets forth a series of "safe harbor" tests for determining whether this reasonable basis exists.

Section 530 was amended in 1986 to specifically exclude from treatment under the statute's safe-harbor provisions any individual "who, pursuant to an arrangement between the taxpayer and another person", provides services for such other person as a computer programmer, systems analyst, etc.. Consequently, determination of the employee-status of such individuals is made according to the common law tests. This exclusion has been criticized by many in IT fields because, they assert, it has had the effect of restricting individuals from forming one-person corporations and offering
B. Judicial Interpretations and Applications of Statutory Schemes

Some recent decisions of the federal courts also provide a view of current statutory limitations on managerial flexibility and questions of employee status as they are developing in the American context. The first of these cases, *Inter-Modal Rail Employees Association v. Atchison, Topeka & Santa Fe Ry.*, 41 involved the United States Supreme Court in construing a provision of ERISA 42 which prohibits an employer from discharging employees for the purpose of “interfering” with their rights to benefits. This case was brought by a group of former employees who had worked for a wholly-owned subsidiary of Santa Fe. The assets of the subsidiary were sold to a third-party corporation, and the employees were discharged. The buyer assumed the subsidiary’s work and re-hired the employees, but paid them both pension and welfare benefits at a substantially lower rate than they previously had received.

The employees contended that this transaction constituted a prohibited interference with their benefits rights under ERISA. A federal appellate court ruled that the statute’s prohibition applied only to interference with “vested” pension benefits. Interference with health and other welfare benefits that do not vest, the court ruled, was not actionable under ERISA. On appeal, the United States Supreme Court held that the “plain language” of the prohibition extended to all benefits.

Because the Supreme Court’s construction of ERISA was consistent with the interpretation given it by several federal appellate circuits, the *Inter-Modal* holding came as no great surprise. Left unanswered by the opinion, however, is the far more significant question concerning the reach of the statute in “mixed-motive” situations, where benefit costs constitute only part of the employer’s justification for moving work. In other words, the extent to which an employer legitimately may take benefit costs into consideration in deciding subcontracting questions remains unclear. Since benefits typically represent a significant aspect of compensation costs, they usually constitute an unavoidably important consideration in subcontracting decisions.

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42. 29 U.S.C. §1140 (1985) (prohibiting employers “to discharge . . . a [plan] participant . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan.”)
Two other recent opinions concerning employee status also are worthy of at least brief mention. In *Vizcaino v. Microsoft Corp.*, the plaintiffs agreed with Microsoft to work as free-lance, independent contractors. The freelancers acknowledged that they would not be eligible for benefits afforded by Microsoft to its regular employees, and that they personally would be responsible for paying federal and state taxes, social security, health benefits, and the like. In lieu of benefits, Microsoft paid the freelancers at a higher hourly rate than its other employees.

The Internal Revenue Service (IRS) subsequently examined Microsoft's records and determined that the freelancers were employees, not independent contractors, for the purposes of the tax code. In making its ruling, the IRS found that the freelancers were integrated fully into Microsoft's workforce: many of them had worked with the company for more than two years; they frequently worked the same core hours and on teams with regular employees, performing identical tasks under common supervision; they used equipment supplied by the company, and were required to carry out their work on its premises. Microsoft thereafter began treating the freelancers as employees for tax purposes, but continued to deny them participation in the company's benefit programs, including the company's lucrative stock-option program. In a split decision rendered after an en banc hearing, the Ninth Circuit held that because the "freelancers" constituted common law employees of Microsoft, they were improperly excluded from participation in the company's benefit plans.

Apart from their not insubstantial impact on the parties, the *Inter-Modal* and *Vizcaino* cases might be regarded as of limited significance. Both are fact-specific, and over the long run, neither holding is likely to have the effect of restricting employers either from subcontracting or from the use of contingent workers. The symbolic importance of the cases, however, should not go overlooked. The opinions illustrate the care required of employers in the structuring of independent contractor relationships and the implementation of outsourcing decisions. Both holdings are likely to provide additional momentum in Congress for the clarification of employer obligations under existing statutory schemes, and for the further relaxation of legislation that fetters the exercise of employer discretion.

43. 120 F.3d 1006 (9th Cir. 1997).

