Employees Losing Power, Losing Jobs: Making the Case for Mediating Power in the Era of Buy-ins and Bailouts

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I.   INTRODUCTION

Market economics of the last few decades has rallied modern American workplace management around a global corporate power initiative, operating through the phenomenon of corporate *self-regulation*, often defined as the "coordination of internal or 'self-regulatory' compliance structures with the external law of the workplace."[1] Self-regulation is the newest paradigm for internal management of private sector workplace ethics. As such, it is an amalgam of social, legal, and business trends combining to orchestrate the appearance of pioneering efforts toward corporate compliance with industry standards and legal norms of ethical business management. In reality, this amalgam of trends is a primary mechanism in the advancement of economic globalization and a veneer covering diminished employee protections worldwide.

As a mechanism of globalization, self-regulation anchors the modern American employment experience, labeled by scholars as the era of the "boundaryless workplace."[2] In the boundaryless workplace, the private

sector has dismantled conventional employment norms and replaced them with a self-regulating or self-help[3] framework of values: emphasizing sustainable governance and profitability. With the events of dramatic corporate deregulation and business reforms of market economics, the self-help ethos results ultimately in a shift away from employee protection. This is apparent from the constraint of employment expectations and the broad purging of employee benefits and legal safeguards from private enterprise. Scholars commonly describe these changes as a natural boundaryless evolution in the employment dynamics of the modern workplace. To some commentators, "this shift may be seen as part of a larger democratization of the American workplace that is being fueled by many economic, cultural[,] and other factors."[4]

The appearance of democratization in the private sector is deceiving, however, and when analyzed from a private workforce perspective, the reality is that self-regulation of private enterprise has not become its democratization. In fact, another reality emerges, which is that boundaryless shifts in employment dynamics show unmistakable signs of an increasingly distressed employment system, clearly illustrated by issues like employee transience, benefits reductions, and, less visibly, employment grievance restrictions.

The human effect of America's distressed employment system is perhaps best illustrated by a growing surge in boundaryless workplace dispute.[5] Effectively, distress inherent in boundaryless employment dynamics has created a natural breeding ground for workplace conflict, conflict which has increasingly materialized into open dispute. For example, it has been reported that an average of 81,000 charges of employment discrimination, alone, have been filed with the Equal Employment Opportunity Commission (EEOC) each year over the last decade.[6] Another report illustrates that over the last thirty years employment litigation has grown at a rate almost ten times greater than that of all other types of civil

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3. Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 972 (2007). "Self help" is a term loosely inferred here and expounded upon by the author's description of contemporary transformative politics as a paradox to true social reform.

4. *See* Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 HARV. NEGOT. L. REV. 11, 13-14 (2005).

5. *See* Charles B. Craver, *The Use of Non-Judicial Procedures to Resolve Employment Discrimination Claims*, 11 KAN. J.L. & PUB. POL'Y 141, 141-42 (2001); *see also* Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMP. & LAB. L. 223, 259 (2005); Thomas C. Kohler, *The Employment Relation and Its Ordering at Century's End: Reflections on Emerging Trends in the United States*, 41 B.C. L. REV. 103, 106 (1999).

6. Anne Noel Occhialino & Daniel Vail, *Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 704 (2005) (citing EEOC Charge Statistics FY 1992 Through FY 2004).

litigation.[7]   One commentator added claims filed in courts with other administrative agencies to describe statistical growth rates at roughly twenty-three percent increase each year,[8] ultimately reminding observers that distress is present and far reaching.

These numbers suggest that deliberative democratic practices are not present in the work environment or are not functioning adequately if they are present. The result is such that in the vacuum of deliberative democratic practice, today's employees are losing rights through corporate compliance rhetoric, losing standing as workplace citizens, and ultimately losing the power-base needed to negotiate their professional lives. Put simply, systemic distress has forced increasing numbers of employees into frustration, angst, and into dispute, arguably in rejection of their status as marginalized professionals in the American workplace. How is this most likely occurring?

The self-regulating machine of modern private enterprise is increasingly autonomous, virtually global, and very powerful, representing a dominant force against which grieving employees are poorly matched, and against which conventional dispute management tools are inadequate in their ability to meaningfully resolve workplace dispute. Much inadequacy is due to the inability of facilitative methods of dispute resolution to manage issues of power disparity experienced between parties to boundaryless workplace grievances.   Practices lacking specific pedagogy for addressing power disparity in the new workplace and the absence of genuine tools for resolving hierarchy issues leave critical holes in current private sector employment dispute resolution design. In a fundamental way, practical failure to address power disparity in boundaryless work environments is the failure to stop the collapse of employees' power-base from the American workplace.   A most certain consequence is the ultimate failure of deliberative democratic practices in the private business sector itself.

This article proposes that dispute in the workplace is the best illustration of the loss of equanimity boundaryless employees experience in their work environment, and further, that dispute systems design necessitates a power neutralizing approach for mediating struggles caused by power disparity present in today's private employment relationships. To that end, my goal is

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7. Stephen F. Befort, *Labor and Employment Law at the Millenium: A Historic Review and Critical Assessment*, 43 B.C. L. REV. 351, 399-400 (2002).

8. Allison Balc, *Making It Work at Work: Mediation's Impact on Employee/Employer Relationships and Mediator Neutrality*, 2 PEPP. DISP. RESOL. L.J. 241, 241 (2002).

to provide an employee-centered perspective of self-regulated employment policy in America, and to demonstrate the degree of conflict (and eventual disputation) such policy creates for boundaryless workforces.

Ultimately, I make the case for an evolved dispute resolution process more able to manage power disparity in modern private workplace issues. My reasoning is based on the view that "organizational structure affects interpersonal dynamics, the languages of power, and available means and procedures"[9] for addressing that power. Therefore, Part II analyzes current trends in the self-regulating workplace by comparing cooperative enterprise models with the structures of boundaryless corporations. Part III evaluates the new workplace for evidence of democratization in the private sector. Part IV addresses the self-regulating, or "self-help," framework of values found in the new workplace. Part V contrasts the self-regulating framework of values with conventional goals of deliberative workplace democracy. Part VI describes the ease with which conflict is created in the power-based environment of today's private sector.

Finally, Part VII makes the case for an evolution in dispute resolution theory toward the practice of mediating issues of power disparity as a deliberative function of workplace dispute resolution design. Efforts in this regard are somewhat hazardous since the topic of mediating power imbalance touches on strictly taboo practices in the field of conventional facilitative dispute resolution.[10] However, with global changes in employment dynamics omnipresent in today's private enterprise environments, mediating issues involving power imbalance is a practice whose time has necessarily come. Winning over the mediator practitioner, though, most likely requires an instructive "big picture" overview of the boundaryless employment experience, starting with a survey of corporate trends affecting employees in the self-regulating American workplace.

II. SURVEYING CORPORATE TRENDS IN THE SELF-REGULATING WORKPLACE

For the American workforce, reform is in the air.[11] "Globalization has broadened the field of competition . . . forcing companies to pay ever greater

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9. Elizabeth A. Hoffmann, *Dispute Resolution in a Worker Cooperative: Formal Procedures and Procedural Justice*, 39 LAW & SOC'Y REV. 51, 53 (2005).

10. *See generally* Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71, 76 (1998).

11. Estlund, *supra* note 1, at 321.

attention to the bottom line."[12] Over the last few decades, the private employment experience has radically changed to accommodate this bottom line. Essentially, employees have become "free agents operating in a free talent market,"[13] expedient personnel moving as markets move. From contingent employees, private consultants, and contractors, to undocumented workers, the scope of nontraditional employment arrangements in the new workplace has created offices without walls and careers without ladders. Down-sizing and out-sourcing are tangible illustrations of this new global experience; corporate buy-ins and industry bailouts, its result.

With varying degrees of skepticism, scholars have generally hailed self-regulation as an improvement in the quality of the private employment experience. Many have agreed, "The new workplace is far more attuned to the interests of the employees."[14] Further, the new boundaryless workplace boasts increased democratic activity, the look of which is lauded as "more vibrant and egalitarian."[15] To some commentators, "this shift may be seen as part of a larger democratization of the American workplace that is being fueled by many economic, cultural, and other factors."[16] In fact, recent academic literature draws functional parallels between what is essentially cooperative workforce democracy and new employment frameworks embedded in the self-regulating workplace.[17] Moreover, scholars have reinterpreted the *value* of work itself along free market parameters.

Commentators have argued that looking solely at economic factors like salaries and promotions as indicators of employee success diminishes the positive reaches of democratic practices in the new workplace.[18] Essentially, these theories frame employee success in the boundaryless workplace through relational measures rather than economic ones. One such frame is the "new psychological contract" between employer and employee in which the employee garners psychological and relational benefits apart from

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12.   Vivian Berger, *Employment Mediation in the Twenty-First Century: Challenges in a Changing Environment*, 5 U. PA. J. LAB. & EMP. L. 487, 490 (2003).

13.   Katherine V.W. Stone, *Employee Representation in the Boundaryless Workplace*, 77 CHI.-KENT L. REV. 773, 774 (2002) (citing BRUCE TULGAN, WINNING THE TALENT WARS: HOW TO MANAGE AND COMPETE IN THE HIGH-TECH, HIGH-SPEED, KNOWLEDGE-BASED, SUPERFLUID ECONOMY 155-57 (2001)).

14.   Reuben, *supra* note 4, at 19.

15.   *Id.* at 12.

16.   *Id.* at 13.

17.   *See id.* at 17-40.

18.   *See id.* at 17-31.

salary.[19]   Another frame measures success by the corporate use of new
management styles such as flattened hierarchies and work teams.[20]   As a
result, scholars have claimed "the new workplace is structured more as a
partnership, with employers and employees as mutual stakeholders."[21]   As
such, employees can expect "greater recognition of [employee] needs,
interests, and concerns . . . beyond mere economics."[22]   Scholars tend to
agree. Improved employee management is the result of the work of more
democratic workplace models in the self-regulating work environment.[23]   In
sum, deliberative labels and democratic descriptors dot the academic
literature with illustrations of bold innovations in the way businesses
manage boundaryless workforces.

In reality, bold employment innovations, governed by an era of market
economics, have openly assaulted the democratic fabric of working
America. Effects of the assault are palpable. Americans read about raids on
manufacturing plants to recover undocumented workers, while they
themselves cannot find employment.   Households experience language
barriers trying to install varied communication services managed by foreign
call centers even though corporate offices are located only blocks away. The
rising price of gas sends oil companies into America's protected
wildernesses and forces airlines to stop serving free meals on *eighteen hour*
transatlantic flights. The stock market goes up when employment numbers
go down, and the value of the dollar drops to the benefit of everyone but the
American worker. The result, in an age of markets, is that an America who
historically worked to prosper, now, just works. So what is the age of
markets?   The answer is central to understanding the employment
experiences of today's private sector.

A.   The Age of Markets

The current age of market economics is broadly described as an era of
finance-driven industry competition, the primary goal of which is wealth
maximization. Market economics is generally applauded for the growth of
American entrepreneurship, expanded career opportunities for minorities
and women, and for highly advanced global business technologies.[24]

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19.   *Id.* at 19.
20*.   See id.* at 17.
21.   *Id.* at 19.
22*.   See id.* at 20.
23*.   See id.* at 27-40.
24*.   See generally* Lawrence E. Mitchell, *The Age of Aquarius or, How I (Almost) Learned to
Stop Worrying and Love Free Markets*, 88 MINN. L. REV. 921, 922-23 (2004) (reviewing
RAGHURAM G. RAJAN & LUIGI ZINGALES, SAVING CAPITALISM FROM THE CAPITALISTS:

Theoretical scholarship tends to attribute the appearance of a more inclusive workforce with minorities, women, and entrepreneurs as a sign of improved democratic activity in the workplace.[25] Broadened opportunity also signifies to many the end of an autocratic age of management hierarchy. According to Orly Lobel, many management scholars believe hierarchical management systems of the past have caused the "most serious problems facing corporate organizations."[26] Yet, with the change in corporate landscape, "the dominance of finance over management that characterizes the last twenty years has led to deal making on a grand scale . . . moving assets from hand to hand in order to make investment bankers and management/stockholders rich."[27] In effect, "the concentration of capital [that market theory] has encouraged creates perverse managerial incentives and is itself an inchoate political force that has the potential to be highly destabilizing."[28]

Essentially, "[t]he destabilizing effects of the transformation from hierarchy to market litter the human landscape of twenty-first century America."[29] Now more than ever "[c]oncentrations of wealth[] translate[] into concentrations of *power*"[30] where "a market composed of investors who have incentives to punish corporations that do not keep their prices rising is a market composed of corporate managers who have incentives to fudge."[31]

> The critical problem in the age of markets is that we have yet to develop appropriate norms, rules, and social structures to accompany it, social structures that are necessary to bring some stability and order, some measure of confidence and safety, some assurance of fair play, some reason for optimism and hope, to the volatile and chaotic market environment in which we now live.[32]

Without these assurances an "ethic of fear is the dominant social psychological result."[33]

UNLEASHING THE POWER OF FINANCIAL MARKETS TO CREATE WEALTH AND SPREAD OPPORTUNITY (2003)).

    25. *Id.* at 923.
    26. Orly Lobel, *Agency and Coercion in Labor and Employment Relations: Four Dimensions of Power in Shifting Patterns of Work*, 4 U. PA. J. LAB. & EMP. L. 121, 169 (2001).
    27. Mitchell, *supra* note 24, at 943.
    28. *Id.* at 931.
    29. *Id.* at 946.
    30. *Id.* at 930 (emphasis added).
    31. *Id.* at 931.
    32. *Id.* at 949.
    33. *Id.* at 948.

B.   The "Ethic of Fear"[34]

Lawrence Mitchell, Professor at George Washington University Law School, has coined an essential phrase for understanding the nature of the current labor market and the psychology behind its control. He terms the current relationship between employment principles and today's market economy as an "ethic of fear."[35] Mitchell defines "ethics" as "the way we interact with others, and the ways in which we restrain ourselves from pursuing our self-interest to the detriment of others."[36] The "ethic of fear," on the other hand, "is a fear born of unstructured, flexible, irregular, uncertain, . . . transformation from the age of hierarchy to the age of markets."[37] The ethic of fear "translates into an ethic of self-protection, in our laws, our rules, our norms, and our institutions."[38] Ultimately, "the ethic of self-protection is the ethic of the market,"[39] and "by itself knows no social harmony."[40]

Mitchell characterizes the lack of harmony inherent in today's market economy as "apathy, rationalization, justification, and exculpation, leading to distrust, detachment . . . and ultimately communal disintegration."[41] If this is the case, then recent corporate bankruptcies like Lehman Brothers, industry-wide collapse such as the "big three" auto makers, and government bailouts of Fannie Mae, Freddie Mac, and AIG (to name just a few) readily reflect a full-scale emaciation of workplace ethics in America's private sector enterprise. In effect, employment ethics in the private sector have been replaced by a psychology of fear and self-preservation called the "survival imperative."[42]

> By the beginning of the twenty-first century, the collapse of the stock market as well as the deep and continuing recession in the American economy . . . have left us with a free-for-all market environment in which the *survival imperative* dominates.[43]

Arguably, the survival imperative was foremost on the minds of lawmakers during continual governmental efforts to bailout AIG; perhaps best illustrated when officials described the insurance giant as simply "too

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34.   *See id.* at 944.
35.   *Id.*
36.   *Id.* at 951.
37.   *Id.*
38.   *Id.*
39.   *Id.* at 952.
40.   *Id.* at 950.
41.   *Id.* at 952.
42.   *Id.* at 948.
43.   *Id.* (emphasis added).

big to fail."[44]   Current trends in corporate self-regulation illustrate the survival imperative hard at work ensuring that failure is *no longer* an option for modern American private enterprise.   Assuring that corporations no longer fail, however, is perhaps the most perilous of capitalism's ambitions. For corporate entities, the power of infallibility means sovereignty itself, and with sovereignty, corporate conglomerates have the power to control the world's economy, which means the power to control world employment. Efforts toward sovereignty inherently begin with industrial self-regulation, where power amasses one policy at a time.

