

# **UCLA**

## **Working Papers**

### **Title**

Green Shoots in the Labor Market: A Cornucopia of Social Experiments

### **Permalink**

<https://escholarship.org/uc/item/8zm4q6b0>

### **Author**

Stone, Katherine V.W.

### **Publication Date**

2014-05-01

### **Copyright Information**

This work is made available under the terms of a Creative Commons Attribution-NonCommercial-NoDerivatives License, available at <https://creativecommons.org/licenses/by-nc-nd/4.0/>



# WORKING PAPER

**2014 - 4**

## Green Shoots in the Labor Market: A Cornucopia of Social Experiments

**Katherine V.W. Stone**

Arjay and Frances Fearing Miller Distinguished Professor of Law  
School of Law  
University of California, Los Angeles

**May 2014**

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



January, 2014

## **Green Shoots in the Labor Market: A Cornucopia of Social Experiments\***

Katherine Van Wezel Stone\*\*

For the past two decades, there has been a transformation in the nature of work in industrial countries, a transformation that will have profound ramifications for decades to come. For most of the 20<sup>th</sup> century, the concept of “employment” meant a steady job with a decent wage level, an expectation of regular incremental raises, and clear pathways for promotion. In some places, job security was so iron-clad that it was practically impossible for workers to lose their job, even when their employers faced imminent economic catastrophe. Moreover, the standard employment contract ensured that workers had not only jobs of open-ended duration but also an ample package of benefits and dependable social insurance. Although varying country by country, workers who had jobs typically received pensions, health insurance, industrial accident insurance, vacation benefits, maternity leave, death benefits, and other social welfare protections from their employer or the state. The combination of steady jobs, reliably rising incomes, and a package of social protection made the lives of most workers stable and their life courses predictable.

Yet, since the late 1970s, that standard model of employment has been declining throughout the industrialized world. Job security and rich benefit packages have disappeared from the workplace along with typewriters and dictaphones. Firms have repudiated long-term employment relationships and turned to other types of employment arrangements instead. The result is that today, having a job does not mean having job security or benefits - it means having a relationship with an employing entity that involves exchanging labor time for a wage for a finite and uncertain period of time. Even if the job continues over time, there is no assumption or reasonable expectation that it will do so.

These changes in the nature of employment are undermining the current labor regulatory arrangements throughout the industrialized world. The institutions and laws that organized and governed employment relationships for the past century are being dismantled. Those laws that remain are no longer adequate to address the issues and needs of large sectors of the population. Precarious work in all its guises is increasing rapidly, generating

---

\* This paper was presented at the Workshop on the Future of Work, International Labor Organization, December, 2013, Geneva. It is based on my joint work with Harry Arthurs that resulted in our book, *RETHINKING WORKPLACE REGULATION: BEYOND THE STANDARD CONTRACT OF EMPLOYMENT* (K.V.W. Stone & H. Arthurs) (Russell Sage Foundation Press, 2013). In particular, the first three sections of this piece draw heavily on the book’s introduction, Stone & Arthurs, *The Transformation of Employment Regimes: A Worldwide Challenge* (Id. at 1-12).

\*\* Arjay and Frances Miller Distinguished Professor of Law, UCLA School of Law

instability, insecurity, and frustration for individuals, and threatening disruption in the social fabric.

This essay describes the changes that have taken place in employment practices and regulation in advanced industrial countries. It first canvasses employment trends to show that job security and the other features of the standard contract of employment are fading. It then describes some measures undertaken in some countries and regions to try to protect workers and to ameliorate the insecurity that present practices human resource practices generate. It concludes by considering what countries can learn from ameliorative policies and programs in other countries.

### 1. The Standard Contract of Employment

The standard contract of employment became the norm in large manufacturing firms throughout much of the 20<sup>th</sup> century. This form of employment did not emerge fully formed: It was created by large manufacturing firm human resource practices, bolstered by pressures from unions, and fortified by the various labor law regimes in the industrial nations. Gradually over the first half of the twentieth century, legal regimes that regulated employment emerged in various countries that adopted this standard employment model as their template. As a result, by the mid-20<sup>th</sup> century most industrial nations had labor law systems that provided extensive protection for job security either by statute, contract, or custom. Most countries also had laws fostering company and/or industry level collective bargaining that assumed that unions represented members who had long-term jobs. Most countries also had laws that limited the types of permissible employment contracts to standard employment contracts and that placed strict limits on the ability of firms to utilize temporary workers, short term workers, or independent contractors.

Although the basic shape of the standard employment contract was similar in the various countries, the legal regimes that emerged to support it differed markedly from country to country. In some countries, the state mandated job security by statute. In others job security was negotiated as part of a state-supported system of collective bargaining. And in others, it was a product of custom reinforced by legal mechanisms. Moreover, in some countries, the state used tax revenues to provide a broad spectrum of work-related benefits such as skills training, employment insurance, job placement centers, day care, as well as universal benefits to workers and others, such as health care, social housing, and education. In other countries, many of these benefits were provided by employers under compulsion of law, or in response to pressures brought by unions through collective bargaining or as part of a strategy to recruit and retain a loyal and productive workforce.

To be sure, the standard employment contract was never universal. In each country, it covered different proportions of the workforce, and within the workforce, different sectors and segments. It was more characteristic of large manufacturing enterprises and the public sector than it was of small enterprises or the service sector, more likely to cover men than women, more available to well-established populations

than recent immigrants or racial and ethnic minorities. Nonetheless, allowing for all these variations, the standard employment contract was both the paradigm that informed much labor policy and practice and the ideal to which these aspired.

In the past two decades, the standard employment contract has declined in importance. Many industrialized countries have deregulated their labor markets, repealed labor laws, relaxed employee protections and reduced state-provided or state-mandated benefits of all kinds. In part, these changes have coincided with changes in the global political economy. Market fundamentalist ideology, trade liberalization programs, and fiscal austerity measures have attracted the support of governments, political parties, academic thinkers and policy communities across the developed world. In part, they have coincided with major changes in the strategy and ideology of management.

Globalization has driven many of these changes. As current trading regimes took shape in the 1980s and 90s, firms that had stable market shares found their market positions challenged by foreign competition. The drive to capture markets and cut costs led firms to rethink their human resource strategies. In doing so, they repudiated the stable long-term employment relationships they had sustained and sought to streamline their operations by making their workforce, as well as their product offerings and supply sourcing, flexible.

Technology has enabled many of these changes. Firms are responding more quickly to a wider variety of market signals, replacing human operatives with digitized machinery, and dispersing operations down a supply chain of local and offshore feeder firms. Each of these developments has had obvious implications for the way workforces are recruited, trained, managed and disposed of – and for the relevance of the standard employment contract.

Technology has also driven change. Firms engaged in a determined quest for a competitive edge in a globalized world believe that they must enhance their capacity for innovation. Innovation requires that, at any given moment, firms must be able to mobilize an array of relevant skills to perform new tasks at a cost that gives them a competitive edge. Given rapidly changing technology and markets, skill requirements shift quickly, frequently requiring differently skilled employees and making incumbent ones unnecessary.

These changes have created a new and constantly evolving international division of labor, as low-skill, low-wage functions are relocated to the developing world, while those requiring greater sophistication or proximity to head offices are retained in the advanced economies. In such a scenario, long-term, locally-based employees — the beneficiaries of the standard employment contract — often come to be seen as a costly burden rather than an asset. In general, flexibility has replaced stability in the lexicon of corporate managers.

As a result of globalization and new technological developments, firms have repudiated long-term employment promises and instead have developed a variety of short

term, episodic employment relationships.<sup>1</sup> For example, the per cent of workers on fixed term – i.e., temporary -- contracts more than doubled in Spain, France, the Netherlands, and Italy between 1985 and 2003. There were also substantial increases in the percent of temporary employment in Germany, Finland, Sweden, and Portugal during the same period.<sup>2</sup> The percent of casual employment in Australia also nearly doubled between 1982 and 2004.<sup>3</sup> A similar trend was apparent in Japan, which experienced a 25% increase in the percent of non-regular workers to regular workers in the five year period, 1999 – 2005, so that overall, approximately one-third of the Japanese workforce is currently in nonstandard employment.<sup>4</sup>

Concomitantly, there has been a sea change in individual employees' experiences and career expectations. Most individuals are no longer employed by a single firm for their entire career. Many older workers are forced to change jobs, despite their earlier expectations of career stability, or forced into early and often poorly-pensioned retirement. Many younger workers expect to, and do, change jobs more frequently than their predecessors.<sup>5</sup> Most also recognize that they have to retrain periodically in order to remain employable. Many workers, especially younger workers, see themselves as free agents who sell their knowledge, skill and talent in a fluid labor market. Just as firms no longer demonstrate long-term attachment to their workers, many workers have no expectation or desire to spend their entire lives with one employer. They may in fact end up staying with a single firm for a long period, but this is not their initial, nor their on-going expectation.