44. As previously noted (see supra n. 39) such determinations are made using indicia developed at common law.

45. For a decision that appears to contradict *Vizcaino*, see the Fourth Circuit's opinion in *Clark v. E.I DuPont de Nemours and Co.*, 105 F.3d 646 (4th Cir. 1997) (denying employee benefits to man who worked for the company on a contract basis for seventeen years, despite the fact that he performed the same functions as regular employees, and was subject to common supervision).
The final opinion for mention is the United States Supreme Court’s opinion in *Walters v. Metropolitan Educational Enterprises, Inc.* This case involved a question concerning the interpretation of a jurisdictional provision of Title VII of the Civil Rights Act of 1964, the statute that forbids racial, sexual or religious discrimination in employment. To fall within the jurisdiction of Title VII, an employer must have 15 or more employees “for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.”

Here, the Court unanimously rejected the invitation to use a restrictive method of counting employees for jurisdictional purposes that would have confined the reach of the statute. Many business groups, and particularly small employers, had urged the Court to approve the restrictive approach. The interpretation adopted by the Court, some maintained, might discourage employers from offering part-time employment. An employer, they argued, may prefer to hire a smaller number of full-time employees rather than offer more positions, but on a part-time basis, to avoid bringing itself within the coverage of Title VII.

Because small employers account for a majority of jobs in the United States, the holding in *Walters* has significant ramifications for the reach of the statutory scheme.

## V. Work Life and Working Arrangements in the United States: An Overview

So far, we have sketched out the legal structure within which the employment relationship is ordered in the United States, and some of the legislative and judicial trends touching on the theme of workplace flexibilization. Now it is time to turn to a brief characterization of the arrangements that exist and are emerging within this ordering framework. It also is appropriate to begin to consider whether employment any longer properly can be thought of and termed a relationship, or whether, like marriage, and increasingly parenthood, employment in the American context is on the way to becoming a serial “event”.

To begin this discussion, we can ask “Who is employed?”, and the answer is: nearly everyone. The United States has the highest labor force participation rate among the leading industrialized nations,

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48. Two methods of counting employees to determine whether an employer comes within the jurisdiction of Title VII had been developed. The “payroll method” simply counts all those on the payroll for the period in question, while the “workplace method” counts only those employees actually being compensated on any given working day. The latter approach would permit certain employers to avoid Title VII jurisdiction by the careful scheduling of working times.
and one of the highest rates of participation among women. Perhaps not surprisingly, the United States also leads the world in the share of the working population employed in the private sector.

Following a trend observable across all advanced industrialized nations, the participation rate of men in the United States has declined slowly during the past forty years, due in large part to a trend toward earlier retirements. During the same period, we experienced an historically unprecedented increase in the labor force participation rates among American women: since 1950, the rate of women's participation in "market work" grew by 200 per cent. Between 1960 and March 1996, the participation rate for women increased from thirty-eight per cent of the working age population to nearly sixty per cent. As of 1991, seventy-four per cent of women twenty-five to fifty-four were employed, the overwhelming proportion of them full-time. After stalling briefly during and after the 1990-91 recession, the rate since 1994 once again has increased, primarily among mothers. Presently, sixty-two per cent of women with pre-school aged children are workforce participants, as are seventy-seven per cent of women whose youngest child is of school age (six to seventeen years). Similarly, fifty-five per cent of women with children under the age of one are active workforce participants, a trend that steadily has grown throughout this decade. In terms of flexibilization and statutory limitations on employer decisionmaking, the influx of women into market work most strongly implicates the prohibitions against sex discrimination of Title VII and the Family Medical Leave Act.

Providing a profile of workforce participants is somewhat easier than characterizing the arrangements under which those participants work. About a decade ago, one well-known observer of labor market trends predicted that, as American business strove to become more competitive, "all employment relationships are going to become more fluid." Whether and the extent to which job tenure has

51. Id. Table 5 at p.21.
53. Id. at 13.
55. Id. at 42-43.
changed in the United States, though, has been a matter of consider-
able concern and debate, and views continue to evolve as data become
available to researchers.\footnote{57} As one group of investigators recently ob-
served, "Anecdotal evidence of the trend toward more flexible employ-
ment arrangements is fairly extensive; measuring the extent of such
employment in the labor force as a whole, however, has been more
problematic."\footnote{58} Present circumstances permit only an attempt at a
brief summary of this complicated and rapidly developing scenario.