C.   *Corporate Trends in Self-Regulation—Power Amasses*

Self-regulation embodies striking shifts in corporate policy and business from the last few decades. Corporate movement toward self-regulation is apparent in the radical decline in employment numbers within the unionized employment sector[45] and in the general shift in the American workforce from blue-collar to white-collar employment.[46] With respect to the birth of corporate regulatory sovereignty, of which these movements are a part, four specific trends have merged together to create the self-regulating paradigm that shapes the private workplace environment today. They are: (1) the re-norming of employment law using practices of reform opportunism, (2) the adoption of regulatory bilateralism through negotiated governance processes, (3) a heavily incentivized privatization of employment law, and (4) the autocratization of the deliberative justice ethos, essentially, the insurgence of private ordering into deliberative justice models. The merging of these trends has a profoundly negative effect on the modern employment experience, particularly since corporate initiatives easily unfold outside the specter of public scrutiny or legal review via opportunistic behavior on the part of private enterprise.

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44.   *See* Lucian Bebchuk, *AIG Still Isn't Too Big to Fail*, THE WALL STREET JOURNAL, Mar. 20, 2009, http://online.wsj.com/article/SB123751263240591203.html; *see* Bill Saporito, *How AIG Became Too Big to Fail*, TIME, Mar. 19, 2009, http://www.time.com/time/business/article/0,8599,1886275,00.html.

45.   *See* Befort, *supra* note 7, at 361-62.

46.   *Id.* at 364.

1. Trend 1: Reform Opportunism Re-norms Employment Law

Extralegal activism can be described broadly as varying means by which social change is created without the use of legal procedure, either by community action or private special interest organizing.[47] Rallying political action groups, training lobbyists and organizers, and "prepar[ing] groups for political confrontation,"[48] are some examples of extralegal activism.[49] In more specific terms, extralegal activism "eliminate[s] the need for reliance on the lawyer's specialized legal knowledge"[50] or the use of organized legal process, turning instead to the political power of interest groups to create policy change rather than legal precedent.[51] Arguably, extralegal activism was born from a need to implement social goals when courts could not.

Courts adjudicate by nature, but, institutionally, they are not adequate enforcers of their own judgments; they are not "self-executing."[52] "[C]ourts lack the capacity, power, and information to oversee the implementation of their decisions."[53] Moreover, scholars suggest that litigation simply fails to "produce lasting social consequences."[54] Hence, policy change may tend to invoke better implementation and enforcement of newly advocated norms than does legal precedent.[55] Ultimately, the more ineffective the legal system appears at dealing with specific interests, the more attractive alternatives become for generating reform.

Two things tend to occur when activism or "mobilization"[56] leads reform: litigation tends to diminish in lieu of social change, which means legal standards tend to loosen their application or to fade against more visible social agendas.[57] In this process, law enforcement shifts into a restorative mode and away from traditionally retributive functions.[58] In other words, policy shifts invite legal flexibility and prevention-oriented

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47. *See* Lobel, *supra* note 3, at 942.
48. *Id.* at 960 (paraphrasing Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1056-58 (1970)).
49. *Id.* at 959.
50. *Id.* at 961.
51. *Id.* at 960-61.
52. *Id.* at 954.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 960.
57. *See generally id.*
58. *See id.*

controls into law enforcement processes, leading to the demise of punishment-oriented solutions.[59]

Through reform initiatives and strategic mobilization at the corporate level, private enterprise builds flexibility in resolving legal issues surrounding unlawful behavior, and companies ultimately become less fearful of punitive measures against misconduct. Special interest organizing and policy agendizing become increasingly appealing to corporate entities who are themselves creatures of powerful special interest advocacy.[60]

Essentially, the partnering of self-regulation with special interest advocacy tends to invite what I call "reform opportunism" into law enforcement, particularly with respect to policy formation. Reform opportunism is the private negotiation of public law for the purported purpose of streamlining law enforcement efforts. In this process, extralegal methods of corporate law enforcement such as policy initiatives, codes of conduct, and grievance processes, are streamlined into the legal regulation of a company and ultimately control the nature of law enforcement within the company. The pursuit of opportunistic reform protects corporate policy and those who make it—generally, by targeting law breakers on an administrative level rather than a legal one. Thus, offending CEOs are often fired instead of jailed, and whistleblowers rarely pierce the proverbial corporate veil.

2. Trend 2: Negotiated Governance Results in Regulation Bilateralism

Kimberly Krawiec uses the term "negotiated governance"[61] to describe a general model of government regulation which gives voice to those groups being regulated[62] through "cooperative governance methods"[63] of compliance. In the private sector, negotiated governance adds corporate voice to the mechanics of regulatory compliance by testing interpretations of regulatory language in two specific ways.[64] First, companies individualize regulatory schemes through "gap filling."[65] Gap filling adds context and, in

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59. *See id.*

60. Mitchell, *supra* note 24, at 932.

61. Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 489 (2003).

62. *Id.* at 490.

63. *Id.*

64. *See id.* at 522-33.

65. *Id.* at 494.

some cases, content to otherwise incomplete law in ways which maximizes the probability of corporate compliance with touched-up or filled-in regulation policy.[66]   Undoubtedly, the hodgepodge process of some incremental lawmaking almost requires private gap filling for real time implementation.[67]   Second, a new line of corporate professionals, or what Krawiec calls "legal compliance officials,"[68] are employed by companies to fill gaps and to find loopholes by overlaying case law with these regulatory schemes.   Their goal is to measure bottom-line corporate behavior and predict safe zones of operation outside the written standards of regulation law.[69]

Courts have viewed exercises in gap filling as generally effective cooperative governance measures when corporations are able to show initiative toward avoiding compliance infractions.[70]   In fact, new affirmative defenses, against sexual harassment for example, were arguably created by the courts to reward private compliance initiatives.[71]   Consider, however, the retrospect involved in lawmaking when courts reinforce private compliance programs that reshape or custom-fit regulatory policy to meet corporate interests.   Essentially, custom-fitting law is the result of extralegal processes between corporations and policy-makers, using "middlemen,"[72] who jointly adjust interpretations of regulatory policy, and modify or amend private compliance initiatives accordingly.[73]   The result is a practice in "regulation bilateralism," where corporations themselves create the law they follow to diminish the legal risk they potentially experience.[74]

The problem with custom-fitting compliance is that "[f]air-looking procedures are often inaccurately conflated with non-discriminatory working conditions."[75]   In other words, procedural compliance is increasingly associated with behavioral compliance.   For example, Frank Dobbin and Erin Kelly have published research on the spread of harassment procedures

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66.   *See id.* at 528.
67.   *See id.* at 517.
68.   *Id.* at 537.
69.   *See id.* at 534-35.
70.   *See id.* at 536-37.
71.   *See id.* at 536-40.
72.   *Id.* at 528.
73.   *Id.* at 532.
74.   *Id.* at 533.

75.   Michelle A. Travis et. al., *Dispute Resolution in Action: Examining the Reality of Employment Discrimination Cases*, 11 EMP. RTS. & EMP. POL'Y J. 139, 146 (2007); *see* Susan Bisom-Rapp et al., *A Critical Look at Organizational Responses to and Remedies for Sex Discrimination*, *in* SEX DISCRIMINATION IN THE WORKPLACE: MULTIDISCIPLINARY PERSPECTIVES 273, 274-78 (2007); *see also* Frank Dobbin & Erin Kelly, *How to Stop Harassment: Professional Construction of Legal Compliance in Organizations*, 112 AM. J. SOC. 1203 (2007).

in private companies.[76]   Their research "establishes that . . . ADR was conceptualized [in corporations] and promoted by personnel professionals as a bureaucratic solution to manage risk in the face of legal uncertainty."[77] Dobbins and Kelly conclude that corporate grievance "programs were billed more as shields from litigation than devices to reduce workplace harassment."[78]

In efforts to shield liability, corporations have prioritized avoiding law suits ahead of substantive efforts to assure appropriate behavior management in the workplace.   The judicial system itself has aided in corporate reprioritization as courts have increasingly refocused on what I call corporate "procedural compliance indicators," such as codes of conduct or procedural guidelines, to determine legal liability.

One concern is that growing judicial reliance on procedural compliance intensifies corporate management of compliance indicators, while not necessarily reducing the incidence of substantive noncompliance. One study in particular illustrates this finding: Lauren Edelman and others studied 116 court cases involving the use of what I call a "compliance defense" (called grievance procedure defenses in this case).[79]   In approximately ninety percent of the cases analyzed, courts were prepared to shield employers from liability on the showing of a robust grievance procedure.[80]

3.   Trend 3: Privatization of Employment Law Invites Independent
     Oversight

The   private   sector   is   "'privatiz[ing]' . . .   public   law"[81]   by institutionalizing a system of private enforcement practices, managed by a contingency of compliance officials. These professionals are responsible for compliance management or "strategic defense planning," and are personnel often shared among major corporations.[82] Legal compliance officers who broker their services to growing lists of corporations soon dominate approaches to best practice within and across corporate lines.   The

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    76.   Dobbin & Kelly, *supra* note 75.
    77.   Travis et al., *supra* note 75, at 145 (citing Dobbin & Kelly, *supra* note 75, at 1205).
    78.   *Id.* at 145; *see* Dobbin & Kelly, *supra* note 75, at 1237.
    79.   Lauren B. Edleman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 431 (1999); *see* Krawiec, *supra* note 61, at 540.
    80.   *See* Edleman et al., *supra* note 79, at 425-26; *see* Krawiec, *supra* note 61, at 540.
    81.   *See* Kohler, *supra* note 5, at 122.
    82.   *See* Kraweic, *supra* note 61, at 534.

collaborative use of extralegal actors throughout the legal hierarchy of self-regulating companies creates a high likelihood that many officials will become "repeat players"[83] in the corporate system. Essentially, these conglomerates of exclusive players create a system where they are private program designers of employment law.[84] The approach is so successful that ninety percent of Fortune 500 companies have program designs or legal compliance structures in place.[85]

Compliance specialists are able to create the reality of compliance in two primary ways: (1) by producing favorable evidence against employee grievances,[86] and (2) by using performance reviews as preventive tools.[87] Both strategies are generally used strategically even before workplace violations are reported.[88] Further, "sanitizing"[89] personnel files of "misleading or harmful documents"[90] is often part of regular procedure for maintaining evidence of non-discriminatory decision-making.[91] Compliance specialists, together with human resource managers, often implement regular preventive maintenance of employment files to improve the company's defenses against employee claims.[92] Additionally, a "standard performance review system"[93] that "point[s] out the employee's shortcomings"[94] is the "preferred method for generating favorable documentation"[95] against employee claims. This often includes documentation of employee discipline to assure that "date, time, locations, and witnesses of misconduct or examples of poor performance [are] preserved."[96]

Apart from the strategic defense planning of corporate legal compliance officials, other players have been incorporated into a widening array of extralegal actors in the employment law arena. These players enter the private sector to eventually become arbitrators via mandatory arbitration

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83. Lobel, *supra* note 3, at 954.

84. *See* Krawiec, *supra* note 61, at 522-23.

85. *Id.* at 511.

86. Susan Bisom-Rapp, *Discerning Form from Substance: Understanding Employer Litigation Prevention Strategies*, 3 EMP. RTS. & EMP. POL'Y J. 1, 16-17 (1991).

87. *Id.* at 19.

88. *See id.* at 16-20.

89. *Id.* at 19 (quoting GERALD S. HARTMAN ET AL., CURRENT EMPLOYMENT LAW AND RELATED LITIGATION ISSUES 358 (1994)).

90. *Id.*

91. *See id.* at 18-19.

92. *See id.* at 14-15.

93. *Id.* at 19.

94. *Id.* at 20 (quoting Ralph H. Baxter & Thomas P. Klein, *Protecting Against Exposure*, NAT'L L.J. Feb. 28, 1994, at S1).

95. *Id.* at 19.

96. *Id.* at 26-27.

clauses used in boundaryless employment contracts.[97] A notable concern in the arbitration field is the potential for repeat player arbitrators to be seen as compliance officials in a larger network of privatized decision-making.[98]

The corporate use of arbitration has not gone unnoticed by the judicial system, but has instead become a practice increasingly supported by the court system itself. A commonly referenced source is a 1994 draft report by the Judicial Conference Committee on Long Range Planning recommending that Congress eliminate federal jurisdiction over workplace disputes "involving economic or personnel relations"[99] or personal liability claims.[100] Eliminations based on the planning recommendations would encompass most federal employment claims, if implemented.[101] Suggestions like these demonstrate the reluctance of courts to second-guess employer's decision-making.[102] Judges have generally refused to substitute their judgments for that of employers[103] in large part due to the notion that courts should not function as legal "super-personnel departments."[104]

The Supreme Court's broad ratification of mandatory arbitration for employment disputes is further evidence of judicial efforts to expel employment claims from court dockets. Essentially, mandatory arbitration of statutory discrimination claims, sanctioned by *Circuit City Stores, Inc. v. Adams*,[105] opened the door for private re-norming of employment law. As a result, pre-employment arbitration clauses are now common practice and progressively more successful in crafting virtually unfettered private adjudication controls on employment grievance processes.

In short, self-regulation's private lawmaking system, added to the negotiated governance of regulation law, equals virtually independent oversight. In the case of self-regulation, legal norms are transformed into company policy, protected by strategic evidence-gathering, all of which is potentially defended through private arbitration. Principally, the process has

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97. *See* Lauren B. Edelman, *When the "Haves" Hold Court: Speculations on the Organizational Internalization of Law*, 33 LAW & SOC'Y REV. 941, 941 (1999).

98. *See id.*

99. COMMITTEE ON LONG RANGE PLANNING, JUD. CONF. OF THE U.S., 103d/104TH CONG., PROPOSED LONG RANGE PLAN FOR THE FED. CTS. 34-35 (1995).

100. *Id.*

101. *Id.*

102. *See* Bisom-Rapp, *supra* note 86, at 45.