The result of these changes is that, for an increasing number of workers, employment is no longer the open-ended long-term relationship of the standard employment contract, but rather a temporary, episodic arrangement that might or might not be renewed from time to time. For example, in Australia, the categories of full-time casual work and part-time permanent work *each* grew by more than 200 percent between

---

1 For a comprehensive survey of data about the rise of precarious and atypical employment in OECD countries since the 1980s, see Katherine V.W. Stone, *Appendix*, in K Stone and H Arthurs, *RETHINKING EMPLOYMENT REGULATION: BEYOND THE STANDARD CONTRACT OF EMPLOYMENT* (Russell Sage Foundation Press, 2013).

2 Gunther Schmidt, *Sharing Risks: On Social Risk Management and the Government of Labour Market Transitions*, in Ralf Rogowski, *The European Social Model and Transitional Labour Markets*, Figure 2, p. 35 (Ashgate Publishers, 2008).

3 Iain Campbell & Peter Brosnan, *Relative Advantages: Casual Employment and Casualization in Australia and New Zealand*, 30 *New Zealand J. of Employment Relations* 33, 35 (2005).

4 Japan Institute for Labour Policy and Training, *Labour Situation in Japan and Analysis/ Detailed Exposition, 2005/06* at 43.

5 See Karin Kurz, Sandra Buchholz, Paul Schmelzer & Hans-Peter Blossfeld, *Young People's Employment Changes in Flexible Labor Markets: A Comparison of Changes in Eleven Modern Societies*, in H. Blossfeld, et. al., *Young Workers, Globalization and the Labor Market*, at 352-353 (Edward Elgar, 2008).

1992 and 2007.<sup>6</sup> In most countries in Europe, the changes were equally dramatic. Temporary employment in France and Italy increased from under 5 percent of the workforce to nearly 15 percent between 1985 and 2009. In Germany, it went from 10 percent to 15 percent in the same period. In the Netherlands, temporary employment as a percentage of the workforce increased from 8 per cent to nearly 20 percent and in Spain it increased 15 to 25 percent. Only in the UK and Denmark did the percent of workers in temporary employment decline in that same period.<sup>7</sup>

The statistics reflect a change in life experiences for a large percent of the population. For example, the number of young persons who have permanent employment has declined markedly in most advanced countries.<sup>8</sup> Individuals today can expect a series of jobs throughout their work lives, and a series of relationships to the labor market. They move between firms, between employment and unemployment, in and out of self-employment, and in and out of training. Employees no longer expect job security from their employer, and firms no longer hire for life and train from within. Rather, they hire specific skills on an as-needed basis from the external labor market. Furthermore, firms increasingly use temporary workers, short term workers, leased workers, and independent contractors in lieu of regular employees. The new labor market rewards skill, flexibility, adaptability, and entrepreneurial self-marketing. It no longer seeks, nor does it value, long term, stable employment relationships.

## 2. The Regulatory Vacuum

Throughout the latter half of the 20<sup>th</sup> century, most countries in the industrialized world had labor law regimes that supported the standard contract of employment. Different countries used different mixes of regulation, bargaining, and custom to provide workers with job security, steady incomes, social insurance, and other benefits. Despite numerous variations and many short-comings, domestic labor law in the industrialized world protected workers by making employment conditions stable, reliable, and predictable. The labor law systems were one aspect of the prevailing Keynesian systems of economic policy, and they operated to raise wages and stabilize aggregate demand.

The labor law regimes reflected prevailing human resource theories that counseled firms to organize work into stable, long-term relationships arranged in internal labor markets. These theories were developed by Frederick Winslow Taylor, the U.S.

---

6 Iain Campbell, Gillian Whitehouse and Janeen Baxter, *Australia: Casual Employment, Part-Time Employment and the Resilience of the Male Breadwinner Model*, Figure 4.1, at p. 10, Table Based on Australian Bureau of Statistics, 2008) (Centre for Policy Development, Working Paper, 2009).

7 See Stone, *Appendix*, in K. Stone & H. Arthurs, *RETHINKING WORKPLACE REGULATION* supra. n. 1 at 372, Figure A.2. On the growth of all types of nonstandard employment in Europe in the past two decades, see, *Precarious Employment in Europe: A Comparative Study of Labour Market Related Risks in Flexible Economies* at 11-13, European Commission Final Report, 2004 (Miguel Laparra Navarro, Coordinator).

8 Stone, *Appendix*, supra. n. \_\_\_ at 373, Figure A.3. The only exceptions are the UK and Spain.



engineer who fathered “scientific management,” and the personnel management theorists of the early 20<sup>th</sup> century.<sup>9</sup> The theories spread throughout the industrialized world, influencing employment practices from Europe to Japan and Australia.<sup>10</sup>

The labor law regimes that emerged varied from country to country, but almost all of them were based upon employees having long term, stable employment contracts with a single employer. For example, in the United States, the New Deal labor law – the National Labor Relations Act -- organized collective bargaining rights according to stable bargaining units within firms. The law assumed employees had long term employment relationships and facilitated unionization for employees in large firms that offered long-term employment.<sup>11</sup> Although the U.S. does not have any statutory protection against unjust dismissal, most unions negotiated just cause protection in their collective agreements, thereby providing job security to those workers, usually in large firms, who successfully unionized.

In parts of continental Europe such as Spain and France, unfair dismissal laws were enacted that made it nearly impossible to dismiss employees, giving them de facto job tenure. In other parts of Europe, including Germany, extension laws made collectively bargained job security arrangements applicable to whole sectors of the economy. And in Japan, a culture of long term employment developed after World War II that was reinforced by judicial decisions granting protection against dismissal. The only major exception was Australia, where there was no culture or law providing job security and enterprise-level bargaining was uncommon. Instead, the Australian arbitration and award system provided sector-wide uniform employment terms so as to offer not employer-based, but sector based job protection.

In addition to encouraging long term employment, most legal regimes discouraged or even prohibited any other forms of employment. For example, in Japan short term employment was heavily regulated. For example, the Labor Standards Law (LSL) enacted in 1947 only permitted employers to hire employees on fixed term contracts lasting up to one year in duration. This law was not relaxed until 1998. Similarly, until 1985, the Japanese Employment Security Law (ESL) prohibited, as “illegal supply projects” any arrangement by which a worker is hired by one entity and performs work under the supervision of another. The type of relationship the law proscribes is the triangular employment relationship typical of temporary help, employee leasing, and worker dispatching industries. Thus Japan did not merely regulate third party

---

9 Katherine V.W. Stone, *Origins of Job Structures in the Steel Industry*, in D. Gordon, M. Reich & R. Edwards, *LABOR MARKET SEGMENTATION* (Lexington Books, 1975); Katherine V.W. Stone, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* (Cambridge Univ. Press, 2004). Sanford M. Jacoby, *EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN AMERICAN INDUSTRY, 1900 – 1945* (Columbia Univ. Press, 1985).

10 Katherine V.W. Stone, *GLOBALIZATION AND FLEXIBILIZATION: THE TRANSFORMATION OF WORK IN THE 21<sup>ST</sup> CENTURY* [forthcoming]. Judith A. Merkle, *MANAGEMENT AND IDEOLOGY: THE LEGACY OF THE INTERNATIONAL SCIENTIFIC MANAGEMENT MOVEMENT* (Calif. Univ. Press, 1980).