Succinctly stated, after some period of uncertainty and disagree-
ment during the early and mid-part of this decade, many researchers
have come to the view that job tenure is eroding.\footnote{59} During the
1980's, working hours for women climbed substantially, and job ten-
ure for women grew, reflecting women's increasing attachment to the
market, even after the birth of children. However, all of the studies
showed declines in job stability for at least some groups of men, espe-
cially the lesser-educated and younger males. One study\footnote{60} found
that in the 1970's, sixty-seven per cent of men had strong job tenure
(i.e., changed employers no more than once a decade), and that after
1980, the number declined to fifty-two per cent.

\footnote{57} See e.g., Capelli, "Rethinking the Nature of Work: A Look at the Research
Evidence," 29 Compensation & Benefits Rev. 50 (1997); Farber, "Trends in Long Term
Employment in the United States, 1979-96," Working Paper No. 384 (Industrial Rela-
tions Section, Princeton Univ.) (July, 1996); Farber, "The Changing Face of Job Loss
in the United States, 1981-95," Working Paper No. 382 (Industrial Relations Section,
Princeton Univ.) (June, 1997); Valletta, "Job Loss During the 1990's," FRBSF Eco-
nomic Letter Nr. 97-05 (Federal Reserve Bank, San Francisco, Res. Div.) (Feb. 21,
1997); Valletta, "Has Job Security in the U.S. Declined?," FRBSF Weekly Letter 96-07
(Feb. 16, 1996); Lawrence Mishel, Jared Bernstein & John Schmitt, The State of
Working America, 1996-97, at 239-73 (1996); Rose, "Declining Job Security and the
Employment Policy)(May, 1995); Farber, "Are Lifetime Jobs Disappearing? Job Duration
Section, Princeton Univ.) (Jan., 1995); Marcotte, "Declining Job Stability: What We
Know and What It Means," 14 J. Pol'y Analysis & Mgm't. 590 (1995); Swinnerton &
293 (1995); Diebold, Neumark & Polsky, "Comment on Kenneth A. Swinnerton and
Rev. 348 (1996); Swinnerton & Wial, "Is Job Stability Declining in the U.S. Economy?
Reply to Diebold, Neumark & Polsky," 49 Indus. & Lab. Rel. Rev. 352 (1996); Farber,

\footnote{58} Nardone, Veum & Yates, "Measuring Job Security," 120 Monthly Lab. Rev. 26
(1997).

\footnote{59} Observers disagree on whether this erosion in tenure represents a change in
overall job stability and the existence of long-term positions. Compare, e.g., Capelli,
supra n. 57; Valletta, "Job Loss During the 1990's," supra n. 57; Rose, Declining Job
Security and the Professionalization of Opportunity, supra n. 57, with Farber, "Trends
in Long Term Employment in the United States, 1979-96," supra n. 57; Diebold, Neu-
mark & Polsky, "Comment on Kenneth A. Swinnerton and Howard Wial, 'Is Job Sta-

\footnote{60} Rose supra n. 57, at iii, 9-11.
Recent studies suggest that despite the growth in the U.S. economy after the downturn in the early part of this decade, job losses increased in the period 1993-95 compared to 1991-93. In contrast to earlier periods, however, college-educated workers, especially those with substantial seniority, were being displaced at rates higher than those experienced by the lesser-skilled. In short, the advantage that higher-skills and long attachment to a job once provided against job-loss has lessened. Additionally, the displacement rates of women now nearly equaled that of men’s. Nevertheless, Henry Farber points out, better-educated employees were more likely to find a new position than the lesser-trained, and tended to suffer a smaller decline in real earnings (6.2% in comparison to 8.6% for the lesser-skilled). Many of these well-educated displaced workers appear to have been affected by the “downsizing” and “re-engineering” of their employers. However, many of the companies that have abolished positions also have been hiring, indicating that the labor market has experienced a rather substantial amount of “churning.” Disputes persist among economists as to whether long-term positions are disappearing. As one observer has stated, however, the data concerning job tenure among men confirms the view that younger workers no longer expect to join a firm and remain with it for the term of their working-lives.