103. See *id.*

104. *Id.*

105. 532 U.S. 105 (2001).

eliminated any effect of legal precedent apart from the repeat player culture and potentially gives no right of appeal for claimants. As it stands, greatest hope for jury trials of employment claims arguably lies in the motivation of the Equal Employment Opportunity Commission (EEOC) to bring independent charges against companies themselves,[106] but currently, it makes up less than one percent of all cases the EEOC undertakes a year.[107] "Over the past decade, for example, the EEOC filed an average of 335 suits on the merits per year out of an average of 81,000 charges received."[108]

4. Trend 4: Workplace Democracy Evolves into Deliberative Autocratization

It has been suggested that during the latter part of the twentieth century, the United States enjoyed the "greatest sustained economic growth in history."[109] In the context of that economic boom, "union density in the private sector declined from almost 17% in 1983 to less than 10% in 2000. . . . [I]n the same period, workers' real wages declined more than 10 percent"[110] even though employees are working more hours now than they did twenty years ago.[111] These employment trends are directly tied to goals of *fair* wage, which essentially replaced traditional competitive wage practices.[112] In other words, salaries are no longer measured by corporate earnings (profit), but by the global market value of labor services.[113] This means that if workers in Taiwan can make a product at the lowest cost, then the manufacture of the same product in America is tied to the market value of *labor* in Taiwan. This means that not only are American products no longer profitable, but American labor has become costly as well.

Conversely, CEO salaries are not tied to the market value of anything. Rather, CEO salaries are tied to corporate earnings margins.[114] When considered, the disparity between actual labor costs and corporate profit margins is phantasmal. In large part because of this disparity, "CEOs of

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106. *See* Occhialino & Vail, *supra* note 6, at 699.

107. *See id.* at 700.

108. *Id.*

109. Charles B. Craver, *The American Worker: Junior Partner in Success and Senior Partner in Failure*, 37 U.S.F. L. REV. 587, 587 (2003).

110. Stone, *supra* note 13, at 787.

111. Mitchell, *supra* note 24, at 936 (citing *Chasing the Dream*, THE ECONOMIST, Aug. 9, 2003, at 62; *see also* Juliet Schor, *Why Americans Should Rest*, N.Y. TIMES, Sept. 2, 2002, at A15).

112. *See* Michael Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581, 622 (2007).

113. *See* Stone, *supra* note 13, at 784.

114. *See* Craver, *supra* note 109, at 587-88.

large firms who earned about forty times the annual salaries of regular workers twenty-five years ago now earn about 475 times average employee salaries."[115]

To put these numbers into perspective, "as of 1998, the top 1% of Americans held 38.5% of our national wealth, and the top 20% held 83.9% . . . leaving the remaining 80% of American families to split up the balance (the bottom 60% of Americans hold virtually no wealth to speak of)."[116] More specifically, "since 1980, the share of aggregate income received by families in the top 5% has increased from 15.8% to 22.4%, while the share of the bottom 5% has decreased from 4.3% to 3.5%."[117] In other words, the rich are getting richer and the poor are getting poorer.[118]

In short, while private sector employees have actually lost income while working harder, "managers have shared directly in the success of their companies."[119] Arguably, much of this success comes from the evolution of a low-finance age of hierarchy into the current high-finance era of market economics,[120] and more directly, from duties intrinsic in the fiduciary relationship between corporate managers and company shareholders.[121]

Shareholder investment builds the wealth of a corporation, and threats of divestiture or breach of fiduciary duty invoke great managerial energy toward maximizing profits. Given the legal nature of these financial relationships, employers often choose to "become collective through corporate immortality, limited liability, and tax benefits,"[122] amassing the protections of corporate law. Employees, however, are not party to the collective protection of corporate law or even corporate governance.[123] For example, a Delaware Supreme Court upheld shareholders' rights to thwart corporate decisions to protect the interests of a company's workforce.[124] In *Unocal Corp. v. Mesa Petroleum Co.*, the court held that a takeover bid to improve the interests of its employees was not in keeping with the board's

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115. *Id.*
116. Mitchell, *supra* note 24, at 935-36.
117. *Id.* at 935.
118. *See id.* at 935-36.
119. Craver, *supra* note 109, at 588.
120. Mitchell, *supra* note 24, at 936.
121. Wachter, *supra* note 112, at 622.
122. Dannin, *supra* note 5, at 260.
123. *See id.*
124. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 958-59 (Del. 1985).

duty to serve the primary interests of the shareholders.[125]   The court determined that "it was for the shareholders that the corporation was to be managed."[126] Implicit in the court's decision is the maxim that management simply does not owe a duty of service to its employees.[127]

To that end, highly outcome-oriented corporations have positioned themselves to mount the most effective business offensive ever for capturing the most gain with the least cost.   Recent results are reflected in the following:

> When corporations have experienced economic setbacks, employees have been the first to be cut . . . managers have reacted to poor profit reports with quick layoff announcements designed to reduce costs, bolster public confidence, and boost stock prices . . . .   When [layoffs] were announced, share par value often rose along with CEO compensation packages.[128]

Effectively, economics dictates an employee's success in the new corporate environment because her productivity is inextricably intertwined with the corporation's bottom-line.[129] Every employee as a financial asset is labored to walk that line. "The goal, of course, is to create the largest possible gap between the yield of this asset and the terms of its hire."[130] Essentially, this means that *every* function of today's private sector workforce is motivated by an economic end, clearly demonstrating the severe disjunction between working hard and achieving success in the new workplace.

One point in fact is that today's employee affiliations are textured differently from upper echelon relationships between CEOs and shareholders. For employees, it means that workplace relationships are weakened[131] by new expectations of impermanence and "quick adjustment"[132] as companies flex into global markets. Being in competition with employment markets around the world, employees are measured now more than ever by their success on a global scale. A competition they are losing.

In Part III, the case is made that an employee's achievement is, in fact, estranged from her labor in today's boundaryless workplace. Much of the

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125.   Wachter, *supra* note 112, at 621 (quoting Unocal Corp., 493 A.2d at 955).

126. *Id.*

127. *See Unocal Corp.*, 493 A.2d at 958-59.

128.   Craver, *supra* note 109, at 588.

129.   Berger, *supra* note 12, at 490.

130.   JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 14 (1983).

131.   Katherine V. W. Stone, *Procedural Justice in the Boundaryless Workplace: The Tension Between Due Process and Public Policy*, 80 NOTRE DAME L. REV. 501, 504 (2005).

132. *Id.*

alienation is caused by a systemic deception in the way new private sector employers label and market democratic practices and protections in the new workplace. Arguably, private sector practices designed to improve employee voice and recognition are little more than smoke screens for public consumption. In reality, analyzing the private workplace for democratization reveals a distorted and perhaps perverse perception of the private employment experience.

III. ANALYZING SELF-REGULATION FOR EVIDENCE OF WORKPLACE DEMOCRATIZATION

Ready association between industrial democracy and the new workplace gives rise to questions of comparison between genuinely cooperative work environments and new boundaryless environments. Does the new workplace really offer employees the right "to influence decisions affecting their working lives?"[133] Is the evolution of the workplace its democratization? Are we even approaching a more democratic workplace? What are we measuring that makes us think so?

In order to answer these questions one must understand the nature of current research on the American workplace experience. Recent scholarship has answered some of these questions mostly in the affirmative.[134] Unfortunately, it has done so by framing the private employment experience through a narrow lens. Scholars have tended to address the new workplace through the lens of *corporate* America, not through the lens of *working* America.[135] However, when the lens is opened to analyze the experiences of the American workforce, differences in perspective between the two views are staggering and beg correction.

By looking through the lens of American employees, research reveals that democratic activity in the workplace is, in reality, little improved and perhaps more greatly egregious to employees today than ever before.[136] The

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133. Craver, *supra* note 109, at 596.

134. *See* Reuben, *supra* note 4, at 12-13; *see, e.g.*, CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE SOCIETY (2003); Stone, *supra* note 2; PETER CAPPELLI, THE NEW DEAL AT WORK: MANAGING THE MARKET-DRIVEN WORKFORCE (1999); Peter F. Drucker, *The New Society of Organizations*, HARV. BUS. REV., Sept.-Oct. 1992, at 100; Tara J. Radin & Patricia H. Werhane, *The Public/Private Distinction and the Political Status of Employment*, 34 AM. BUS. L.J. 245, 259-60 (1996); CHRISTOPHER MCMAHON, AUTHORITY AND DEMOCRACY: A GENERAL THEORY OF GOVERNMENT AND MANAGEMENT 17-27 (1994).

135. *See generally id.*

136. *Id.*

negative effects of self-regulation on *workers* illustrate growing incongruity between company practices and employment rights, which have been significantly altered by the mechanics of autonomous business policy.

Undeniably, autonomous frameworks for private enterprise have existed as American business models since the country's inception. The birthing of a sovereign nation saw economic freedom and opportunity as indelible protections. In conjunction, the practice of collective bargaining itself developed from workers' desire "to engage in mutual aid and protection[] and to have an active part in improving and stabilizing their working conditions."[137] In other words, American employees have always valued free enterprise, conditioned on essentials of mutuality in their working relationships and the self-determination needed to function as experts in their field.[138] These assurances have historically provided relative job security through promotions, pay raises, and retirement plans.

Comparing collectivist ideals to the new boundaryless workplace, however, illustrates a dramatic dissimilarity between cooperative business values and the new workplace ethos. Certainly, the private sector workforce, corporations notwithstanding, is represented by a spectrum of workplace environments using differing degrees of democratic practice and self-regulating schemes. Indeed, "individual workplaces and industries vary greatly with respect to such progressiveness."[139] The problem lies in growing alienation in the employment goals of employee and her employer, manifested in the disharmony between conventional-minded workers and new boundaryless employment values.[140] Few companies have successfully tethered traditional employment goals with new workplace values. The Saturn Corporation is one among those that tried.

The ability of self-regulating corporations to maintain cooperative workplace values was best tested in the General Motors – U.A.W. Saturn Corporation "experiment."[141] In fact, Saturn is frequently highlighted in academic literature as a model for cooperative business enterprise. The Saturn Corporation has been described as one of the most employee-centered corporations in America due to their extensive network of shop committees, or employment involvement programs (EIPs), a trait not many

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137. Dannin, *supra* note 5, at 262.

138. *See* Marion Crain, *The Transformation of the Professional Workforce*, 79 CHI.-KENT. L. REV. 543, 545 (2004) ("Historically, the professions avoided commodification by exchanging the collective commodity for their expertise for autonomy at work and monopoly power over their craft.").

139. Reuben, *supra* note 4, at 13 (quoting CYNTHIA ESTLUND, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE SOCIETY 56-59 (2003)).

140. *See* Reuben, supra note 4, at 14.

141. Craver, *supra* note 109, at 605.

other companies share. Effectively, Saturn "emulate[d] their foreign competitors and created shop level committees designed to minimize employee dissatisfaction, enhance product of service quality, and improve productivity."[142]

Saturn's use of shop committees is one corollary to true cooperative work. Other companies have integrated EIP, as well. Research shows that "64% of firms have established at least minimal employee involvement programs . . . ."[143] Further, "86% of the Fortune 1000 companies have created involvement committees."[144] These numbers appear to indicate a trend toward some degree of employee self-determination in the workplace. However, these numbers are misleading.

One must measure the growing numbers of EIPs against the single most important corporate goal of employee participation, the eradication of the risk of unionization.[145] "[A]ccording to studies . . . employee participation programs are among the most effective anti-union strategies implemented by employers."[146] In contrast to the union structure, private sector "participation schemes are depicted as creating a more flexible, informal, and collaborative framework"[147] for negotiating better work environments. If this is the case, then corporations offering highly controlled employee input programs are successfully avoiding much greater employment autonomy offered by unionized activity.

Essentially, EIPs are an example of the new flexibility of nonunion enterprise, but also of new mechanisms for corporate control. What EIPs are not doing is safeguarding workers when flexible plans fail to protect their interests, leaving them with little recourse. This loophole exists in part because of the fine line definition of § 8 of the National Labor Relations Act (forbidding employer management of labor organizing), which restricts employee involvement initiatives.[148] Ultimately, these restrictions offer boundaryless companies a way out of substantive grievance procedures and benefits negotiations.[149]

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142. *Id.*
143. *Id.*
144. *Id.*
145. Lobel, *supra* note 26, at 143.
146. *Id.*
147. *Id.* at 142-43.
148. Craver, *supra* note 109, at 605.
149. *See id.*

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Platitudes describing Saturn's success are far reaching. Yet, a closer investigation shows that even Saturn falls short of a true cooperative workplace paradigm in important ways. While shop committees convene around improving productivity, they have not had the power to resolve worker grievances[150] or negotiate over existing employment conditions.[151] Likewise, "[m]anagers decide the structure of these [improvement] plans and the issues to be addressed, and they generally reserve the right to determine which committee proposals to accept."[152]

As described, Saturn's approach is a corporate experiment. The company has struggled with "limited profitability"[153] issues. Theorists are not certain how long Saturn will be able to maintain its profit redistribution system before having to reorganize.[154] The company has struggled with the reality of limited profitability as a result of shared economic rewards with employees, and is currently on GM's chopping block because of industry downturn. Therefore, Saturn's best case scenario provides only guarded satisfaction that new workplaces are experiencing sustainable democratic behaviors in the self-regulating environment.

A. Comparing Cooperative Enterprise to the Self-Regulating Workplace

An array of democratic terms and descriptors has been used by companies to market human resource innovations in the boundaryless workplace, Saturn's shop committees notwithstanding. Most of these labels are meant either to reinterpret employee relationships on the management ladder, or to redelegate employee control over the office work environment. Thus, buzzwords like "facilitative management," "flat hierarchies," "horizontal management teams," "self-directed teams," "cross-functional work teams," "micro-level job control," "co-determination," "participatory employment," and "dynamic problem-solving," all signify a close association of employment practices with authentic workplace democracy,[155] as have been borrowed from the American cooperative business paradigm.

These terms, or principles, are time-honored labels for cooperative workplace initiatives, and are highly value laden. Further, particular values historically shared by most business cooperative alliances are also those

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150. *See id.* at 605-06.

151. *See id.*

152. *Id.* at 606.

153. *See* Orly Lobel, Note, *Orchestrated Experimentalism in the Regulation of Work*, 101 MICH. L. REV. 2146, 2151 (2003) (quoting PAUL OSTERMAN ET AL., WORKING IN AMERICA: A BLUEPRINT FOR THE NEW LABOR MARKET 86 (2001)).

154. *Id.*

155. *See id.* at 2150.

which unions have historically bargained for: member control and participation in workplace decision-making, autonomous self-help organizing, and community cooperation and support.[156] In other words, when cooperative workplace labels so closely aligned with traditional workplace democracy and union values are used to define the status of employees within current self-regulating corporations, those labels attach name recognition to rich histories of employee participation and control over highly democratic employment sectors. Therefore, the corporate adoption of poignant buzzwords, such as those listed above, creates the *illusion* that self-directed, co-determined, and cross-functional private sector employees are, in fact, highly involved in primary processes of daily business management. Is that really true for most private sector employees today or have they been marginalized instead?