11 Katherine V.W. Stone, *FROM WIDGETS TO DIGITS* SUPRA. n. 10 at 206-216.

employment relationships such as temporary agencies, it prohibited them.<sup>12</sup>

In the late 20<sup>th</sup> century, these labor laws came under attack. The intensified competitive environment created by liberalized trade regimes and new production technologies put pressures on firms to streamline their operations, downsize their work forces, and hone their product offerings to a fickle and unforgiving marketplace. In their efforts to make these changes, firms found domestic labor laws to be a major impediment. Furthermore, the eclipse of Keynesianism by supply-side economic theories undercut the rationale for regulation that fostered a high-wage middle class. By the end of the twentieth century, pressures from the business communities converged with changing attitudes amongst the public, inducing politicians to dismantle labor protections and revise the labor laws.

Accordingly, over the past two decades, the labor laws in industrialized countries have changed in tandem with changes in work practices. Countries have relaxed their dismissal protections and expanded the types of nonstandard employment relationships that are permissible. For example, Japan has enacted several laws in the past few years that together have created an external labor market to enable firms to hire laterally for skills that they cannot obtain in-house. Beginning in 1985, a series of laws relaxed the prohibition on use of temporary employment. And since 1998, it has expanded the ability of employers to hire workers fixed term contracts. In addition, Japan has legalized private job placement services to enable workers to initiate mid-career job moves. New court decisions have relaxed the circumstances in which firms can dismiss workers for economic reasons. Another new law has modified the previous rigid limitations on working hours and facilitated the use of incentive-based pay. In addition, in 2004 the Diet created a new dispute resolution tribunal that enables individual workers to bring claims when they feel that their employment rights have been violated. Subsequently, in 2007, the Diet enacted an individual employment contract law that gives workers the ability to negotiate individual employment terms. Also in 2007, Japan revised its minimum wage law to eliminate the role of collective bargaining and extension laws in establishing industry minimums. These and other changes make it an open question whether Japan's long-standing tradition of secure, lifetime jobs with seniority-based pay will survive.<sup>13</sup>

Similarly dramatic changes have occurred in Australia. In 2005, Australia abandoned its century long-standing system of regulation by awards after a fifteen year process in which the system had been gradually diluted. The award system had made Australia one of the most egalitarian societies in the industrialized world for one hundred years. The modifications began in the 1980s and gained strength in the 1990s by measures that permitted awards to be superseded by collective bargaining and individual employment contracts. The 2005 Work Choices Act not only dismantled the award system, it also radically individualized the employment relationship. It contained

---

12 Takashi Araki, *LABOR AND EMPLOYMENT LAW IN JAPAN* at 39-40.

13 Katherine V.W. Stone, *Flexibility in Japan: New Institutions of Work and New Conceptions of the Social Contract* [forthcoming].

measures that made it a crime to engage in collective efforts to set employment terms. After the election of a labor government in 2007, Australia embarked on a process of revising its entire regulatory regime. The new labor laws enacted did not reinstate the former award system, but instead enacted a new system that combined collective bargaining with a set of universally applicable individual employment guarantees.<sup>14</sup>

Throughout Europe, the issue of flexibility and labor law reform are currently a subject of intense dispute, both within the EU and inside individual nations. The EU has recently adopted measures to grant employer's increased flexibility to use non-standard workers and make it easier for employers to terminate workers in the event of business exigencies. At the same time, the EU has strengthened some forms of job protection in an effort to devise a new set of policies that combine flexibility with security.<sup>15</sup>

Tensions between flexibility and security are also playing out inside the EU member states. For example, in France in 2006, the government proposed new forms of flexible work contracts that triggered widespread demonstrations in opposition. The proposed legislation would have enabled employers to dismiss an employee under the age of 26 during the first two years of employment without having to go through the cumbersome and expensive dismissal proceedings required by French labor law. Over 2.5 million workers and students went on strike in protest. Although the protests caused the government to withdraw that legislative proposal, similar legislation to make work flexible and relax restrictions on dismissals has been enacted in recent years.

In the past two decades, Germany has relaxed its legal restrictions on the use of short term contracts and temporary agency work. It has also relaxed its dismissal protections. In the early 2000s, it enacted a series of reforms to the unemployment system called the Harz reforms that had the effect of expanding the low wage sector, pushing many jobless workers into the precarious, low wage labor market. It also created a new category of work called "mini-jobs" that are jobs that carry no right to social insurance benefits.

In Italy, a proposed law was introduced in 2002 that would have relaxed dismissal protection for workers in small establishments. The law would have permitted employers with less than 15 employees to dismiss its workers without the extensive just cause protection required by Italian labor law. The purpose of the law was to give small employers flexibility to try out and if necessary, dismiss workers so that they would have an incentive to hire more employees. Over 3 million workers struck in protest and the proposal was rescinded.<sup>16</sup> Nonetheless, the following year, Italy enacted a major revision to its labor laws. The Biagi reforms created over forty new types of lawful types of employment contracts in Italy – a big change from the former one-size-fits-all standard

---

14 See Katherine V.W. Stone, *The Decline of the Marsupial: The End of the Australasian Form of Employment Regulation* [forthcoming].

15 [give citation.]

16 See Melinda Henneberger, *Millions of Italians Take to the Streets in a General Strike*, New York Times, Apr. 17, 2002, at A3.

open-ended employment contract of the past.<sup>17</sup>

In Spain, until 1984, it was a fundamental legal principle that employment contracts had to be open-ended. Temporary or fixed-term contracts were forbidden except for a small number of discrete temporary tasks. In 1984, a significant change to the law made it possible for employers to utilize temporary workers for any task for up to a maximum of 3 years. The 1984 law also created special fixed term contracts for training young people and for launching new activities. Subsequent changes relaxed the job security of “permanent” workers. In 1994, a major change to the labor law made it easier for firms to dismiss regular employees for economic reasons. That year, a legal reform also legalized temporary employment agencies for the first time. As a result, employers have greatly expanded their use temporary contracts. Today Spain has the largest percent of its workforce in temporary employment of any country in Western Europe.<sup>18</sup>

In Sweden, where industrial relations are primarily a matter of negotiated agreements rather than legislation, there have been attempts to enact legislation to permit more flexibility, especially by relaxing protection for job security. Further, there have been changes in the law to permit increased use of fixed term employment contracts, and there are proposals by the government to further liberalize the use of short-term temporary workers.<sup>19</sup> In addition, two court decisions in 2003 and 2004 by the Swedish Labor Court permitted employers to substitute contract workers for regular employees despite legislation and collective agreements to the contrary.<sup>20</sup>

As the labor laws have changed, employers’ use of temporary agencies, short term contract workers, on-call workers, and independent contractors has accordingly expanded. For example, between 2004 and 2007, the amount of temporary agency work increased 53 % in Germany, 48 % in the Netherlands, 70 % in Sweden, 27 % in Belgium, 40% in Ireland, and a whopping 133 % in Greece.<sup>21</sup> Similarly, the number of temporary agency workers in Japan skyrocketed once legal restrictions on temporary work was relaxed in 1998, more than doubling in numbers between 1998 and 2006.<sup>22</sup> So too has the use of outsourcing, in-sourcing, and subcontracting, all contributing to the demise of the standard employment contract.

---

17 Michele Tiraboschi, *The Italian Labour Market After the Biagi Reform*, 21 Int’l J. Of Comp. Lab. L. & Indus. Rel 149 (2005).

18 Virginia Hernanz, et. Al., *Dreaming of a Permanent Job*, in Streeck . . . , supra. at 79-86.

19 Brigitta Nystrom, *Trade Liberalization and Labour Law, Sweden National Report*, XVIII World Congress of Labour Law & Social Security (2006).

20 Eric Danhard, *Individual and Collective Dismissals in Labour Law and Productive Decentralization – Sweden: Outsourcing of Work and Labour Hiring*, XVIII World Congress of Labour Law & Social Security (2006) at 18-19.

21 *Temporary Agency Work and Collective Bargaining in the EU*, European Foundation for the Improvement of Living and Working Conditions, Dublin, 2009.)

22 *Japanese Working Life Profile, 2007/08*, Japan Ministry of Labour, Health, & Welfare, 2006, at p. 37.

These changes in employment relations obviously have different consequences in countries where workers are dependent on their direct employer for benefits and job security than in countries in which the state provides extensive benefits directly to workers and/or requires employers to do so. In the former countries, unions have been weakened through changes in labor laws as well as through the decline in working class identity, culture and solidarity. In the latter, changes in the global political economy and in local political cultures have led governments across the political spectrum to weaken programs designed to buffer workers from the consequences of unemployment and other job-related misfortunes.