Another extensively discussed and debated matter concerns how widespread the use of contingent and alternative work arrangements has become in the U.S. One problem in studying these arrange-
ments consists in the lack of a commonly accepted definition of the term, "contingent" work. 64 Using the formulation: "Contingent work is any job in which an individual does not have an explicit or implicit contract for long-term employment", researchers at the federal Bureau of Labor Statistics (BLS) developed three estimates of the extent of the use of contingent work arrangements, and found under them that 2.2 per cent to 4.9 per cent of the work force in February, 1995 constituted contingent workers. 65 The study further found that the proportion of part-time workers who were contingent in February, 1995 ranged from five to 12.8 per cent. 66 The BLS study showed that contingent workers were slightly more likely to be female and African-Americans than non-contingent workers, and were much more likely to be young and enrolled in school. The study also revealed that under the broadest of the three estimates, teachers accounted for more than ten per cent of all contingent workers, and that teachers at the college or university level were far more likely to be contingent employees than their counterparts at the grade school level. 67

As one observer notes, although "there has been a dearth of data to quantify the number of workers in these [alternative work] arrangements", evidence suggests a growing trend by employers in the use of "flexible staffing." Various studies indicate that firms have increased their purchases of services relative to the direct hiring of permanent staff, 68 and many observers expect this trend to continue. One recent study estimates that about twenty-two per cent of the workforce now consists of temporary, part-time, or contract employees. 69 In passing, it is interesting to note that Manpower, Inc., the personnel supply services organization, is now the largest private

65. Id. This was a point in time study, and developed its measures using information contained in a supplement to the February 1995 Current Population Survey. Id.
66. Of course, not all part-time employees are contingent workers as the BLS defines the term. The BLS reports that half of all part-time workers aged 25 or more had been with their employer at least 3.3 years, and in February 1995, the mean years of job tenure for part-time workers 25 and older was 6.8 years. Id. at 3-4. (Also indicating problems with data captured by point-in-time studies.) As these figures may suggest, part-time does not mean undesirable: as one commentator remarked, "part-time jobs are good or bad for the same reasons that full-time jobs are." Tilley, "Two Faces of Part-Time Work: Good and Bad Part-Time Jobs in U.S. Service Industries," in Working Part-Time: Risks and Opportunities 227 (Barbara D. Warme, Katherina L.P. Lundy & Larry A. Lundy, eds. 1992).
sector employer in the United States. Although space precludes any more than its mention, it also is true that the workplace is less one "place" than it once was. Telecommuting arrangements are on the rise, and many now work at locations other than company facilities—and increasingly at home.\textsuperscript{70}

VI. CONCLUSION

In his Commentaries, Sir William Blackstone famously observed that the "three great relationships of private life are" those of "husband and wife", "parent and child", and "master and servant."\textsuperscript{71} In saying this, he (perhaps unknowingly) echoes Aristotle, who makes a similar observation at the start of the Politics, and discusses how these relations comprise the essential elements of political life.\textsuperscript{72}

Family and work relationships may be elemental to any form of stable and well-ordered social and political life. But, in the American context, there is no denying that at least the first two of the bonds that Blackstone enumerates hardly are flourishing. Although other nations are beginning to become more competitive in this arena, the United States continues to have the highest divorce rate in the world. As one group of researchers report about the American domestic scene, "the probability that a marriage taking place today will end in divorce or permanent separation is calculated to be a staggering 60 percent."\textsuperscript{73} Similarly, Frank Furstenberg and Andrew Cherlin estimate that sixty per cent of children born in the United States during the 1990's will live in a single-parent family before age sixteen.\textsuperscript{74} If employment, like marriage and, at least for men, parenthood, comes to assume the character of a spot (one hesitates to say a "just-in-time") relationship, we should not be surprised. One need pass no value judgments on any of these developments to suggest that they are not entirely unrelated. Although it may represent something of a "trailing" indicator, there is no reason to expect that the employment bond, which we strongly tend to characterize as representing purely an economic association, should be any more durable than life's other significant relations. Our habits not only belay any such expectations, but prepare us to accept serial affiliations as the norm.


\textsuperscript{71} I William Blackstone, Commentaries on the Laws of England 422.

\textsuperscript{72} See Politics Book I, chapters 2-4.

\textsuperscript{73} Council on Families in America, Institute for American Values, Marriage in America: A Report to the Nation at 7 (1995).

\textsuperscript{74} Frank F. Furstenberg & Andrew J. Cherlin, Divided Families: What Happens to Children When Parents Part at 11 (1991) (assuming that "the divorce rate remains high and nonmarital childbearing continues its upward trend.").
Space limits a further exploration of this theme here. But in closing, it is worth mentioning that for better than two centuries, the far-sighted among us repeatedly have voiced considerable concern about the impact of modernity and the anthropology that informs it on the character of our associational life in all of its aspects. Flexibilization and the newly emerging patterns of co-operation and ordering may provide many with unprecedented freedom to organize their working lives. At the same time, these developments press the question of personhood and our relations to others in ways that lawyers will find it increasingly difficult to evade.