1. Corporate Structures: The Allure of Work Teams and Flattened Hierarchies

Cooperative enterprises are generally described as "cooperatively owned and democratically managed workplace[s]."[157] "Worker cooperatives embrace egalitarian ideologies and utilize flattened workplace hierarchies with few levels of formal supervision."[158] They "use democratic processes to create their grievance procedures and to hire their managers."[159] Research notes that participating in workplace cooperatives engenders team organization and self-management skills.[160] These skills-building mechanisms within organized work teams tend to increase self-confidence.[161] Subsequently, the phenomenon of "group mode"[162] grows out of teamwork practices, and the perception of "fair treatment" increases.[163] Group mode specifically creates a work environment in which workers "embrace behavior patterns based on fairness, rather than on expected outcomes (distributive justice)."[164] These positive behavior patterns

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156. *See generally id.*
157. Hoffman, *supra* note 9, at 51.
158. *Id.*
159. *Id.* at 55.
160. *Id*. at 53.
161. *Id.*
162. *Id.* at 55.
163. *Id*. at 54.
164. *Id.*

constitute what can be called "workforce continuity"[165] via teamwork efforts. As a result, "teams are probably the most difficult work innovation to implement and the one that is most likely to be disrupted by turnover and restructuring."[166]

Boundaryless workplace reform boasts improved teamwork efforts. It is a system that involves accolades such as re-skilling and enhanced networking, but not employment security.[167] In other words, today's employment system is replete with high turnover and restructuring. "'Jobs' are being replaced by 'projects' and 'fields of work' . . . giving rise to a society that is increasingly 'jobless but not workless.'"[168] What Katherine Stone has termed "transitory employment"[169] and I describe as "working transience" is the phenomenon of systemically induced high employee turnover rate inherent in new private sector employment.[170] Working transience is central to the new workplace paradigm. This phenomenon tends to naturally limit the success of teamwork structures, as employees move in and out of short-term, fast-paced work activities, and on to new similarly situated positions in other companies.[171] The nature of such continual change diminishes the lasting effects of teamwork efforts.[172] "Teams thus rely upon the very factor that the new workplace repudiates— *workforce continuity*."[173]

Apart from mischaracterized rhetoric about teamwork, the new workplace also redefines traditional functions of "flattened hierarchies."[174] Originally, flattened hierarchies, or what I call "cooperative hierarchies," operated with high levels of autonomy with industry employees participating in management functions as experts in their production tasks.[175] They still operate that way. Cooperative hierarchies employ highly decentralized and flexible personnel networks. Today, however, the boundaryless workplace

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165. Stone, *supra* note 13, at 793.

166. *Id.* at 792 (quoting Paul Osterman, *Work Reorganization in an Era of Restructuring: Trends in Diffusion and Effects on Employee Welfare*, 53 INDUS. & LAB. REL. REV. 179, 186 (2000)).

167. *Id.* at 793.

168. Catherine L. Fisk, *Knowledge Work: New Metaphors for the New Economy*, 80 CHI-KENT L. REV. 839, 840 (2005) (quoting Edmund L. Andrews, *Don't Go Away Mad, Just Go Away: Can AT&T Be the Nice Guy as It Cuts 40,000 Jobs?*, N.Y. TIMES, Feb. 13, 1996, at D1, D6).

169. Stone, *supra* note 131, at 503.

170. *Id.*

171. Stone, *supra* note 13, at 792.

172. *Id.*

173. *Id.* at 793 (emphasis added).

174. *Id.* at 783.

175. *See id.*

has redefined the flattened hierarchy model, which is not cooperative at all, but consolidated and centralized.[176]

In her analysis of employment metaphors, Catherine Fisk provides a keen example of the difference between traditional cooperative hierarchies and new boundaryless hierarchies, using a case involving the National Labor Relations Board (NLRB), *Harrah's Lake Tahoe Resort Casino*.[177] In this case, an employee proposed to change the company's employee stock ownership plan to increase total employee ownership from one percent to fifty percent.[178] The employee distributed a leaflet to his colleagues describing how a leveraged buyout would increase job stability, pay, morale, and retirement benefits through a new process of participatory management.[179] On review, the NLRB determined the employee's actions were not protected behavior because his proposal sought to advance workers' interests not as employees but as entrepreneurs, owners, and managers, which they were not.[180] The Board determined that only Harrah's corporate management could make such a change.[181] In the company's rapid efforts toward nationwide expansion,[182] and consequential corporate re-engineering, Harrah's management readily declined the idea of a leveraged buyout.

2. Management Techniques: A Focus on Corporate Re-engineering

In 2005, Diane Avery and Marion Crain investigated Harrah's employee management methods, as it was the "largest gaming corporation in the world[],"[183] to discover a systematic devaluation of employees under the guise of the company's corporate re-engineering process.[184] With the termination of middle management and new centralized control over human resources, Harrah's workforce can be described as a novel model of

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176. *See generally* Dianne Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism*, 14 DUKE J. GENDER L. & POL'Y 13, 69-70 (2007).
177. Harrah's Lake Tahoe Resort Casino, 307 NLRB 182 (1992); Fisk, *supra* note 168, at 845.
178. Fisk, *supra* note 168, at 845; 307 NLRB at 182.
179. Fisk, *supra* note 168, at 845.
180. *Id*. at 845-46.
181. *Id.*
182. *See* Avery & Crain, *supra* note 176, at 69.
183. *Id.*
184. *See id*.

flattened hierarchy.[185] Yet, its labor model entails the scientific management of employment skills, a concept born under the labor management scheme of mid-twentieth century Taylorism.[186] "Scientific management refers to the systematic process of dividing jobs up into discrete components so as to centralize control over the knowledge of the labor process in management and increase profits."[187] Further, "scientific management techniques typically involve an in-depth study of the craft and subsequent reduction of its principles or knowledge base to a series of rules, which can be delegated to less skilled or specialized workers in the interest of efficiency and profit maximization."[188] Scientific management was re-engineered in the 1980s under the Japanese influence of the "lean production" system.[189] Under re-engineering, managerial functions are consolidated, redundant positions are eliminated,[190] and the control of job skills is transferred from workers to management.[191]

Central to any method of scientific management is the goal of "de-skilling" the workforce.[192] De-skilling is essentially the drastic reduction of independent employee decision-making and the compartmentalizing of technical activities.[193] Time is money, and *thinking* takes time, hence thinking costs money.[194] Therefore, de-skilling diminishes the creative thinking and problem-solving an employee is required to do.[195] Re-engineering employee approaches to productivity by training them in routine practices and the use of input devices for technological problem-solving, saves time and thus money.[196] The boundaryless workplace essentially re-engineers this paradigm into a broader psychological approach.

Boundaryless workplace practices are supposed to have replaced Taylorism, or scientific management, as the "new organizational behavior theories and practices aim[ing] to inculcate knowledge and skill in the

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185. *See id.* at 69-70.

186. *See* Crain, *supra* note 138, at 555-56; *see also* Michael C. Harper, *The Continuing Relevance of Section 8(a)(2) to the Contemporary Workplace*, 96 MICH. L. REV. 2322, 2358 (1998) ("Taylor developed a 'scientific' theory for how management could best control workers engaged in standardized work.").

187. Crain, *supra* note 138, at 555.

188. *Id.* at 556.

189. *See* Harper, *supra* note 186, at 2357.

190. Stone, *supra* note 2, at 568.

191. Harper, *supra* note 186, at 2364.

192. *See generally id.*; *see* Avery & Cain, *supra* note 176, at 76-77.

193. *See generally id.*

194. *See* Avery & Cain, *supra* note 176, at 77.

195. *See id.*

196. *See id.*

worker at every level."[197] According to Katherine Stone, companies "have abandoned Taylorism, dismantled their internal labor market modes of organization, and instead have attempted to substitute more flexible forms of work."[198] In reality, what defines the boundaryless workplace today is the pairing of residual scientific management goals with new broadly skilled horizontal hierarchies through new techniques such as "up-skilling" or "cross-training."[199]

Up-skilling is the boundaryless term for retraining or broadening workers' productivity for improved work product or services.[200] Up-skilling, in boundaryless terms, is the psychological equivalent of de-skilling in scientific management in that both "assume[] that people are largely interchangeable,"[201] and ultimately replaceable. A good example of boundaryless re-engineering is the new automated checkout stations used in many grocery stores.[202] These "fast lanes" have replaced cashiers with computers, and rely on customer self-help for workplace checkout routines. The cashier stands at a remote counter and watches the flow of employee-less interactions for the entirety of her work shift, ready to manage a broader range of problems that may arise in the automated checkout lines, but often does little with her expertise. In this light, the manner in which corporations market democratic processes like work team efforts and flattened hierarchies to today's highly interchangeable workforce is difficult to appreciate. If, at this point, it is still hard to conceptualize the level of micro-control American employees really suffer on the job, then ask yourself the next time you drive-thru for a happy meal how happy you are that the burger you ordered was actually made *your way*.

3.   Human Resource Policies: The Potential for Commodified Employment

Marion Crain describes corporate re-skilling practices as "commodification" or the "objectification of human beings and their labor,"[203] and equates slavery to the ultimate commodification of human

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197.   Stone, *supra* note 2, at 523.
198.   *Id.* at 523.
199.   Harper, *supra* note 186, at 2364.
200.   *See id.* at 2364.
201.   Avery & Crain, *supra* note 176, at 25 (citation omitted).
202.   Crain, *supra* note 138, at 563.
203.   *Id.* at 543.

labor.[204] Crain states that "professional" employees have historically been able to avoid commodification by "exchanging the collective commodity of their expertise for autonomy at work and monopoly power over their craft."[205] However, today, flattened hierarchies with invisible power dynamics[206] and professional subordination to centralized control[207] have discarded the idea of autonomous experts. Instead, boundaryless hierarchies have promoted up-skilling as the new and improved workplace management where secretly, "workers [become] fungible and high turnover [is] no longer costly."[208]

Catherine Fisk depicts Wal-Mart as a metaphor for this new workplace.[209] Her example illustrates the fungible nature of today's employees.

> Wal-Mart in Bakersfield, California, tries to be perceived as a humane employer. They do not provide any benefits—no health care, no pensions, no childcare, no disability insurance, nothing. And they do not pay enough for many employees to afford those things, themselves. But they are not heartless. They give each employee a list of the free social services that are available in the city and county.[210]

Fisk concludes, "It is our acceptance of the legally fictive entity—the corporation—as defining the scope of legal and social duties to the workers who serve it that enables corporations that use and benefit from labor to avoid most legal consequences for exploiting it."[211] Essentially, in cooperative business environments, the employment system exploits problem-solving, teamwork, autonomy, and expertise for profit.[212] In the contingent environment of the boundaryless workplace, however, the system exploits *employees* for profit.

The boundaryless workforce is one in which, "work has . . . become contingent, not merely in the sense that it is formally defined as short-term or episodic, but also in the sense that the attachment between the firm and the worker has been weakened."[213] Contingent employment includes growing numbers of part-time workers, temporary personnel, outsourced experts, and independent contractors.[214]

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204. *Id*.
205. *Id*. at 545.
206. *See* Stone, *supra* note 2, at 606-07.
207. Crain, *supra* note 138, at 545.
208. Avery & Crain, *supra* note 176, at 21-22.
209. *See* Fisk, *supra* note 168, at 869-70.
210. *Id*. at 869.
211. *Id*. at 845.
212. *Id.*
213. Stone, *supra* note 13, at 776.
214. Fisk, *supra* note 168, at 490.

Workforce continuity is fragile in this new environment because employees are often seen as self-managed free agents[215] hired for "abilities and potentials rather than work history."[216] Practices such as up-skilling and networking orient boundaryless employees to "person descriptions rather than job descriptions," [217] through which businesses manage people, not expertise. In other words, organizations now "base human resource policy not on the job but on the individual."[218] Job qualifications are thus focused less on documented experience and more on image and interpersonal skills—the "soft skills."[219] Employment, therefore, is less organized by expertise than by psychological orientations to productivity.[220] As a result employees identify with their employment roles through workplace indoctrination, often called the "new psychological contract."[221] However, what scholars tend to label as a contract is much more like a methodical, psychological *conditioning*.

4. Employment Contracts: Exercises in Pre-conditioning

As described, the new psychological contract is a psychological orientation toward work product and productivity.[222] In order to maximize both, the new psychological contract seeks employees who match a corporate image, are adaptable, compliant, and expendable. Boundaryless employers orient newly hired employees toward performance expectations through controlled psychological conditioning. Psychological conditioning generally begins upon hire so to establish employment expectations from the start. Companies often provide extensive job orientation and training activities using methods like the "transformation" employment approach[223] in order to regiment employee work activities in a comprehensive way.

> The "transformation" . . . approach, confers control over the work process by transforming the worker into one whose personal characteristics, appearance, and values

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215. Stone, *supra* note 13, at 774 (paraphrasing BRUCE TULGAN, WINNING THE TALENT WARS 155-57 (2001)).
216. *Id*. at 774.
217. Stone, *supra* note 2, at 562.
218. *Id*.
219. Lobel, *supra* note 26, at 166-67.
220. *See id.*
221. Stone, *supra* note 2, at 549-50.
222. Lobel, *supra* note 26, at 166-67.
223. Avery & Crain, *supra* note 176, at 20.

> match the image that the company is seeking to project and market, and then allowing the worker to make his or her own judgments in interactions with customers. Such "self-regulation" techniques seek to create workers who act like managers without sharing . . . managerial pay.[224]

Psychological effects of the transformation approach can reach far into the egos of predisposed employees by "engag[ing] workers in a way that their hunger for respect and voice is diminished."[225] Scholars suggest that employees who value their corporate image feel the power of that image without necessarily having any real positional authority.[226] As a result, the cost of middle management is diminished, productivity is increased, and the interest in union activity is reduced.[227] In short, employees are generally type-cast into employment positions where they internalize the corporate image, embrace new boundaryless values, and offer brand marketing in lieu of industry, innovation, or service.[228] In the process, the world of innovative ideas increasingly originates from outside a corporation,[229] and therefore, ingenuity is outsourced rather than internalized.

Authors Dianne Avery and Marion Crain reflect on the fantastical example of Disneyland[230] as a re-emerging business model for boundaryless enterprise with "type-casting" or branded service at its core. Walt Disney was a businessman truly ahead of his time. He created a legendary theme park based on the idea that employees were type-caste into their employment roles as Disney characters. According to the authors, scholars call this imaging process "branding."[231] Branding "orients the workers psychologically toward the business's brand values and with regulations that script worker self-presentation . . . ."[232] Disney's dramatic approach was revitalized in the 1980s to teach branded service as a management technique at the Disney Institute.[233] There, employees become the face of business as fictional characters, in an almost fictional employment experience.[234] Employers learn "casting for the show,"[235] or how to choose and train employees with the right attitude and appearance to function in an

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224.   *Id*.
225.   *Id.*
226.   *Id*.
227.   *Id.*
228.   *See id.*
229.   Fisk, *supra* note 168, at 847.
230.   *See* Avery & Crain, *supra* note 176, at 26-27.
231.   *See id.* at 17-18.
232.   *Id*. at 22.
233.   *See id*. at 26.
234.   *Id*.
235.   *Id.*

environment where behavior is strictly regulated.[236] In short, prospective employees are tasked to be everything corporate, everything but who *they* are if who they are cannot be capitalized on, and employers capitalize on everything.

There exists an inevitable problem with this kind of work ethic. The predicament is that "the employer's imposed norms of behavior, attitude, and appearance . . . can be self-alienating."[237] When the employment role or script becomes unnatural or loses its appeal, employees and their employers lose relational parity, which leads them to part ways. For example, Walt Disney would never expect to employ a Cinderella character until her retirement. Naturally, children would not understand why the Magical Kingdom's most popular princess had begun to look strangely "grandma-esque" after awhile. In other words, today's Cinderella of "certain age" no longer meets princess-like expectations and remains a princess no more.