The combined effect of these developments, at least in the advanced economies, is that workers have experienced flat or declining real wages, reduced social protection, diminished political influence and a declining capacity to defend their own interests through industrial action. According to the OECD, the wage share of national income in the OECD countries has dropped from 67 per cent to below 60 percent between 1975 and 2005.<sup>23</sup>

### 3. Dismantling Job Security and Shifting Employment Risks

Countries throughout the developed world have enacted new labor laws to enable them to provide firms with flexibility in their work forces with the goals of reducing costs, fostering innovation, and enabling firms to respond nimbly to fast changing product market trends. However, the regulatory changes have diluted the pre-existing mechanisms for job and income security. Some of the changes have been the following:

- dismantling or relaxing employment security protections,
- permitting numerous types of short term employment,
- expanding the use of temporary workers and independent contractors,
- breaking the norm of uniformity in pay and benefits,
- changing compensation systems so that pay is aligned with market rather than institutional factors,

One consequence of the new employment regimes has been a rise in precarious employment. More and more, workers are hired on temporary or fixed term contracts, without any hope of regular employment. The new “precariat” move in and out of the labor market, earning low wages when they have work, and putting strains on public welfare and health care systems when they do not.<sup>24</sup> In Japan, it is estimated that more

---

23 OECD Report, *Workers in the Global Economy: Increasingly Vulnerable?* Alexander Hijzen, Directorate for Employment, Labour and Social Affairs, Conference on Globalisation and the Labour Market, 2007.

24 See, Guy Standing, *THE PRECARIAT: THE NEW DANGEROUS CLASS* (Bloomsbury Academic, 2011); C. Thornley, S. Jeffreys & B. Appay, *Introduction: Globalization and Precarious Forms of Production and Employment* in *GLOBALIZATION AND PRECARIOUS FORMS OF PRODUCTION AND EMPLOYMENT* (C.

than a million young people have lost hope of long term job prospects and have retreated entirely from social life, staying at home and in their bedroom alone for months or even years.<sup>25</sup>

The rise of precarious employment has been accompanied by a growing chasm between regular employees and non-regular ones. This is the phenomenon known as “labor market dualism,” a condition in which a privileged group of workers has well paid secure jobs while the rest of the labor force has intermittent, low paid work in dead end jobs. As many countries in Europe have discovered, extreme labor market dualism threatens social cohesion. Often the non-regular employees are members of vulnerable groups, such as youth, immigrants, racial, ethnic or religious minorities, the aging, and women. In some parts of Europe, growing labor market dualism has dovetailed with tensions about immigration, religion, and ethnicity to create an explosive mix of social problems.

For individuals, the new labor practices mean that they now bear many risks that used to be borne by the firm. Workers now face increased risk of job loss, and with it, the loss of those forms of social insurance that are employer-based. In many countries, job loss thus means loss of health insurance and pensions. Workers who have jobs face the risk of uncertain pay and promotion prospects, making it difficult to obtain credit or start a family. All workers risk the loss of the value of their labor market skills because as jobs are redefined, skill requirements shift. The previous training mechanisms no longer suffice to keep workers up to date, so incumbent workers can no longer compete with newcomers.

Another consequence of the changing nature of work is a decline of unions. In the 20<sup>th</sup> century, unions in most countries were organized to represent workers in stable jobs with long-term employment. As work practices become precarious, unions as we have known them decline. Union decline affects not only workplace-specific concerns— it also affects the quality of democratic governance. Unions provide workplace voice and their presence enables the bulk of the population to experience at least a modicum of participation in their everyday life. Without participation and voice, civic engagement is diminished.

The decline of unions also contributes to growing income inequality. As firms abandon institutional and union-negotiated compensation practices and shift to market-based and performance-based pay, wage differentials escalate. The rapid rise of benchmarking for setting pay testifies to the increase in market measures rather than internal institutional measures for establishing pay, and imports external labor market wage differentials into the firm.<sup>26</sup> Furthermore, the decline of unions also means that the wage compression effect of unions is no longer operative.

Labor market policies are unlikely to return to the protective regimes of the 20th century. Pressures from international competition and globalized production are

---

Thornley, S. Jeffreys & B. Appay, eds.) (Edward Elgar Publishing, 2010).

25 [Add citation.]

26 Peter Capelli & David Neumark, *Do “High Performance” Work Practices Improve Establishment-Level Outcomes?*, 54 *Indus. & Lab. Rel. Rev.* 737, 767 (2001).

transforming employment relationships in ways that make the labor protections of the past unworkable. Rather it is necessary to invent a new regulatory framework that can promote fairness at work and a new type of social safety net that addresses today's labor market.

#### 4. Green Shoots

For the past ten years, I have studied developments in labor markets and labor regulatory regimes in advanced industrial countries. I found that the process of globalization has opened up policy space for experimentation at the national and sub-national level. Countries are reconsidering their longstanding regulatory frameworks, and in so doing, permitting new ideas, approaches, and considerations to take root. Thus there are a number of "green shoots" of policy experimentation in a number of places. Some countries, regions, and sub-regions, as well as some theorists, are devising or proposing new approaches to labor regulation that can facilitate flexibility and innovative economic performance for firms without sacrificing worker security.

Some of the labor policy "green shoots" involve mechanisms to assist people during work-life transitions, such as new types of social safety nets that provide for assistance for transitions into, out of, and within the labor market. Others involve new regional institutions to offer employers flexibility yet devise new types of protective labor market measures for employees at the local and regional level. Yet others involve new forms of worker activism and representation that engage multiple employers across multiple sectors of the economy. Some involve new types of worker training and unemployment programs. Yet others involve new types of dispute resolution that enable individual workers to enforce employment rights in tribunals that are located outside the workplace. These and other green shoots are attempts to find more efficient and flexible regulatory strategies that nonetheless can plausibly claim to produce results for workers comparable to those they enjoyed under the old employment arrangements.

In 2010, I collaborated with Professor Harry Arthurs, Canada's leading labor law scholar to organize a conference that would bring together labor experts from ten key countries to compare and evaluate institutional innovations in labor markets in advanced economies. With the help of the Rockefeller Foundation, the Russell Sage Foundation, Osgood Hall Law School, and UCLA Institute for Research on Labor and Employment, we held a conference at the Rockefeller Conference Center in Bellagio in September 2010. There, nineteen scholars in eight different fields and from ten countries explored changes in the nature of work and new regulatory approaches to address the new challenges in each of the ten countries represented. The results of our collaborative work were published by the Russell Sage Foundation Press in February 2013 in a book entitled *RETHINKING WORKPLACE REGULATION: BEYOND THE STANDARD CONTRACT OF EMPLOYMENT* (Katherine V.W. Stone & Harry Arthurs, eds).

In the book, each author reported on experimental forms of regulatory intervention in their national settings to re-balance firm flexibility and worker security so as to retain the dynamism of flexible work practices while also maintaining social

stability and a legitimate social order. Not all the experiments discussed were successful. Failures can be as instructive as successes in their power to reveal previously unknown complexities and practical limits. Indeed, failure and success are interlinked and necessary aspects of any new strategy. Below I present some of our findings.<sup>27</sup>

#### *4.1 The Emerging Plural Forms of Employment Contracts*

As explained above, until recently, most European countries placed strict limitations on the lawful forms of employment contracts. They required that all employment take the form of a standard open-ended contract with iron-clad protections against dismissal. But in recent years, several countries have introduced other types of permissible employment contracts that relax job security protection but add new features in its stead. For example, in Italy, there are now 40 different lawful types of employment contracts, some of which give workers some employment protection while also giving employers flexibility to redesign employment relationships. These include training contracts, transitional contracts, provisional contracts, contracts with graduated security, amongst others. Some countries have developed a new legal category, variously called ‘quasi-employee,’ ‘freelance worker’ or ‘dependent contractor,’ that expand employment protections to non-regular and heretofore excluded categories of employees.<sup>28</sup> Oxford Professor Mark Freedland has proposed a further development – that we adopt a concept of a contract for intermittent employment as a mechanism to provide some employment protections even when workers make transitions in their working lives.<sup>29</sup>

The new forms of contracts are designed to provide firms with flexibility to utilize short term workers and project workers. In that sense, they have the potential of impairing job security and degrading labor standards. For example, the new Germany “mini-jobs” permit employers to hire short-hours workers and avoid paying full social benefits. Mini-jobs offer workers no protection against dismissal and the jobs tend to be low paid, and they are the fastest growing part of the German labor market.<sup>30</sup>

Despite the weakening of labor protections found in some types of new employment contracts, others have provisions that are designed to provide workers with employability as a substitute for a lifetime job. For example, some forms of employment contracts available for younger workers mandate that the employer provide training, so

---

27 The ensuing discussion contains only a portion of the topics covered in the book, and does not fully convey richness and analytical sophistication of chapters. I present them here in order to convey some of the exciting new ideas taking root and to demonstrate that there are indeed serious efforts in some places to respond to the changing nature of work in a way that preserves, or creates, new forms of worker protection. For more details of any of these ‘green shoots,’ I commend the reader to the respective book chapters.

28 On European approaches to redefining the category of “worker” in order to expand social protection, see Bruno Caruso, *The Employment Contract is Dead! Hurrah for the Work Contract!*, in K. Stone & Harry Arthurs, *RETHINKING WORKPLACE REGULATION* at 102-106.

29 Mark Freedland, *THE PERSONAL CONTRACT OF EMPLOYMENT*, (Oxford Univ. Press, 20??).

30 [add citation].



that workers receive skills that can serve them throughout their careers. In Italy, the government gives tax subsidies to firms that agree to provide worker training to young workers. Another type of reform is a contract that subsidizes retraining for workers who become technologically unemployed so they can obtain skills in new, rising industries. In general, the new forms of employment contracts promote a variety of employment arrangements that depart from standard full-time employment, such as probationary employment, combinations of work with training, voluntary work, and unpaid work experience placements.

In the main, unions have opposed most if not all the new forms of employment contracts precisely because they fail to provide job security. Nonetheless, when such contracts are coupled with training mandates, they can help workers at all ages and career stages weather the winds of change.

Several countries have also attempted to transform the employment contracts of atypical workers by mandating that atypical workers receive the same terms of employment as regular workers. For example, amidst the rapid increase in the number of part time workers in the Netherlands, the legislature passed a statute called the Prohibition of Discrimination in Working Hours Act in 1996 that required employers to provide part-time workers with the same pay and benefits (pro rata) as full time workers.<sup>31</sup> The statute was followed in 1999, by the European Union (EU)'s Fixed Term Directive that required member states to enact mechanisms to give fixed term workers equal pay with open term employees. These kinds of measures help regularize atypical employment by giving atypical employees the some aspects of the emoluments that typical employees enjoy. However, they do not ensure that atypical workers have job security or adequate annual incomes.

#### 4.2 Flexicurity

At the same time that the job security protections and centralized bargaining systems in Europe are breaking apart, Europe has become a laboratory of experimentation and diversity in the area of employment regulation. While some of the reforms are designed to make assist employers by making labor markets more flexible and thereby remove impediments to job creation and economic efficiency widely attributed to 20<sup>th</sup> century social protections, some of the reforms attempt to preserve livelihood security for citizens who are threatened by changing corporate human resource practices. These latter efforts are often grouped under the general heading of “flexicurity.”

The European Union advocated flexicurity policies in its 2007 and 2008 *Employment in Europe Reports*. The Reporters defined flexicurity as “a high level of employment security, that is the possibility to easily find a job at every stage of active life

---

31 Jelle Visser, *Flexibility and Security in Post-Standard Employment Relations: The Netherlands*, in K.Stone & H. Arthurs, *RETHINKING WORKPLACE REGULATION* at 135. A subsequent law, the Flexibility and Security Act of 1999 permitted employers to utilize more fixed term employees and gave fixed term workers and agency temporary workers some job security and pay protection. See *id.* at 147 – 149.

and have a good prospect for career development in a quickly changing economic environment.”<sup>32</sup> As the definition makes clear, the goal of flexicurity is not to foster a continuous job with a particular employer, nor to re-create the job security systems of the past. Rather, the goal of flexicurity is to devise new employment relationships that combine flexibility for employers with livelihood security for employees. The Report called for new institutions and governance in both labor relations and labor markets that develop an employee’s labor market prospects throughout the working life.

Flexicurity is a deliberately vague concept that is meant to encourage local and diverse approaches. In recent years, several European countries have attempted to implement the flexicurity mandate. Some countries have attempted to provide flexicurity by relaxing restrictions on working hours, revising entitlements for leave, and requiring lifelong education and training. For example, in several countries, employers and workers can agree to establish ‘time banks’ by which the worker can work longer hours than otherwise permitted for limited periods of time in exchange for shorter hours or time off at another time. German unions have negotiated ‘working time corridors’ with employers to escape the rigid restrictions imposed by overtime rules, thereby enabling employers and workers to restructure their working time to meet production and/or personal needs.<sup>33</sup>

The best known example of flexicurity is the approach to employment regulation and social protection developed by the Nordic countries of Denmark, Sweden, Norway, and Finland. While each of the Nordic countries differs, their employment systems have several common features, including high union density, strong unions committed to solidaristic wage policies, centralized wage setting devices, relatively egalitarian wage structure, and the use of collective bargaining rather than legislation to set most terms of employment. The Nordic countries devote vast sums to education, worker training, and public welfare programs. They also provide workers with a high level of unemployment benefits combined with labor market activation measures to assist unemployed workers during labor market transitions. For example, Denmark’s unemployment system gives unemployed workers approximately 80% wage replacement coupled with extensive labor market activation measures that require unemployed workers to undergo training to upgrade their skills. The system also provides them with job opportunities and pays for education, training, relocation, and other job-related expenses. Thus while Denmark does not provide its workers with statutory protection for job security the workers have assurances that they will have adequate incomes and valuable training when they change jobs. As a result, Danish workers change jobs more frequently than do other workers in Europe, and Danish companies are able to automate and change workplace practices without engendering opposition from workers or the national unions.<sup>34</sup>

Another well-known example of flexicurity is found in The Netherlands. There

---

32 [add citation]

33 Thomas Haipeter, *Erosion, Exhaustion, or Renewal? New Forms of Collective Bargaining in Germany*, in K. Stone & H. Arthurs, *RETHINKING WORKPLACE REGULATION* at 119 – 129.

34 Thomas Bredgaard, *Flexibility and Security in Employment Regulation: Learning from Denmark* in K. Stone & H. Arthurs, *RETHINKING WORKPLACE REGULATION* at 213 – 232.

flexicurity has been directed toward facilitating part time work opportunities, particularly for women with child care responsibilities, who previously had been either excluded from the labor market or relegated to marginal jobs. A series of laws and national-level agreements between the unions and employers' associations eased the transition from non-work to part-time work and enabled part time workers to increase and decrease their hours to adapt to care work demands. There were also laws that regularized the pay and benefits of part time workers by requiring employers to give part-time workers parity with full-time workers, as mentioned above. In addition, the use of minimal terms collective agreements and framework collective bargaining agreements permitted unions and management to negotiate plant level terms that deviated from uniform terms set nationally. This decentralized collective bargaining has enabled unions and management to negotiate a variety of measures at the plant level to give firms more flexibility over issues such as working time and sickness and accident leave.<sup>35</sup>

#### *4.3 Redesigning Unemployment Insurance and Severance Pay*

Some countries have made adjustments to their public programs for unemployment compensation, severance benefits, and labor market re-entry after child-rearing in order to enable individuals to move between jobs and between jobs and non-work statuses. Many countries have made access to unemployment assistance conditional on participation in work or training programs. Some further couple unemployment compensation with relocation assistance to enable workers to assume new types of jobs and careers. Others have re-structured systems that provide severance pay. Severance pay is designed to assist workers who lose their jobs, but in the past, payments are often structured to discourage job changing and hence lock workers in to dead-end jobs in declining industries. To combat these rigidities, Austria implemented a new severance pay scheme in 2003 that was designed to facilitate job mobility by removing penalties for frequent job changers and enabling all workers to build up rainy day savings.