In the same sense, boundaryless employees, like aging Cinderellas, typically transition out of dead-end roles and into positions in new companies for a fresh experience, unwittingly signing new psychological contracts with different employers. Employees become working transients in this process, moving in and out of positions in search of the *right* job, or a *good fit*, and perhaps, infrequently finding it. The hunger to work at something meaningful; to climb the ladder of success; to find the camaraderie of office-family relationships; and to retire after loyal service becomes intently conflictive with the realities of the modern workplace environment. Increasingly unfulfilled, employees begin to battle job dissatisfaction and career uncertainty. As the case may be, a princess cannot expect to be a princess forever. What's worse, there is no longer a logical next step for a princess past her prime, no matter how experienced she is. Cinderella is forced, instead, to move on, to reinvent herself as a different character in a new storyline. Many transitioning employees find moving on a difficult task, however. One study suggests that "[f]or every one percent increase in unemployment, homicides rise 5.7%; suicides increase 4.1%; deaths from heart disease, liver cirrhosis, and stress-related disorders increase by 1.9%; and 4.3% more men and 2.3% more women admit themselves to mental hospitals."[238]

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236. *Id.*

237. *Id.* at 24.

238. Robert C. Bird, *Employment as a Relational Contract*, 8 U. PA. J. LAB. & EMP. L. 149, 162 (2005).

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Essentially, aligning modern market driven goals with "values-branding" creates a potentially perverse psychological contract between professional employer and her workforce, which is inherently unsustainable on many levels. Not only that, but the new employment experience is described as no less than militaristic in nature. In corporate terms, "the organization[al] principle of bureaucracy is command."[239] Now more than ever, companies want the freedom to "deploy their work forces quickly"[240] with the expectation that employees of the modern office will go above and beyond the call of duty[241] with "firms disavow[ing] any long-term employment relationship."[242] A morbid mind might fashion the image of employees scrambling around the corporate landscape performing "spontaneous and innovative activity"[243] in duck-and-cover moves to avoid human resource landmines on their careers. Why such behavior exists is perfectly clear: today, "the risk of the firm's . . . success is placed squarely on the employee."[244]

B.   *The Demise of Social Capital in the Workplace*

Perhaps the most unfortunate part of the new psychological contract and its various forms of values-branding is the reality that many employees have bought into the objectification schemes of the modern workplace, and ultimately, experience a greater sense of defeat than the lack of a promotion or the loss of a job.[245] Today's employees experience the defeat of the psyche itself. In other words, in today's boundaryless workplace, when an employee loses an employment opportunity, faces termination, or experiences irresolvable conflict, she loses *herself* as well as her job security, by design.

Contrast aggressive images of the new psychological contract with the observation that "the workplace is widely viewed as a training ground for democratic participation."[246] Under this theory, the workplace functions as a segment of civil society within which personnel "embrace notions of public

239.   Orly Lobel, *Agency and Coercion in Labor and Employment Relations: Four Dimensions of Power in Shifting Patterns of Work*, 4 U. PA. J. LAB. & EMP. L. 121, 179 (2001) (emphasis removed).
240.   Stone, *supra* note 131, at 504.
241.   *See id*. at 504-05.
242*.   Id*. at 504.
243.   *Id*. (citation omitted).
244*.   Id*. at 505.
245*.   See* Crain, *supra* note 135, at 545.
246.   Ann C. Hodges, *The Limits of Multiple Rights and Remedies: A Call for Revisiting the Law of the Workplace*, 22 HOFSTRA LAB. & EMP. L.J. 601, 620 (2005).

trust, social connection, cooperation, reciprocity, and civic virtue."[247] In combination, notions like these create social capital in the workplace or shared values by which employees ground their work environments. Social connectedness[248] grows through the use of shared values until over time they evolve into social norms. The process takes time and requires broad participation at all levels of society. By analysis, social capital in the workplace should reach from the boardroom to the mailroom, and back again. Essentially, all parties must serve the efforts of shared workplace values in order for social capital to emerge within the work environment.

One explanation for the mechanics of social capital in the workplace is centered in the idea of OCB or "organizational citizenship behavior."[249] OCB is often defined as the degree to which employees perform over and above the requirements of their formal job descriptions.[250] Workplaces with high OCB tend to demonstrate a high degree of social connectedness and share democratic norms which have evolved from positive social capital, or values, in the workplace.[251] Business cooperatives tend to function with high OCBs.[252] In a highly functional workplace, OCB translates into power-sharing, either formally or informally, and often both.[253]

Power-sharing arguably marks the highest measure of success for democratic practices in the workplace.[254] On the other hand, where power-sharing is not occurring—for example, where segments of employees have no power base—then not only is democratic practice hindered, but also all evidence points to the failed evolution of a social capital which is needed to create social connectedness in the workplace. What may be true in many cases is that employees are functioning with duck-and-cover strategies, instead, as employer autocracies define which workplace values will be exercised via the new psychological contract. Does it really seem likely that today's employees would want to work longer and harder for their

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247. Reuben, *supra* note 4, at 20 (citing ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY, 163-87 (1993)).

248. *See id.* at 22.

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

250. Stone, *supra* note 2, at 557 (citing Dennis W. Organ & Mary Konovsky, *Cognitive Versus Affective Determinants of Organization Citizenship Behavior*, 74 J. APPLIED PSYCHOL. 157, 157 (1989)).

251. *See id.*

252. *See* Hoffman, *supra* note 6, at 56.

253. *See id.*

254. Craver, *supra* note 104, at 594.

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employers for less pay and fewer benefits? Are employees really looking to invest more effort for less job security? Why?

    1.   Opportunistic Behavior in Workplace Relations

In Robert Bird's examination of workplace relations he reveals that "relational opportunism"[255] or opportunistic behavior on the part of employers diminishes employee morale. "Relational opportunism is self-interest seeking that contradicts the terms of an established relational [psychological] contract."[256] Bird used research performed by Pauline Kim to interpret the phenomenon of relational opportunism in the workplace.[257] He suggests that "taking advantage of employees' ignorance of the law is an example of relational opportunism."[258]

"Contradicting the perception that employees understood employment at will, [Pauline] Kim found that employees wrongly believed they have significant job security."[259] Kim discovered that "eighty-two percent of respondents incorrectly believed that an employer cannot replace an employee with another employee to do the same job for less pay."[260] Further, "eighty-nine percent of respondents incorrectly believed that an employer cannot fire an employee because of personal dislike."[261] These results "suggest a serious disconnect between the expectations of employees and the realities of contemporary employment law."[262] They also suggest that employees fail to comprehend the potential omniscience employers have in negotiating today's employment terms and even employment relationships themselves.

For most employees, a relational contract begins alongside any formal employment contract and then evolves with norms of the workplace into an informal understanding of employment rights, responsibilities, and expectations. The formal employment agreement develops into an informal relationship between employer and employee with emotional ties. In other words, business is never just business, it is also personal. As Kim's study

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    255.   Bird, *supra* note 235, at 198.

    256*. Id.* at 198; *see also* Ian R. Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus,"* 75 NW. U. L. REV. 1018, 1024 n.20 (1981).

    257.   Bird, *supra* note 235, at 196.

    258*. Id.*

    259*. Id*. at 196; *See* Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL. L. REV. 105 (1997).

    260*. Id.* (paraphrasing Kim, *supra* note 254, at 134).

    261.   *Id.* at 196-97 (paraphrasing Kim, *supra* note 254, at 134).

    262.   Befort, *supra* note 7, at 388.

illustrates, many workers found it hard to believe they would be penalized or even fired for reasons *not attributable* to formal contract terms. Indefinable penalties arising out of personal preference and professional bias can be caustic, implicitly redefining an employment relationship and changing its nature for reasons that have nothing to do with performance of contract terms. When an employer redefines relational terms with an employee, i.e., changes the nature of the employment relationship for unattributed reasons, it inevitably causes a "relational attitude change," [263] diminishes any emotional investment being made and further, potentially undermines an employee's work ethic.

Employees unavoidably experience ethical dilemmas when an employer breaches the shared psychological contract—the relational connectedness between employer and employee. Ethical dilemmas exists because an employee often infers contractual diligence from an employer's relational behavior. Relational behavior is a valuable indicator of employment assurances and when violated, it is the cause of conflict, the ruin of good workplace relations, and importantly, the ruin of positive work ethic. One study indicates that "psychological contract violations [lead] employees to reevaluate and downgrade their view of their obligations to their employers."[264] Not surprisingly, relational opportunism "is a primary cause of employment resentment"[265] in the workplace.

Generally speaking, corporations are not necessarily seeking to disgruntle employees into poor job performance though that is often the result. In the words of Jack Welch, former CEO of General Electric, what modern business enterprise is trying to do is focus "people's *emotional* energy . . . outward on a competitive world where no business is a safe haven for employment unless it is winning in the marketplace."[266] This suggests that employees are engaged in market relations more than they are in workplace relations, not unlike private speculators, but as "human capital investors,"[267] juggling the interests of their companies for the sake of their professional futures.

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263. *See* Bird, *supra* note 235, at 168.

264. Stone, *supra* note 2, at 550-51 (summarizing Sandra L. Robinson et al., *Changing Obligations and the Psychological Contract: A Longitudinal Study*, 37 ACAD. MGMT. J. 137, 149-50 (1994)).

265. Bird, *supra* note 235, at 199.

266. Stone, *supra* note 13, at 778 (emphasis added).

267. *See* Stone, *supra* note 2, at 558.

Unfortunately, the creation of "market employees," with an outward focus under the ploy of speculative employment terms, inevitably results in opportunistic behavior, diminished workplace relations and ultimately deflated work ethic. As work ethic ebbs, the speculation cycle produces workplace conflict, and the beginning of the end of an employee's tenure.[268] This modern relational cycle is truly problematic because the outward focus required of today's workers actually creates the cycle of diminished work ethic, poor performance ratings, a surge in workplace dispute, and the subsequent working transience that comes with termination, unemployment, and the struggles of new job searches. Clearly, today's employment experience lies in open contradiction to the historical view that in America "[p]rofessionals' experience of work has been characterized by autonomy and the privilege to self-regulate . . . ."[269]

In retrospect, whatever pains unionized employment protections have historically caused for private enterprise, arguably, nothing has been better than the union contract at focusing workplace energies *inward* toward productivity and quality rather than outward over the span of market forces.[270] "The most common explanation [for this] is that unions facilitate the enforcement of long-term contracts by preventing employers from acting opportunistically through the enactment of just-cause provisions, seniority rules and other such clauses."[271] Today's private enterprise, however, increasingly relies on purely relational terms to condition tenure, the result of which is a potential tug-of-war between employer and employee over rights to terms of employment.

Ellen Dannin offers a legal context for this discussion using the case *J. I. Case Co. v. NLRB*.[272] In this 1944 case, the Supreme Court noted that while employment is contract-like, the contract exists within the context of a working relationship.[273] Further, the working relationship is layered with a mix of status, custom, and informal understandings that are continually reshaped.[274] It is unclear, however, how much of the case's rhetoric would be reaffirmed in today's Court.

Dannin explains that much of the conflict inherent in workplace relationships is "rooted in the . . . struggle over who owns a job, on what

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268. *See* Bird, *supra* note 235, at 169.
269. Crain, *supra* note 135, at 544.
270. *See* Lobel, *supra* note 23, at 131.
271. *Id.*
272. J. I. Case Co. v. NLRB, 321 U.S. 332 (1944); Dannin, *supra* note 5, at 256.
273. Dannin, *supra* note 5, at 256.
274. *Id.* at 256.

basis, and to what degree."[275] Employees generally believe the employer holds the rights to a job, based on "its financial investments and planning that . . . sustain the job."[276] Employees, however, claim ownership in their work through their investment in "sweat equity."[277] As a result, many of the challenges of resolving conflict in the workplace revolve around repairing and re-grounding relationships between persons who are both highly invested in an employment position.[278] One concern is that because workplace relationships are less permanent than they used to be, relatively amorphous in nature and more limited in scope, the ability to build authentic and even productive workplace relationships is increasingly poor.

2.   Legalized Employment Relationships

In today's workplace, a variety of professional relationships are on the wane. Specifically, employees experience declining rapport with their clientele.[279] In conjunction, they are less involved in work-related community service.[280] Shifts in professional connections like these are telling. Declining rapport and reduced involvement in the needs of business communities and clientele may illustrate an abandonment of the value of professional *service*.[281] Essentially, the boundaryless ethos has separated the value of "service from the professional provider."[282] When employee providers lose service-mindedness, an array of relationships is negatively impacted, including relationships with customers, clients, and patients.[283] "Professionals thus lose the ability to forge their own relationships with clients or to define the uses to which their skills are put . . . ."[284]

At the same time the quality of provider relationships is in decline, there is "a greater legalization of the employment relationship,"[285] which suggests that the quality of employment relationships is also in decline. "[G]reater

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275.   *Id.* at 255.
276.   *Id.*
277.   *Id.*
278.   *See id.* at 256.
279.   *See* Crain, *supra* note 135, at 558.
280.   *See id.*
281.   *See id.* at 562.
282.   *Id.*
283.   *See id.*
284.   *Id.* at 558.
285.   Dannin, *supra* note 5, at 258.

legalization . . . has led to . . . a complex array of tort and contract doctrines, federal and state whistleblower and anti-discrimination statutes, and federal and state anti-discrimination laws."[286] Paramount to successful relationships in the new workplace is the ability of participants to manage this complex web of newly defined roles in the context of an influx of legal norms newly integrated into workplace policy.[287] Companies must observe more legal protocol while generating maximum employee performance. Protocol often comes in the form of handbooks, codes of ethics, office policies, routinization, and branded service.[288] While document guides have, in reality, little to do with management of the modern relational contract between employer and employee, they have everything to do with the appearance of compliance, showcasing boundaryless employment principles. The large scale integration of employment protocol into the boundaryless work environment distinguishes the new workplace from the old and brings with it a new set of workplace principles.[289] Problematically, the onslaught of protocol in new work environments dismantles most of the natural rules of the workplace, which were primarily responsible for regulating behavior in the traditional work environment.[290] Customarily, natural rules were taken from society's ethical threads themselves as employees brought community values about work into the workplace.[291] With respect to the new corporate environment, however, self-regulating companies no longer internalize conventional values about work, but manage the system of employment rules they themselves create and freely regulate from within.[292] In conjunction, with the proliferation of workplace rules, an evolution of market-driven values is underway in the boundaryless workplace.[293]

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286. *Id.* at 258-59.

287. *See* Avery & Crain, *supra* note 173, at 20 (discussing two approaches employers have taken to control and standardize service sectors, which heavily affect employees' role in the workplace).

288. *See generally* Avery & Crain, *supra* note 173.

289. *See* Mitchell, *supra* note 21, at 944.

290. *See generally id.* at 944-47 (stating that businesses have "kicked out from under us the old rules, norms, and roles that supported our social order." Further, stating that there was a dismantling of hierarchical structures and allegiances to certain institutions as there was a transformation of new business ideas); *see generally* Avery & Crain, *supra* note 171 (discussing how new business approaches changed workplaces and regulation of employees); *see* Befort, *supra* note 7, at 389-90 (employers changed their practices, for example, no longer committing to giving employees long-term employment).

291. *See* Befort, *supra* note 7, at 389 ("Legal rules generally reflect widely-held beliefs and practices.").

292. *See* Bird, *supra* note 233, at 170-72.

293. *See* Mitchell, *supra* note 21, at 946.

Essentially, private enterprise has dismantled conventional workplace values in rejection of a cooperative ethos.