As with the new forms of employment contracts, the changes to benefit systems have been controversial. And as with the new types of employment contracts discussed above, the devil is in the details. For example, the Hartz reforms to the German unemployment system in the early 2000s engendered bitter opposition and conflict because they not only curtailed the duration of unemployment benefits, they also pushed workers into low wage jobs. Nonetheless, as the Danish example shows, some of the approaches could provide workers with enhanced career opportunities and facilitate upward rather than downward mobility.

#### *4.4 New Forms of Transition Assistance and New Types of Social Insurance*

In many countries, health benefits, old age assistance, and other forms of social

---

<sup>35</sup> Jelle Visser, *Flexibility and Security in Post-Standard Employment Relations: The Netherlands*, in K.Stone & H. Arthurs, *RETHINKING WORKPLACE REGULATION* at 140 – 145.

insurance are linked to employment, and as a result, they fail to address the needs of today's mobile workers. For example, in the United States, neither the social welfare laws nor the labor laws have focused on the problem of transitions. Moreover, U.S. unions do not negotiate with employers to provide post-employment assistance because once workers lose their jobs, they also lose their union membership and their contract rights.

Because most workers today can expect to experience discontinuities in their labor market experiences, we need social assistance programs that provide for workers and their families during gaps and transitions in their labor market experience. The inevitability of gaps in employment means that any such program must be part of a new type of social safety net, one that is delinked from any particular employer and that provides protection for workers during periods of transition and for those workers who have atypical and/or discontinuous labor market affiliations.<sup>36</sup> The new safety net will have to offer portable health benefits and provide lifetime training and retraining opportunities, universal and adequate old age assistance, and other forms of assistance for individuals who are moving between jobs, between jobs and unemployment, between jobs and training, and during periods of care work.

Australia has developed the beginnings of such a new safety net. Its social assistance program provides a generous means-tested, flat rate benefit to those out of work for any reason. Eligibility does not depend upon a specific period of time spent in the labor market, and the amount of benefits is not pegged to prior earnings. The benefits are also tapered once a recipient has a job, so they do not provide a disincentive for taking a job. The benefits are financed from general tax revenues. Because the Australian tax system is highly progressive and because the benefits are means-tested, they have a redistributive impact. However, because most people can expect to draw on the benefit at some points in their life course – for child rearing, unemployment, retraining – the system acts as an income-smoothing device.<sup>37</sup>

The issue of transition assistance has been actively considered in Europe. A group of distinguished labor relations experts was convened by the European Commission in 1999 to consider the implications of the changing nature of work. The group, chaired by French labor law professor Alain Supiot, was charged with considering the impact of changes in the workplace on labor regulation in Europe and to devise proposals for reform. In 2000, the group issued a report, known as the Supiot Report. The Supiot Report contained a number of suggestions for changes in the institutions regulating work to provide active security, of which the most visionary proposal was for the creation of “social drawing rights” to facilitate worker mobility and to enable workers to weather transitions. Under the proposal, an individual would accumulate social drawing rights on the basis of time spent at work. The drawing rights could be used for paid leave for purposes of obtaining training, working in the family sphere, or performing

---

36 See generally, Anthony O'Donnell, *Safety Nets and Transition Assistance: Continuity and Change in a Liberal Welfare State*, in K. Stone & H. Arthurs, *RETHINKING WORKPLACE REGULATION*, at 273 – 291.

37 Anthony O'Donnell, *Safety Nets and Transition Assistance*, *supra*. at 277.

charitable or public service work. It would be a right that the individual could invoke on an optional basis to navigate career transitions, thereby giving flexibility and security in an era of uncertainty. Social drawing rights, its proponents claim, would smooth these transitions and give individuals the resources to retool and to weather the unpredictable cycles of today's workplace.<sup>38</sup>

The Supiot Report did not address the question of who would pay for the social drawing rights. One possibility is that it be paid out of general tax revenues. Another is that it be paid by employers as a form of mandatory paid-in leave.

Australia has long had a form of leave that resembles the Supiot proposal for social drawing rights. In Australia, employees are entitled to long service leave after they have been with the same employer for a fixed period of time. The particulars of long service leave are set by each state and/ or by awards and collective agreements, and the time requirement for eligibility is between seven and fifteen years. Employees who reach the requisite time are entitled to a period of time off – usually three months to six months (check) -- at regular pay.<sup>39</sup> Although long service leave is currently designed to reward long service with a single employer, it is a concept that could be adapted to current employment practices. If individuals were able to accumulate leave time by working for a number of employers and tacking together their various stints in the labor market, then long service leave could become a vehicle to enable individuals to periodically re-tool and re-invent their careers.<sup>40</sup>

In the United States, there are precedents for the concept of paid time off with re-employment rights to facilitate career transitions or life emergencies. There are well established precedents for paid leaves for military service, jury duty, union business, and other socially valuable activities. Some occupations also offer periodic sabbatical leaves. The concept is also built into the idea of temporary disability in state workers compensation and other insurance programs, which provide compensation and guarantee re-employment after for temporary absences. These programs all reflect and acknowledge the importance of subsidized time away from the workplace to facilitate a greater contribution to the workplace. They could serve as the basis for developing a more generalized concept of career transition leave, or to use more familiar parlance, a workplace sabbatical. Indeed, it could take the form that is currently used for unemployment compensation, where employers contribute to a fund which workers can draw on once they satisfy the eligibility criteria.<sup>41</sup>

---

38 Alain Supiot, ed., *BEYOND EMPLOYMENT: CHANGES IN WORK AND THE FUTURE OF LABOUR LAW IN EUROPE* (2001).

39 See Anthony O'Donnell, *Safety Nets and Transition Assistance*, supra. n. \_\_\_ at 280-281. The details of long service leave are explained on the Australian government web site at <http://www.fairwork.gov.au/leave/long-service-leave/pages/default.aspx>.

40 Long service leave is being re-designed under the current Fair Work Australia National Employment Standards because under that statute, employment conditions are no longer set by awards. See <http://www.fairwork.gov.au/factsheets/FWO-Fact-sheet-Long-service-leave-and-the-NES.pdf>.

41 Katherine V.W. Stone, *FROM WIDGETS TO DIGITS*, supra. n. \_\_\_ at 287 – 288.

#### 4.5. *New Regional Labor Market Institutions*

In the past fifteen years, there have developed new local and regional institutions that attempt to protect labor rights and at the same time strengthen local economies. One such institution, found in Italy, Spain, the UK and some other European countries, are local and territorial social pacts.<sup>42</sup> The pacts are established as a result of negotiations between local labor groups, local employers, and local government officials. They set local labor market policy, addressing issues such as unemployment insurance arrangements, worker training programs, and other labor market measures. In some cases, the territorial pacts are negotiated not by only the traditional social partners – employers’ associations and trade unions – but also with participation by civic groups and other organized local constituencies. The territorial pacts receive funding from the European Union structural funds as well as their national governments to invest in infrastructure and regional economic development. As Italian legal scholar Bruno Caruso writes

“[Territorial employment pacts in Italy have] fostered territorial bargaining in the so-called economy of ‘districts.’ . . . which often correspond to sectors traditionally featuring small firms or craftsmen (textiles, furniture, building, tourism). . . . [Territorial bargaining has involved a] bilateral partnership but at a territorial rather than industry or plant level, to support the competitiveness of micro firms by injecting a heavy dose of flexibility (as regards working hours, wages, and geographic location) into both the internal and external labour market. These measures are almost always accompanied by others supporting income levels if not permanent employment security.”<sup>43</sup>

There is some debate about effectiveness of these local forms of bargaining, but many observers acknowledge that they are a promising means to improve local economic performance while at the same time providing employment protection to local populations.<sup>44</sup>

In addition to territorial pacts, another territorial-based labor market institution has emerged in Europe. In some parts of France and Italy, employers have formed cooperative associations to share their workforces. These associations are formed by employers who have seasonal or variable production schedules and flexible staffing

---

42 See generally, Ida Regalia, *Regional and Local Experiments for Labor Market Policy in Europe*, in K. Stone & H. Arthurs RETHINKING EMPLOYMENT REGULATION, AT 160-163.

43 Bruno Caruso, *Decentralised Social Pacts, Trade Unions and Collective Bargaining – How Labour Law in Changing*, in Mario Biagi, TOWARDS A EUROPEAN MODEL OF INDUSTRIAL RELATIONS 193, 210 (2001).

44 Regalia, *supra* n. 44, at \_\_\_\_.

needs, yet require workers with particular skills that they do not want to lose when they institute layoffs during slack periods. In France, the associations, known as the *groupements d'emploi* (GdE), employ workers on behalf of all the member firms in a localized geographic area. Each employer in the *groupement* can utilize workers from the association as needed without establishing a direct employment relationship with any individual worker. The worker has an open-ended employment relationship with the *groupement*, and the *groupement* itself is the employer for purposes of labor rights and benefits. Sometimes the *groupement* also provides the workers with training.<sup>45</sup>

The *Groupements d'Emploi* is similar to a US union hiring hall in that employers only hire on an as-needed basis and workers do not have on-going relationships with a particular employer. And like a hiring hall, the wages and benefits of the workers are set uniformly for all the firms, so that the firms do not compete with each other over wages. However, unlike a hiring hall, the workers in a GdE have steady jobs with steady income and benefits. The GdE, not the particular firm, gives workers a standard contract of employment. The worker thereby receives substantially more job, wage, and benefit security than they would either in a hiring hall or in the unmediated labor market.

#### *4.6 Resolving Disputes in a New World of Work-- New Modes of Workplace Dispute Resolution Systems*

Workplace dispute resolution systems evolved in an era of mass production industry, strong unions and stable employment relationships. For example, the privatized labor arbitration system of the Wagner Act model of collective bargaining in the United States was developed as a response to the world of work of their era. Arbitration was developed as a mechanism to enable unions and employees to enforce the types of rights against their employer that were specified in collective bargaining agreements – rights to job security, reliable raises and promotions, vacation and sick leave, and adequate employer-provided benefits. These rights pertained to the working conditions and terms provided within a single employing unit, and were important to long-term employees who expected to stay with that employer for a long time.<sup>46</sup>

As both the organization of work and employment and the institutional structures of regulation have been transformed in recent decades, these dispute resolution institutions are becoming out-dated. Many workplace disputes in the past took the form of collective disputes such as strikes and mass worker mobilizations that were aimed at establishing collective representation or improvements in collective terms of employment. In contrast, today's workplace disputes are primarily brought by individuals and involve individual claims of unfair treatment. Today many disputes arise at the hiring stage, when individuals are either refused employment on allegedly discriminatory grounds, or are offered employment as temporary workers, independent contractors, or some other status that is inferior to that of a firm's "regular" employees. Many other disputes arise at the time of an employee's exit, when employers want to

---

45 I. Regalia, *Regional and Local Experiments*, supra. n. \_\_\_ at 163 – 164.

46 See K. Stone, *FROM WIDGETS TO DIGITS*, supra. n. \_\_\_ at 212 – 214.

impose post-employment restrictive covenants in order to restrict the employee ability to use of intellectual property the worker acquired. Yet other common disputes today involve claims of unfair treatment on the job – denial of a bonus or promotion to which the employee felt entitled. All advanced countries have experienced a large increase in individual workplace disputes of these types in recent decades.<sup>47</sup>

In response to the mushrooming of individual workplace disputes, many countries have revised their workplace dispute resolution institutions. The Anglo-American countries (the U.S., Canada, the U.K., Australia and New Zealand) have been the sites of a range of different institutional approaches. In the United States, the most important development in workplace dispute resolution is the growth of a system of management-initiated privatized arbitration tribunals in non-union workplaces. These tribunals hear claims of alleged violations of statutory employment rights, including such important areas of statutory regulation as the civil rights laws and minimum employment standards laws. By contrast, in the United Kingdom an increase in the statutory regulation of employment has been accompanied by a system of public employment tribunals that are seeing increasing caseloads. Meanwhile, the recent enactment of major labor law reforms in Australia includes the establishment of both an independent umpire structure, dubbed “Fair Work Australia”, and a public Fair Work Ombudsman.<sup>48</sup>

There have also been new directions in established dispute resolution institutions in some of the European countries. For example, the German system of labor courts have until recently received less attention than that country’s works councils and codetermination systems, but their caseload for individual claims has mushroom in the past two decades. In response to the massive increase in termination cases brought to the Labor Courts, the Diet revised the Dismissal Protection Act in 2003 so that firms can now avoid judicial proceedings by offering severance payments to employees who agree to refrain from filing claims with the Labor Court.<sup>49</sup>

In Japan, a new public system of labor tribunals was established in 2004 in order to give employees a mechanism to vindicate their individual employment rights outside their specific workplace. The system is designed to provide an alternative to the previous focus on enterprise-specific mechanisms for vindicating workplace rights, and to extend employment protection to employees who are not part of the lifetime employment system. The tribunals are comprised of one judge and two lay judges-- one appointed by the major union federation and the other by the major employer association. The tribunal holds three sessions in which it gathers facts, attempts to mediate the dispute, and failing that, conducts a hearing and issues an award. Parties then have two weeks to reject the award and take the case to the civil courts. If they do not do so, the award becomes binding. The Japanese employment tribunals went into operation in 2006 and, in its first four years, nearly 85 percent of cases either ended with an arbitral award to which neither

---

47 Alexander Colvin, *Employment Conflict in a Post-Standard Contract World*, in K. Stone & H. Arthurs, *RETHINKING WORKPLACE REGULATION*, at 196-197.

48 Alexander Colvin, *id.* at \_\_\_\_.

49 Add reference



party objected or were settled by the parties. Only 15 percent went to the civil court. Moreover, the average time for the entire case from filing to completion was about 2.5 months, far less than a proceeding in a civil court.<sup>50</sup>

Across these various national systems there are common themes of increasing usage levels in the context of growing individualization of employment relations and a shift from collectively bargaining terms and conditions of employment to greater reliance on a basket of minimum rights provided by statutes. Many past workplace dispute resolution systems were tied to an individual employer. A major issue in the new world of work is to fashion workplace dispute resolution systems that can effectively respond to disputes that involve multiple employers who jointly employ workers, such as subcontractors or networked models of production, and to address issues that arise for workers in the course of careers that span multiple employers.

#### *4.7 New Forms of Collective Bargaining to Reconcile Individual Bargaining with Collective Rights*

In their classic study of collective bargaining in the 1990s, *CONVERGING DIVERGENCES*, Harry Katz and Owen Darbishire reported that collective bargaining systems were undergoing revision throughout the developed world. The changes involved devolution away from centralized bargaining structures and the re-location of collective bargaining to the plant and even some times to the individual level.<sup>51</sup> The decentralization process Katz and Darbishire described has continued into the 2000s, but with some new permutations.

In Germany, starting in the late 1990s, some national sectoral agreements contained clauses that permitted local works councils to bargain with their individual companies on issues of incentive wages and working hours. Since then it has become common for national unions to negotiate framework agreements and permit local works councils to negotiate terms that derogate from those in the applicable national or sectoral agreements. In addition, some industry agreements permit firms to negotiate with individual workers and to conclude individual agreements on wages and hours that vary from the collective agreements' terms. To prevent a total erosion of collective agreements, the chemical workers union and the metal workers' union developed standards for derogations and imposed coordination rules that gives the national union final authority over which ones are approved.<sup>52</sup>

The German experience of devolution of bargaining to the local and individual level and the derogation of collective terms by individual agreements is mirrored by

---

<sup>50</sup> Takashi Araki, *New Forms of Dispute Resolution: Japan's Labor Tribunal System*, in K. Stone & H. Arthurs, *RETHINKING WORKPLACE REGULATION* at 183 – 187.

<sup>51</sup> Harry C. Katz & Owen Darbishire, *CONVERGING DIVERGENCES: WORLDWIDE CHANGES IN EMPLOYMENT SYSTEMS* (ILR Press and Cornell Univ. Press, 2000).