C. Dismantling Old Employment Values and Behavioral Norms

"In little more than a generation, the structure of American society has changed, as an age of hierarchy has given way to an age of markets."[294] Scholars have described the old hierarchical workplace as a place where the employer was seen as a caretaker for the employee.[295] Further: "Employees who were good performers were virtually guaranteed a job by their employer until retirement, the employer helped employees plan their careers and provided promotions to ensure career development, and employees were loyal and committed to the job and the organization."[296]

Essentially, the corporate environment since World War II has been a community-oriented system:

> Beginning with the era of World War II . . . American employers invested great efforts in reducing employee turnover. These employers realized that a stable workforce helped to reduce recruitment and training costs while simultaneously boosting employee morale. To achieve this stability, employers designed personnel policies to encourage career rather than casual employment tenure. . . . [Employers encouraged] commitments to long-term job security and the creation of defined paths of progression and promotion.[297]

Union issues, notwithstanding, business culture since WWII is historically a symbiotic, unified, and cooperative environment, even as a closed and relatively autocratic. As the post-war middle class grew, functional workplaces mirrored the collectivist ethos and behavioral norms of other relational groups and group environments in the surrounding community and broader society.[298] In other words, conventional workplace values at least technically normalized themselves to parallel values in the home, schoolroom, and community, at times to the disadvantage of minority groups and women.[299] As a result, the private employment contract of the mid-twentieth century was construed as a "social contract,"[300] with civic

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294. Mitchell, *supra* note 21, at 944.
295. Marcie A. Cavanaugh & Raymond A. Noe, *Antecedents and Consequences of Relational Components of the New Psychological Contract*, 20 J. ORGANIZ. BEHAV. 323, 324 (1999).
296. *Id.*
297. Befort, *supra* note 7, at 388-89.
298. Mitchell, *supra* note 21, at 945.
299. *See id.* at 944, 946.
300. Befort, *supra* note 7, at 388-89.

implications. With the rapid change in workplace conditions of this century, however, "many workers are experiencing material insecurity, instability, social dislocation, and a loss of balance between work and family."[301]

Some scholars suggest that "[s]ocial institutions, from business to the family, have transformed in ways that have kicked out from under us the old rules, norms, and roles that supported our social order and an optimistic and generous way of thinking about the future."[302] Having kicked out the old rules, modern business enterprise has replaced "optimistic and generous" workplace values with a new self-reliance, individualism and uncertainty that reflect the new market economy.[303] Arguably, even as "[a]ntidiscrimination laws and affirmative action [have] tapped huge pools of unrealized talent and allowed it to compete in the market[,]"[304] new groups of employment beneficiaries are still relegated to bottom-rung job opportunities, high turnover, and rising unemployment.[305] Thus, a dramatic deterioration of America's implied social employment contract is symptomatic of the relentless nature of boundaryless corporate culture overpowering the social order of American life with spiraling effect.

Corporate culture has been described as the combination of philosophies, values, assumptions, and norms of an organization.[306] Generally speaking, workplace *values* can be described as the ethics or principles behind workplace *norms*.[307] Workplace norms are the behavioral manifestations of a shared set of values used in the work environment.[308] As such, norms are powerful prompts for behavioral management. Robert Bird explains that "employment norms are perceived as law more than laws are[]"[309] and aspects of employment such as "corporate culture, office politics, future planning, and the complex matrix of organizational life—[are] the exclusive domain of norms."[310] Further, "[e]mpirical studies reveal that most employees rely upon norms, not laws, to define workplace rules."[311] If this is true, then far greater influence flows from the company's informal management of workplace norms than from formal employee

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301.   Lobel, supra note 150, at 2148.
302.   Mitchell, *supra* note 21, at 944.
303.   *Id.*
304.   *Id.* at 946.
305.   *See generally id.* at 944-49 (discussing how the change in the workplace structures has led to instability for workers, and massive layoffs at times).
306.   Bird, *supra* note 235, at 180-81.
307.   *See id.*
308.   *See id.*
309.   *Id.* at 150.
310.   *Id.*
311.   *Id.*

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protocol. As a result, corporate efforts to showcase compliance can be pursued at little expense to private practices through close management of internal norms within a corporate culture.

Orly Lobel suggests "[t]here is the 'external culture,' which reflects how the corporation portrays itself to the 'world,' the consumers, the public, the market and an 'internal culture,' the life inside the firm."[312] This public–private behavior differential tends to explain how companies can model far reaching compliance goals and still have personnel sued or arrested for illicit behavior.[313] Perhaps the best illustration of this dichotomy is the pre-scandal corporate environment of Enron.

1. Enron's "Culture of Cleverness"[314]

According to Marion Crain, the phenomenon of "ideological proletarianization"[315] has emasculated the professional employee in the boundaryless workplace by restricting her professional values and purpose to "the realm of technique."[316] In other words, the professional has lost her sense of calling.[317] "With the loss of ideological control, the bonds connecting professionals to the larger community that they are charged with serving become frayed."[318] As a result, professional employees adapt "by aligning [themselves] with the employing institution and advancing institutional goals and interests rather than those of clients, professional values and ethics, or larger societal interests."[319] Such was the employment scenario at Enron in the wake of one of the most successful corporate mergers in recent times. "This seventy billion dollar company . . . was poised to dominate the twenty-first century economy."[320]

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312. Lobel, *supra* note 23, at 177 (citing Jody Hoffer Gittell & James Powers, Lecture at Sloan School of Business, MIT: Organizing Work to Support Relational Coordination (Mar. 14, 2000)).

313. Bird, *supra* note 235, at 179-80.

314. *Id.* at 180 (citing Ronald R. Sims & Johannes Brinkmann, *Enron Ethics (Or: Culture Matters More Than Codes)*, 45 J. BUS. ETHICS 243, 246 (2003)).

315. Crain, *supra* note 135, at 559.

316. *Id.* at 559 (citing Charles Derber, *Managing Professionals: Ideological Proletarianization and Mental Labor*, in PROFESSIONALS AS WORKERS: MENTAL LABOR IN ADVANCED CAPITALISM 63, 172 (Charles Derber ed., 1982)).

317. *Id.* at 560.

318. *Id.* at 559 (citing Derber, *supra* note 298, at 173).

319. *Id.* at 560 (citing Derber, *supra* note 298, at 174-75).

320. Bird, *supra* note 217, at 178-79.

As a leader in the energy industry, Enron followed a bevy of institutional rules including a code of ethics and *Principles of Human Rights*, which were conditions of employment. [321] Yet, through a scheme of self-dealing transactions[322] and after a host of failed quasi-partnerships,[323] Enron became indebted for millions of dollars of falsely reported earnings. Robert Bird describes Enron's situation as:

> A "culture of cleverness" [which] devolved from a pursuit of excellence to a mere appearance of excellence through elaborate self-dealing transactions. Even with the presence of a specific code of ethics, ethical boundaries at Enron simple eroded away in a rule-breaking, intimidating, aggressive work environment. . . . Enron's implicit corporate culture, not its explicit code of ethics, established the norms of this workplace.[324]

By observing the circumstances that led to Enron's demise, it becomes clear that corporate culture drives the norms of an organization regardless of explicit workplace codes and principles of behavior. In that light, Part IV analyzes changes in workplace values over time in order to explain how compliance mechanisms used by corporations have little real effect on actual corporate behaviors.

IV. ASSESSING A NEW SELF-REGULATING FRAMEWORK OF VALUES

With the dichotomizing effect of rigid compliance mechanisms and otherwise expedient corporate norms, intensive self-regulation in the private sector has evolved into systemic self-help.[325] Through the corporate self-help philosophy, private enterprise has amassed the power to negotiate governmental policy, to prevent or reduce legal liability, mask corporate illegalities, and ignore employment protections.[326] The private sector has succeeded in amassing power under the banner of preventive maintenance, central to which is the shifting of all economic, professional, and legal risk

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321. *See id.* at 179. See ENRON, CODE OF ETHICS (July 2000), http://www.thesmokinggun.com/graphics/packageart/enron/enron.pdf to view Enron's Code of Ethics handbook.

322. *Id.* at 179-80 (citing Sims & Brinkman, *supra* note 311).

323. *Id.* at 180 (citing Catharine E. Stark, Comment, *Regulating Corporate Governance: Amended Rules of Professional Code of Conduct Allow Lawyers to Make the World a More Ethical Place*, 53 CATH. U. L. REV. 1195, 1209-10 (2004)).

324. *Id.*

325. See Lobel, *supra* note 3, at 972.

326. *See generally* pp. 142-43.

to the boundaryless employee.[327]   Employees feel the shift as a loss in autonomy, security, and jobs.

Boundaryless companies have shifted employment norms in the new workplace by introducing what I call *negative behavior motivators* into the workforce, which undermine the employment experience. Specifically, the new workplace implements negative motivators to diminish employees' expectations of reliable employment.   For example, there are patent distinctions in the way boundaryless employees experience job security, loyalty, and camaraderie in the boundaryless workplace, all of which have been diminished in the new workplace orientation.[328]   Essentially, otherwise qualified and productive employees are increasingly oriented, by design, *not* to rely on these attributes or values which are central to building future-oriented expectations with their companies.   Employees are, instead, internalizing new workplace values, which negatively impact the employment experience and diminish professional expectations.

Orly Lobel provides an example: "While many law firms formally offer reduced hour arrangements and flexible parental leave policies, these have little effect on the lives of the lawyers employed by the firm, since the cultural underpinning of law firms, the "culture of success," prevents lawyers from utilizing these formal arrangements."[329]

Catherine Fisk captures the rationale behind corporate encouragement of diminished workplace expectations in her review of Levis Strauss and Nike Corporation's recent management methods.[330]   She explains that concern for job security is not only caused by the realities of working transience but by greater corporate strides to ultimately outsource employment to foreign industries.[331]   Fisk reveals that "neither Levi Strauss nor Nike makes a thing in the U.S. if you focus only on the activities conducted within the boundaries of each corporation."[332]   As a result, "[l]ittle remains in the

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327.   *See* Fisk, *supra* note 163, at 840-41 (discussing AT&T's method of rationalizing its enormous layoffs by classifying its employees as "vendors of skills" and how this "well-chosen metaphor magically shifts all risk of economic downturn from AT&T . . . to its former employees.").

328.   *See* Stone, *supra* note 13, at 775 (stating that there is a absence of job security and commitment from the employers).

329.   Lobel, *supra* note 26, at 178.

330.   *See* Fisk, *supra* note 168, at 857-59.

331.   *See id.* at 858.

332.   *Id.* at 857.

United States except the design and marketing employees and people to manage the companies' fantastically valuable trademarks."[333]

Today, the employer is obligated to the fictitious *corporate* person, the trademark, not to the employee or even the product.[334] Accordingly, corporate loyalty is the tenor of fidelity in the new workplace, the unspoken code of conduct.[335] Nike, for example, was a company who "led its industry in the development of guidelines for labor relations, both internally and among its suppliers, with the creation of the Nike Code of Conduct."[336] Nike's code succumbed to ridicule after labor exploitation issues in foreign sweatshops arose.[337] The company blamed sweatshop-like working conditions on the questionable ethics of foreign contractors, not on its failure to follow its own code of conduct.[338] "As far as Nike was concerned, it had little control over, little information about, and certainly no responsibility for the conditions under which independent companies spread all over the world actually sewed athletic wear and shoes."[339]

As can be seen, companies are shifting workplace values away from future-oriented employment expectations, alongside shifts in economic and legal risk. Four overarching values in the self-regulating framework are responsible for the shifts in risk, functioning specifically to develop employment insecurity: protectionism, unilateralism, embedded authority, and deterrence incentive.[340] These attributes embody the self-help framework as counter measures against the old workplace paradigm. As part of the self-regulatory ethos, each attribute wreaks havoc on the private employment experience.

A. Internal Protectionism

In the boundaryless workplace, employees are offered employability instead of job security.[341] Employees are re-skilled "to develop their human

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333. *Id.* at 858.
334. Fisk, *supra* note 168, at 842.
335. *See* Avery & Crain, *supra* note 176, at 69.
336. Gregory Todd Jones, *Trust, Institutionalization, and Corporate Reputations: Public Independent Fact-finding from a Risk Management Perspective*, 13 U. MIAMI BUS. L. REV. 121, 152 (2005).
337. *Id.* at 152-53.
338. Fisk, *supra* note 168, at 858 (citing Brief for the Petitioners, Nike v. Kasky, 539 U.S. 654 (2003) (No. 02-575)).
339. *Id.* at 858 (citing Brief for the Petitioners, Nike v. Kasky, 539 U.S. 654 (2003) (No. 02-575)).
340. *See infra* Part IV.A-D.
341. Stone, *supra* note 131, at 505.

capital"[342] in order to meet corporate service demands as they change in the marketplace. In this process, employees run the risk of becoming instruments for corporate success.[343]

> If the individual is seen as an instrument, even an "empowered" instrument, he or she is there to be used by others for their purposes. Such an instrumental contract, no matter how well intentioned or how benevolently interpreted, is a denial of democracy. . . . [P]erhaps the only way[] to match our needs for democracy in our critical institutions with our need for efficiency is to think of our organizations as membership businesses.[344]

The "instrumental contract"[345] often provides employability under the terms of employment-at-will doctrine, which has the luxury of offering horizontal performance promotions and creating problem-solvers with no authority and supervisors without management pay. Private sector employers "ignore the fact that . . . the absence of real worker involvement in the managerial decision-making process generate[s] *employee insecurity*."[346]

Today's employees increasingly experience diminished job satisfaction or low morale,[347] often caused by employment insecurity. According to one scholar:

> Employees reasonably fear that suggested productivity enhancements will be rewarded— not by greater firm appreciation—but by layoffs caused by the need for fewer workers. Employees also believe that quality improvements will increase shareholder equity and managerial bonuses, but have no impact on basic worker compensations.[348]

Under the circumstances of boundaryless employment insecurity, a paradox occurs.[349] Declining morale begins to correlate with employees' heightened willingness to work longer work weeks, often with fewer benefits and little chance of an internal promotion. In other words, insecurity creates employees who are more willing to work harder even as they are less satisfied with their work environments and receive fewer returns on their efforts.[350] In short, the psychological rewards of

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342. *Id.* at 505.
343. *See* Lobel, *supra* note 26, at 138-39.
344. *Id.* at 138.
345. *Id.*
346. Craver, *supra* note 109, at 593 (emphasis added) (citing LESTER THUROW, HEAD TO HEAD 137-40 (1992)).
347. *Id.*
348. *Id.* at 593.
349. Stone, *supra* note 2, at 568-69.
350. *See* Bird, *supra* note 238, at 169-70; *see also* Craver, *supra* note 109, at 593.

boundaryless work weaken while labor intensifies. In this environment, employees become increasingly committed to employment goals as business instruments, their values retooled by the policy of employability. In a real way, the culture of employability impedes employee gratification as it multiplies fears of unemployment in a corporate effort to generate what I call "controlled insecurity."