<sup>52</sup> Thomas Haipeter, *Erosion, Exhaustion, or Renewal? New Forms of Collective Bargaining in Germany*, in K. Stone & H. Arthurs, *RETHINKING WORKPLACE REGULATION* at 119-127.

similar new forms of bargaining in some sectors in Italy, Belgium, the Netherlands, and other places. For example, in the Netherlands, since the 1980s, unions and employers have expanded the types of collective agreements they negotiate. Previously they negotiated standard agreements that set terms and conditions either for a single company or a sector and did not permit deviations of the terms. Since the 1980s, they began to negotiate two other types of agreements – minimal term agreements that permitted plant-level bargaining for upward deviations in favor of employees, and framework agreements that permitted both upward and downward deviations by means of local bargaining. Some industry agreements permit have both types of provisions for particular areas, and some have a provision that permit individual worker to give up some money in exchange for reduced working time or paid leave.<sup>53</sup>

The European experience of derogated bargaining has similarities to the ‘embedded contract bargaining’ that is used for craft workers in the entertainment industry in the United States. In that industry, craft-based unions representing the trades such as lighting design or sound technicians negotiate framework agreements with multi-employer groups, and then each individual worker makes their own bargain above the minimum specified in the framework when they are hired. These contracts offer workers no job security, but they do provide workers with minimum terms for each project and continuity of benefits. Some of the unions also negotiate for the employers to contribute to funds to provide continuous training so the union members can keep their skills up to date.<sup>54</sup>

These new forms of collective bargaining provide a mechanism that enables employers to avoid rigid one-size-fits-all employment terms and permits them to adapt employment hours and other conditions to changing operational needs. In the German case, some analysts have argued that these kinds of carve-outs represent the weakness of unions and the erosion of collective bargaining.<sup>55</sup> However, German labor sociologist Thomas Haipeter argues that there has been an unforeseen consequence of the devolution of bargaining the plant level in Germany. He chronicles the growth of “local alliances” between management and works councils have enabled works councils, now heavily dominated by the unions, to have input into new issues, including on-going training, task qualification, the development of criteria for wage classification, and the use of teamwork. Even more significant, he claims, is that the movement of the locus of bargaining to the local level has forced unions to get encourage rank-and-file participation, which they have done by instituting grass-roots mobilizations and short-term strikes. Some unions have used their new-found clout at the local level to get employers to agree to innovate, make investments in research and development, and

---

53 Jelle Visser, *Flexibility and Security in Post-Standard Employment Relations: The Netherlands*, in K. Stone & H. Arthurs, *RETHINKING WORKPLACE REGULATION* at 141 – 143.

54 Katherine V.W. Stone, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* (2004 Cambridge Univ. Press) at 220 – 227.

55 See e.g., Wolfgang Streeck, *RE-FORMING CAPITALISM: INSTITUTIONAL CHANGE IN THE GERMANY POLITICAL ECONOMY* (Oxford Univ Press, 2010).

institute training and apprenticeship programs.<sup>56</sup>

These new forms of bargaining, while risky for unions and still in experimental stages in many places, may provide a mechanism to reconcile individual bargaining with collective rights, thereby giving employers flexibility to individualize employment relationships while enabling workers to retain some of the benefits of having collective representation.

#### 4.8 *New forms of unions and employee organizations*

In light of the decline of worker-firm attachment, workers need organizations that further their joint interests but that are not pegged to a particular employer. Because workers move between firms throughout their working lives, they need a mechanism that enables them to deploy their collective power in order to affect terms and conditions across multiple employers. At the present time, some new types of labor organizations are forming that do just that. For example, in many cities in the United States, unions have formed coalitions with community groups to enact living wage ordinances to improve labor standards for low wage public sector employees city-wide. Presently there are living wage ordinances in over forty U.S. cities. In addition, unions and community groups in Los Angeles, San Antonio, and some other cities have formed coalitions to negotiate agreements, called “community benefit agreements,” with city authorities and private developers. These agreements obligate developers to create jobs, provide job training, local hiring preferences, affordable housing, social services, public parks, and other community improvements in exchange for the coalition’s political support development projects. There have also been multiple-employer organizing efforts of immigrant workers within particular sectors. In many cities, worker centers have developed to inform low wage workers, often immigrants, of their legal rights.<sup>57</sup>

In Japan, there has also been an explosion of non-traditional forms of labor organizations. In many places there are city unions that pressure employers in an entire metropolitan area around work-related concerns. There are also women’s unions organized to further interests of women workers, and ethnically-specific unions to assert pressure on behalf of specific ethnic groups. One form of union that has become prevalent in Japan is unions of immigrant workers organized by their country of origin. For example, there is a large union of Peruvian immigrant workers in a major working class suburb of Tokyo.

A particularly dynamic form of non-conventional union in Japan is the community union. These unions include part time workers, temporary workers, immigrant workers, and others who are generally excluded from the traditional enterprise-based unions. In 1990, the Community Union National Network was formed

---

56 Thomas Haipeter, *Erosion, Exhaustion, or Renewal?*, supra. n. \_\_\_ at 127 – 129.

57 Katherine V.W. Stone, *The Decline of the Standard Contract of Employment in the United States: A Socio-Regulatory Perspective*, in K. Stone & H. Arthurs, *RETHINKING WORKPLACE REGULATION* at 75; Katherine Stone & Scott Cummings, *Labor Activism and Local Politics: From CBS to ‘CBAs,’* in *THE IDEA OF LABOUR LAW* (G. Davidov & B. Langille, eds.) (Oxford Univ. Press, 2011).

to bring together 72 community unions that were operating in 30 different prefectures. These unions have continued to grow in membership and numbers, and some have affiliated with the National Confederation of Trade Unions or the Japanese Trade Union Congress. These unions promote labor-friendly policies to local governments and participate in community assistance organizations. Some of their activities involve advocating policies to promote employment of the handicapped and elderly, and providing a meeting place for retired union members. They also address important non-work issues, such as advocating improvements in school lunch programs – policies that will ultimately improve the employment opportunities for women with children. One particularly important role that community unions play is to advise individual workers who have job-related problems about how to resolve them in union committees, the labor tribunals or the courts. In some cases, the community union provides representation to individual workers in the new employment tribunals described above.<sup>58</sup>

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

## 5. Conclusion: Legal Transplantation and The Prospects for Cross-National Legal Learning

I have described numerous initiatives that comprise not one but a cluster of green shoots that have emerged in different countries in response to the challenges posed by the end of the standard employment contract and the spread of precarious, unpredictable, and nonstandard forms of employment. It remains to ask whether any of these can be applied across national boundaries. It is a truism in comparative labor law that one cannot simply “transplant” industrial relations systems or regulatory structures from one country to another. However, countries clearly learn from each other's successes and failures. Moreover, experiments such as the EU's “open method of coordination” show how some approximation of a policy convergence can be achieved within a regional economic union without insisting on precise conformity to specific modes of regulation.

Harry Arthurs has addressed the problem of policy transplants and the possibilities for transnational legal and policy learning in his essay, *Cross-National Legal*

---

<sup>58</sup> Keisuke Nakamura & Michio Nitta, *Organizing Nonstandard Workers in Japan: Old Players and New Players*, in K. Stone & H. Arthurs, *RETHINKING WORKPLACE REGULATION* at 261 – 267.

*Learning: The Uses of Comparative Labor Knowledge, Law, and Policy.*<sup>59</sup> There Professor Arthurs outlines the difficulty of applying lessons across national boundaries given the unique national and/or regional political economies, legal systems and socio-cultural environments. Despite these difficulties, he shows that it is useful to think of transnational learning as not an outcome, but a process. To be sure, in that process, policy makers and theorists are bound to encounter structural, epistemological, and methodological barriers that are every bit as real as those posed by the differing legal systems, histories, and cultures of the countries that might otherwise learn from each other. Nonetheless, Arthurs contends, globalization itself has created conditions that are conducive to trans-national learning and policy transplantation. The integration of national economies across the globe and the convergence in trade, monetary, and fiscal policies have made it possible for policy-makers to imagine and even construct social policies and programs that are somewhat detached from their national origin.

Here I have described a number of policy ‘green shoots,’ without prioritizing them or insisting that each one is either effective or transplantable. I do so in the spirit of enabling the creation of a transnational dialogue and fostering the spread of “best practices” into the policy domain. It is hoped that by uncovering and sharing these green shoots, we can foster a transnational learning process.

---

<sup>59</sup> Harry Arthurs, *Cross-National Legal Learning: The Uses of Comparative Labor Knowledge, Law, and Policy*, in K. Stone & H. Arthurs, *RETHINKING WORKPLACE REGULATION*, at 357 – 361.