Controlled insecurity defines the internal corporate protectionism that moves employers to offer employability rather than job security. Protectionism shields companies from employment offenses while it relegates corporate loss to the employee who has essentially become an employment instrument instead of a professional colleague.[351] Internal protectionism is antithetical to democratic practices in the workplace. It is packaged in the new psychological contract as an innovative way for employees to appreciate job transience instead of permanence, and fair pay instead of competitive salaries.[352]

The reality is that private sector employees lose bargaining power under the auspices of controlled insecurity via novel work environments, horizontal management strategies, and threats of job loss. Losses in the ability to bargain fairly is perhaps best illustrated by the example of "an employee who wishes to complain about a lack of advancement in the new environment . . . [but is] unsure what exactly constitutes promotion and whether she actually has been denied one."[353] Clearly, "new high-commitment management models are colliding with 'the job-insecurity reality' found in American corporations."[354] American workers are the benefactors of the wreck that results, aptly illustrated by rising unemployment numbers.

B. Unilateralism

Some scholars reason that companies trending into self-regulation "need to build commitment, not blind loyalty."[355] Generally speaking, the terms commitment and loyalty are often used interchangeably. Yet, the two ideas are not synonymous in the boundaryless business world. A commitment is a vow or pledge that something *will* be done, while loyalty is reliability or

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351. *See* discussion *supra* Part IV.A.

352. *Id.*

353. Berger, *supra* note 12, at 497 (paraphrasing Stone, *supra* note 2, at 607).

354. Stone, *supra* note 13, at 782 (emphasis added) (citing ROSABETH MOSS KANTER, ON THE FRONTIERS OF MANAGEMENT 190 (1997)).

355. *Id.* at 775 (paraphrasing ROSABETH MOSS KANTER, E-VOLVE!: SUCCEEDING IN THE DIGITAL CULTURE OF TOMORROW 225 (2001)).

fidelity because something *has* been done. The real difference is a matter of relationships.

Primarily, loyalty is retrospective, based on a history of mutually validating relations. Commitment, however, is self-directed and goal oriented. Commitment "measures an employee's performance and . . . implicates an employee's sense of attachment, affiliation, and identification with the organization."[356] In the workplace, commitment essentially creates an obligor/obligee relationship, whereby an employee works to reach targeted goals as set out by the employer. Therefore, redefining the new workplace in terms of commitment rather than loyalty minimizes ideals like fidelity and reliability, and recasts employees as obligors in their employment experience.

The problem in dispensing with loyalty in the workplace is that mutuality of contract is lost and more easily replaced with the instrumental contract which offers employability rather than employment security.[357] Mutuality of contract is best described as a mutually beneficial agreement formed as the result of arms length negotiations.[358] Losing loyalty as a value in the workplace extinguishes mutually beneficial agreements, which translates into concerns for job security. The result is an obligation-driven employment experience, which, unfortunately for employees, produces the best managerial environment for unilateral control over the workplace, or unilateralism.[359]

Unilateralism is used here to describe a lack of mutuality in the workplace. Unilateralism is problematic because "[t]he essence of industrial democracy is the right of employees to influence decisions affecting their working lives."[360] For today's employee, however, no matter how co-determined new workplace hierarchies are, they are still functionally isolated from centralized administrators who determine their futures. Therefore, employees are committed to futures with no "anchor relationships," no

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356. Bird, *supra* note 238, at 169 (citing Vincent Cassar, *Violating Psychological Contract Terms Amongst Maltese Public Service Employees: Occurrence and Relationships*, 16 J. MANAGERIAL PSYCHOL. 194, 197-98 (2001); Richard T. Mowday et al., *The Measurement of Organizational Commitment*, 14 J. VOCATIONAL BEHAV. 224 (1979)).

357. *See* Paul Berks, *Social Change and Judicial Response: The Handbook Exception to Employment-At-Will*, 4 EMP. RTS. & EMPL. POL'Y J. 231, 239-40 (2000).

358. *See id.*

359. *See id.* at 243-44.

360. Craver, *supra* note 109, at 596 (quoting R. Willis, Minister for Employment and Industrial Relations, *Employee Participation News* No. 3, at 8 (1994), *quoted in* Lord Wedderburn, *Trust, Corporation and the Worker*, 23 OSGOODE HALL L.J. 203, 249 (1985)).

definitive direction, and no voice in the employment experience. This forces employees into "isolating roles and routines within which they are unable to fully recognize one another in an empowering and mutually confirming way."[361]

In order to diminish this isolation, some authorities recommend providing employees with welcoming gifts, mentors, and periodic recognition ceremonies, as ways to improve employee morale.[362] However, these recommendations can be viewed as somewhat patronizing to the un-empowered employee.

C. Embedded Authority[363]

"[C]ompetency-based organizations, total quality management, and other high-involvement work practices . . . define the new workplace . . . ."[364] These technical innovations are meant to bring collaborative personnel together as laterally integrated work groups. With the redistribution of office personnel, however, employees have seen the dismantling of the career ladder against which modern "criteria for advancement are not clearly specified"[365] and no explicit paths to promotion exist.

While the career ladder may be gone, corporate power structures still exist and operate, arguably, with greater tendencies toward oppression than hierarchical chains of command. Embedded within today's amorphous employment frameworks are "informal and invisible power structures."[366] When performance is the gauge for pay and promotion, and everyone is teamed at the same or similar performance levels, motivated employees will find ways to stand out. In this process, informal networking is used,

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361. Lobel, *supra* note 26, at 156 (citing Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U REV. L. & SOC. CHANGE 369, 371 (1982)).

362. Stone, *supra* note 13, at 774-75 (citing KANTER, *supra* note 352, at 225).

363. *See* Stone, *supra* note 2, at 606-07. Stone's use of the term "invisible authority" is a slightly different referent from my term "embedded authority" used here. I use the term "embedded authority" to suggest that even informal factors can create authority in the workplace, such as informal networking where men often amass most of their power base on the job. Also, "embedded authority" suggests that while the workplace hierarchy may have embedded itself into lateral functions, the quality of an *authority hierarchy* is still recognizable to employees as it exists laterally.

364. Stone, *supra* note 13, at 780-81.

365. Stone, *supra* note 2, at 606.

366. Berger, *supra* note 12, at 497 (quoting Stone, *supra* note 2, at 525).

particularly by men, to open informal doors to new opportunities.[367] Informal networking, however, tends to enable "[s]ubtle patterns of non-interaction"[368] and "blur[] . . . lines of authority."[369] In addition, some employees and their "facilitator supervisors" are choosing to use subtle "non-interaction or exclusion"[370] behaviors in order to distance undesirable personnel from the work process. As a result, flat hierarchies do not move personnel up or down the career ladder, but move employees in or out of the work *group* instead.

Lateral networks such as these can actually "perpetuat[e] sex and racial segregation"[371] and "may well turn out to be more remote and impenetrable for women and minorities than the old power structures."[372] Stone explains: "Clique members use the tools of ostracism, belittlement, verbal harassment, innuendo, nefarious gossip, and shunning–tools that are difficult to identify or remedy. And often the targets are newcomers, atypical employees, [or] those who are not part of the old crowd."[373] These segregative behaviors create what I call an "exclusion effect," which progresses some employees toward success while it holds others back in a clandestine positioning for recognition. One result of the exclusion effect is that behaviors used to ostracize employees are associated with "more than ninety-five percent"[374] of disparate treatment complaints filed against companies.[375]

The exclusion effect is also created by what is often called "first reporting" practices. Essentially, first reporting is the practice of tattle-telling in the business world, and has competitive employees feeding workplace issues to team manager personnel sometimes called supervising "facilitators."[376] Facilitator supervisors intercede as neutral low-level

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367. Stone, *supra* note 2, at 607 (paraphrasing Susan Sturm, *Race, Gender and the Law of the Twenty-first Century Workplace: Some Preliminary Observations*, 1 U. PA. J. LAB. & EMP. L. 639, 642 (1998)).

368. Berger, *supra* note 12, at 497 (paraphrasing Sturm, *supra* note 367, at 642).

369. *Id.*

370. *Id.*

371. Stone, *supra* note 2, at 607.

372. *Id.*

373. *Id*. at 608; *see* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1694-95 (1998); David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 477-78 (2000).

374. Berger, *supra* note 12, at 498-99 (citing Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 U. ILL. L. REV. 583, 588 (1999)).

375. *Id.* (citing Yelnosky, *supra* note 374, at 588).

376. Lobel, *supra* note 26, at 170.

problem solvers, whose primary goals are generally quality control, compliance management,[377] and deterrence of employment claims. Apparently, however, facilitator intervention is not working over ninety-five percent of the time.

D. *Deterrence Incentives*

For some scholars, "the new workplace is far more attuned to the interests of the employees,"[378] or so it appears. Wal-Mart has attempted to prove that idea. Upon the creation of a "Corporate Compliance Team," Wal-Mart announced it was newly dedicated to "becom[ing] a corporate leader in employment practices."[379] Wal-Mart's efforts as the world's "largest private employer"[380] to become employee-centered have resulted in streamlined internal compliance structures "to secure legal advantages of self-regulation and to erect a partial shield against regulatory and judicial intervention."[381] Efforts have come in the wake of multiple "legal challenges under wage and hour laws, immigration laws, labor laws, and discrimination law—including the certification of an unprecedented multi-million member class action."[382]

Now, Wal-Mart managers receive bonuses according to their success in hiring minority employees.[383] Diversity hiring programs are examples of deterrence measures which have led some courts away from imposing strict vicarious liability for injury to employees in the workplace, in lieu of duty-based liability.[384] Companies can avoid liability in many instances by showing they acted reasonably in taking due care[385] in their efforts to deter employment violations.[386] In other words, duty-based liability only holds a firm liable if it fails to "take appropriate actions to discourage

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377. *Id.* at 170-71.

378. Reuben, *supra* note 4, at 19 (citing David Wheeler & Maria Sillanpaa, *Including the Stakeholder: The Business Case*, 31 LONG RANGE PLANNING 201 (1998); Rienk Goodijk, *Partnerships at the Corporate Level: The Meaning of the Stakeholder Model*, 3 J. CHANGE MGT. 225 (2003)); *see* MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 80-85 (2d ed. 1998).

379. Estlund, *supra* note 1, at 320 (citing *Wal-Mart Details Progress Toward Becoming a Leader in Employment Practices*, WalMart, Inc., News Release (June 4, 2004), *available at* http://walmartstores.com/FactsNews/NewsRoom/4939.aspx (last visited Mar. 8, 2010)).

380. *Id*. (citing Wal-Mart, Inc., News Release, *supra* note 379).

381. *Id.* at 322-23.

382. *Id.* at 320.

383. *Id.* (citing Wal-Mart, Inc., News Release, *supra* note 379).

384. Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 692 (1997).

385. *Id.*

386. *Id.*

wrongdoing."[387] Duty-based liability does not impose full sanctions on a company for its *failure* to prevent wrongdoing, only for its failure to have deterrence measures in place.[388]

One concern with the changing standard of care in employment cases is the potential for "under-deterrence."[389]   Under-deterrence results when companies have massed great effort to impose visible compliance mechanisms into the workplace by conducting self-reporting, for example, with the effect of mimicking true effectiveness.[390] Mimicking means that companies continue to conduct prohibited behavior under the guise of self-reporting with reduced potential for sanctions after a period of observable implementation occurs.[391]

So, are employees really better off working under the self-regulatory scheme, or do they just appear better off? All indications point to massive corporate efforts to create a grand illusion of improved employment practices when, in reality, change in language is the result of convincing corporate rhetoric.   With this view, Part V explores the failure of deliberative democracy in the boundaryless workplace and illustrates how privately enterprised work environments are inevitable breeding grounds for conflict.

V.   CONTRASTING THE SELF-REGULATING FRAMEWORK OF VALUES WITH CONVENTIONAL GOALS OF DELIBERATIVE DEMOCRACY

Many believe that democratic activity is the freedom that individuals possess to act in their own individual best interests, and when these interests are aggregated, laws are then made in the interest of public order. Phillip Harter, dispute resolution pioneer, suggests that the goal of "deliberative democracy" means a little more than that.[392] Harter offers the idea that deliberative democracy is "not just the aggregate of individual preferences, but rather a group quest for what is the public good[.]"[393] This view

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387. *Id.*
388. *See generally id.* at 692-93.
389. Krawiec, *supra* note 61, at 491.
390. *Id.* at 491-92.
391. *Id.* at 492 (citing Kimberly D. Elsbach, *The Architecture of Legitimacy*, *in* THE PSYCHOLOGY OF LEGITIMACY 391 (2001)).
392. Philip J. Harter, *In Search of Goldilocks: Democracy, Participation, and Government*, 10 PENN. ST. ENVTL. L. REV. 113, 121 (2002).
393. *Id.*

proposes that the practice of democracy is not simply about ordering the interests of members of a society, but about pursuing common interests that produce the highest good. Fundamental to this idea is the premise that democratic practices are cooperative in nature whereby best practices are pursued in the interest of the broadest representation of stakeholders involved, or for the "public interest."[394] In this venue, democracy is not about order but about common advantage.[395]

Harter explains that baseline behavior needed for deliberative democracy is "faithful[ness] to the essential criteria"[396] or values determined to be essential in any particular decision-making process.[397] Participants in the process themselves decide what values are essential to any structured decision-making, and maintain the objective of reinforcing those values throughout the deliberative process.[398] The deliberative process entails the exercise of integrating essential ideals into a decision-making design.[399] When democratic, the result is an improved environment of self-government.

Such is not the case for the self-regulating corporate environment. The boundaryless workplace fails deliberative democracy in both process and product by diminishing natural goals of cooperative enterprise and by advancing order instead of common advantage. The result is a set of perverse values with which employees must function in the absence of natural goals of deliberative democratic organization.

A. Integrating Democratic Values into the Workplace

There are natural values, or goals, of deliberative democracy that are practiced in private cooperative enterprise. Certain goals in the cooperative business model are necessary for creating a harmonious work environment. A few of them are: (1) reinforcing job confidence, (2) increasing workplace satisfaction, (3) improving employment policy, and (4) optimizing professional relationships.[400] These functions parallel democratic values of civil society such as social connection, reciprocity, civic virtue, and public trust, for example.[401] In short, cooperative enterprise is tied to improving

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394. *Id.*

395. *Id.*

396. *Id.* at 129.

397. *Id.*

398. *Id.*

399. *Id.*

400. *See infra* Part V.A.1-4.

401. Reuben, *supra* note 4, at 20 (citing ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY, 163-87 (1993)).

democratic values in the workplace by reinforcing job confidence and satisfaction, optimizing sound policy, and promoting good relationships in the work environment. The following examples illustrate the importance of aligning the workplace with democratic ideals as they exist in cooperative enterprise.

1. Social Connectedness Reinforces Job Confidence

Job confidence is one measure of the social connectedness an employee feels in her work environment. "Work is closely linked to [constructs] of agency, identity, personality, or, more broadly, of the 'self.'"[402] Accordingly, when an employee experiences ownership in her labor, her sense of *self* improves.[403] Research has found that cooperative workplaces create employees who increase their own ability to acquire skills in self-management.[404] More confident employees tend to improve their self-management skills, improving job performance.[405]

An employee's confidence in her job performance is self-actualizing. A self-actualized employee has labored through confidence issues and organizational skills–building to become a more productive member of the work environment. There is often great psychological effort involved in achieving greater productivity and higher quality outcomes through self-actualized behavior.[406] Scholars refer to such effort as "emotional labor."[407] Emotional labor improves the degree with which employees use interpersonal skills to solve problems and build community.[408] "Interpersonal skills includ[ing] friendliness, teamwork, and ability to fit in"[409] are the result. Therefore, job confidence contributes greatly to an employee's ability to attain healthy interpersonal skills and to build workplace community through a necessary self-actualizing process. The interpersonal skills attained then build social cohesiveness between

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402. Lobel, *supra* note 26, at 139 (citing JOHN F. WITTE, DEMOCRACY, AUTHORITY AND ALIENATION IN WORK: WORKER'S PARTICIPATION IN AN AMERICAN CORPORATION (1980)).

403. *See* Hoffman, *supra* note 9, at 53.

404. *See id.*

405. *See id.*

406. *See* Lobel, *supra* note 26, at 165-66.

407. *See id.*

408. *See id.*

409. *Id.* at 165 (citing Philip Moss & Chris Tilly, *"Soft" Skills and Race: An Investigation of Black Men's Employment Problems*, 23 WORK & OCCUPATIONS 252, 256 (1996)).

employees. As described, workplace performance reflects a sense of self, which actualizes over time to become social cohesion in the workplace.

In the boundaryless workplace, however, the expectation is that if a prospective employee is friendly, flexible, and has a good attitude then her work performance will be solid. Many companies interview with the goal to "hire for attitude, train for skill."[410] In reality, this adage is misconceived. As described, it takes enabling an employee to self-actualize as a relevant member of her work environment to create standing in the group and in order for her to reach top performance levels. However, modern employers expect that happy faces are productive hands and with the volatility of the job market, they are not invested in the long term efforts of workplace community-building that high performance usually needs. Democratization of the workplace needs confident professionals at work building social connectedness or social capital in the work environment. What companies are not realizing is that without job confidence, the opportunity for self-actualization is lost to an employee, and work becomes less satisfying and less productive.

2. Reciprocity Increases Job Satisfaction

Reciprocity is the degree of mutuality that exists in a relationship, and from a collective bargaining standpoint, "a meaningful counterweight to undeterred employer discretion[.]"[411] In the workplace, true mutuality is cohesiveness of employment interests and benefits employees share and employers support.[412] Substantial employee participation functions as a way to generate mutuality or a shared sense of workplace values and goals.[413] Increased employee contribution in problem-solving and setting job performance goals "increases productivity by offering an efficient way of extracting information from [and between] employees."[414] Information-sharing like problem-solving and setting performance goals increases "self-monitoring, discipline, and responsibilit[y]."[415] Moreover, a high level of

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410. Avery & Crain, *supra* note 176, at 26.

411. Befort, *supra* note 7, at 393.

412. *See generally* Lobel, *supra* note 26.

413. *Id.* at 181 (citing James R. Lincoln & Arne L. Kalleberg, *Commitment, Quits and Work Organization in Japanese and U.S. Plants*, 50 INDUST. & LAB. REV. 39, 56 (1996)).

414. *Id.* at 134 (citing Stephen M. Bainbridge, *Privately Ordered Participatory Management: An Organizational Failures Analysis*, 23 DEL. J. CORP. L. 979, 1010-12 (1998)).

415. *Id.* at 134-35 (citing Bainbridge, *supra* note 414, at 1022-28).

information flow between employers and employees also creates greater tendency for loyalty.[416]

Information flow is merely one example of reciprocity moving through the workforce. Acts of reciprocity, like information-sharing and policy making, essentially, capture the degree of job satisfaction employees experience in their work. High job satisfaction is arguably the greatest indicator of a healthy work environment. When employees believe they share the benefits involved in job productivity, then the give-and-take of reciprocity improves the democratic forces present in the workplace.[417] In return, employers tend to experience lower turnover, higher productivity, and increased loyalty to the organization.[418]

3. Cultivating Good Policy Promotes Loyalty

Good policy-making practices need information sharing and loyal stewardship for success. Principled decision-making arises from input opportunities employers offer their workforce, such as opportunities for participation and feedback. Input is a form of information sharing, and gives reverence to the expertise employees hold in their jobs. Input creates a degree of reciprocity, which is a building block for loyalty.

In order for employees to garner loyalty to their workplace, there must be opportunity for growth and entitlement to the autonomy of authority present in an employee's work practices.[419] In other words, an employee wants to *own* her position, which means owning the authority and expertise that come with her position. Owning expertise produces feelings of trustworthiness and creates standing or legitimate status in the group.[420]

When an employee faces conflict in the workplace and does not own entitlement in her skill-set, and therefore, does not experience legitimate status in her position, she may fear that addressing conflict will result in losing autonomy or control instead of as a means to gain power through resolution.[421] Issues of entitlement are directly related to employees'

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416. *Id.* at 135 (citing Richard Freeman & Edward Lazear, *An Economic Analysis of Works Councils*, *in* WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS 28-30 (1995)).

417. *See id.*

418. Bird, *supra* note 238, at 169-70.

419. *See generally* Hoffman, *supra* note 9.

420. *See id.* at 54.

421. *See id.* at 53.

perception of standing within a group.[422]   When an employer extracts autonomy from an employee's expertise in the workplace, she signals bias and implicitly diminishes an employee's membership in the group.[423] When an employee feels cast out of the group, she no longer experiences ownership in the social capital being created in the workplace[424] and no longer feels socially connected. When personnel perceive that neutrality has been lost, they begin to see administrative decision-making as subjective and unprincipled.[425]

Perceived loss of employer neutrality creates an employee who loses faith in factual decision-making processes in the workplace.[426] This loss puts an employer's policy management in a precarious situation because the employee begins to perceive biased treatment rather than objective, rational policy implementation.[427]   Perceptions of bias weaken the fabric of democracy in the workplace one decision at a time.[428] Consequently, the connection between democratic values and principled decision-making is central to understanding where employee claims of employment discrimination may originate. Inevitably, principled management practices are necessary in developing integrity and garnering loyalty within the ranks of a workplace community.

4.   Optimizing Trust Improves Workplace Relations

In his study of the relationship between trust and risk management, Gregory Jones notes that "trust is important in a number of ways: it enables cooperative behavior; promotes adaptive organizational forms . . . [and] reduces harmful conflict . . . ."[429]   He suggests that scholars have "demonstrated that legalistic controls inhibit the development of trust."[430] If this it true, then legalization of workplace policies and formalized ethics codes do little to promote trust within a corporation, and may actually hinder

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422.   *See id.* at 54.

423.   *See id.*

424.   *Id.*

425.   *Id.*

426.   *Id.*

427.   *Id.* (explaining that "[i]f people feel that authorities act fairly in their decisionmaking, they believe they can obey authorities' orders without fear of exploitation. By contrast, if authorities seem to act unfairly, people fear exploitation and obedience becomes less likely.").

428.   *Id.* ("[I]f [employees] feel poorly treated, they enter 'individual mode' and act primarily to maximize individual short-term outcomes rather than focusing on fairness.").

429.   Denise M. Rousseau et al., *Not So Different After All: A Cross-Discipline View of Trust*, 23 ACAD. MGMT. REV. 393, 394 (1998).

430.   Jones, *supra* note 336, at 136-37 (citing Rousseau et al., *supra* note 429, at 399).

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the development of trust between personnel. This fact alone, illustrates the importance of building trust as a structural component in the workplace.

"Trust implies that contributions will be reciprocated."[431] Thus, trust builds cooperation. "Having an institutional foundation for cooperation helps reinforce expectations of supportive behavior, thereby strengthening whatever cultural traits may have led to cooperation in the first place."[432] That foundation can advance social capital in the workplace.

To social law scholars "[i]t is generally accepted that trust is 'socially embedded'"[433] in a context and in an environment, and is "shaped by dynamics specific to particular social settings."[434] One such dynamic is described as "bridging" social capital.[435] Bridging social capital is the "social glue" that integrates or bridges cooperative tendencies from numerous diverse groups of people toward common goals.[436] These cooperative tendencies originate from individuals who experience a heightened sense of well being and can nurture positive workplace relations. In other words, bridging is the result of people trusting others out of feelings of self assurance and positive expectation. Therefore, businesses would benefit from internal mechanisms which nourish cooperative tendencies.

The bridging process is important to a company's bottom line, as well. Numerous scholars associate trust with economic success[437] and as "an important correlate of stable democratic government."[438] Numerous global studies have found "positive association between trust and economic success," particularly between the years 1960-1993.[439] During this period, "Americans lived in a land where natural abundance and growing

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431. Bird, *supra* note 238, at 169.

432. Frank B. Cross, *Law and Trust*, 93 GEO. L.J. 1457, 1507 (2005) (citing Anirudh Krishna, *Creating and Harnessing Social Capital*, *in* SOCIAL CAPITAL: A MULTIFACETED PERSPECTIVE 71, 76 (2000)).

433. *Id.* at 1504 (citing Andrew C. Wicks et al., *The Structure of Optimal Trust: Moral and Strategic Implications*, 24 ACAD. MGMT. REV. 99, 101 (1999)).

434. *Id.* (quoting Wicks et al., *supra* note 433, at 101).

435. *See generally id.* at 1539-42.

436. *See id.* at 1542.

437. *Id.* at 1479 (citing Rafael La Porta et al., *Trust in Large Organizations*, 87 AM. ECON. REV. 333, 334-35 (1997); Stephen Knack & Philip Keefer, *Does Social Capital Have an Economic Payoff?*, 112 Q.J. ECON. 1251 (1997)).

438. *Id.* at 1481 (citing John Brehm & Wendy Rahn, *Individual-Level Evidence for the Causes and Consequences of Social Capital*, 41 AM. J. POL. SCI. 999, 1006 (1997)).

439. *Id.* at 1479 (citing La Porta et al., *supra* note 437, at 334-35; Knack & Keefer, *supra* note 437, at 1251).

industrialization created real opportunities that were the basis for American optimism."[440]   This was the period of an emerging middle class.[441] Workplace optimism has been replaced in large part by fear in the twenty-first century and, whether they are aware or not, companies are hurting because of it.

B.   The Self-Regulating Framework of Values Fails Deliberative Democracy in the Workplace

Cooperative workplace goals such as reinforcing job confidence, increasing workplace satisfaction, improving employment policy, and optimizing relationships are central to the success of deliberative democratization of the workplace. These goals promote democratic values like social connectedness, reciprocity, civic virtue, cooperation, and trust, among others. The question becomes, can the conventional construct of deliberative democracy meaningfully engage employment values as they have evolved within the boundaryless workplace?

As described, the new self-help philosophy has created a framework of *negative* values motivating boundaryless employees toward diminished job confidence and satisfaction through unreliable policies and relationships. Attributes of protectionism, unilateralism, embedded authority, and deterrence initiative embody the self-help framework and entrench democratic workplace values in a dogma of self-serving goals. Questions abound as to the feasibility of integrating deliberative democracy into the self-regulating corporate framework under the circumstance of such negative posturing. But, does it make sense to devalue cooperative goals when they are the cornerstone of an effective work environment? To diminish job satisfaction and reward? To expect poor policy to facilitate improved productivity? To formally deter misbehavior while privately encouraging it? These queries have real-time answers.

1.   Does the Private Sector Promote Job Confidence as a Protectionist Work Environment?

In 2002, the Sarbanes-Oxley Act, or the Whistle Blower's Act, was passed to require among other things that securities corporations file "internal control reports" showing financial reporting practices and

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440.   Mitchell, *supra* note 24, at 945.
441.   *Id.* at 945.

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disclosing ethics codes.[442]   The Act also prohibits retaliation against an employee who reports incidences of suspected illegal behavior on the part of a publicly traded corporation. Federal protection was bestowed on "whistle-blowers" after the unfolding of scandals like Enron, where internal compliance mechanisms were not deterring unlawful firm behavior.[443] Essentially, reluctant employees needed the big stick of federal legislation both to prompt reporting of unethical behavior and to protect against employer retaliation after reports were made.

In effect, the observation that whistle-blowing employees must be sheltered from their own companies by federal statute illustrates the extreme inverse relationship that exists between corporate protectionism and job confidence. Because internal controls were not sufficient safeguards for corporate employees, external controls had to be exerted on pains of criminal prosecution. In short, job security was created externally for the corporate employee whose professional welfare was jeopardized by her own employer. Essentially, the existence of external controls for the private workplace is a key indicator that protectionism is prevalent and that job confidence is likely very low.

2.   Can Employees Increase Job Satisfaction Unilaterally?

In his research on the contemporary labor movement in America, Charles Craver used a set of examples to illustrate the kind of incentive packages CEOs were given for jobs well done. One scenario is as follows:

> Charles Technologies (CT) announced greater than expected losses last Friday, causing CT stock prices to fall 9.6%. After CT President C.B. Wood indicated yesterday morning that CT would immediately lay off 3000 employees to reduce operating costs, CT stock prices rose 11%. To reward President Wood for his courageous leadership, the CT Board of Directors voted this morning to provide him with a $3,000,000 bonus. At the same meeting, the Board approved President Wood's recommendation that employee wages be frozen and that workers be required to assume a greater share of rising health coverage costs.[444]

Craver uses his example to reinforce the view that "[a]verage workers have not shared in the success of business firms."[445] If economic reward is

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    442.   Krawiec, *supra* note 61, at 488 (citing 15 U.S.C.A. 7262 (West 2000); 15 U.S.C.A § 7264 (West 2002)).
    443.   See *supra* Part III.C.1.
    444.   Craver, *supra* note 109, at 587.
    445.   *Id.* at 588.

the measure of high job performance in the private sector, then disparity is clear. When many highly performing employees gain so much less earning power from their business successes than their bosses do, then disparate standards for success exist. If true, then employees work with a different code for success than employers do. Too often, the difference means boundaryless employees are working to survive while their firms work to succeed. The problem here is that working to survive requires a very different mindset than working to succeed. An employee in survival mode, who perceives that she benefits so much less than her employer, likely finds it difficult to cultivate job satisfaction on her own. It is, therefore, not surprising that some employees choose to compromise professional standards in order to prove their performance rather than exist in the stasis of survival mode. They do so by opting to cross "ethical boundaries"[446] and "deliberately break the rules"[447] to succeed. Consider that this behavior is exactly what corporations may want, and relegating employee success to what I call a "survival code" is method to the madness.

3. Have Corporations Improved Policy Through Embedded Authority?

In *Price Waterhouse v. Hopkins*[448] a female accountant was denied partnership in her company even though she was referred to as "extremely competent, intelligent, strong, forthright, . . . very productive, and creative."[449] She was considered an "outstanding professional"[450] by many partners in the firm. However, the committee who passed her over reasoned that she lacked "interpersonal skills"[451] necessary to make a good partner. Partners reported that she was "sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff."[452] One partner stated she "overcompensated for being a woman."[453] Otherwise, the plaintiff clearly excelled in competence and productivity.[454] Essentially, the firm's partners were drawn to deny her promotion using the amorphous measure of interpersonal skills to determine that she lacked the congeniality necessary to be a partner.[455]

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446. Bird, *supra* note 238, at 180.
447. *Id.* at 180.
448. 490 U.S. 228 (1989).
449. Lobel, *supra* note 26, at 167 (quoting Judge Gessel).
450. *Id.* at 167.
451. *Id.*
452. *Id.*
453. *Id.* at 167-68 (quoting *Price Waterhouse*, 490 U.S. at 235).
454. *See id.* at 167 (citing *Price Waterhouse*, 490 U.S. at 235).
455. *Id.*; *Price Waterhouse*, 490 U.S. at 234-35.

The court in this case found clear discrimination based on stereotyping.[456] According to Orly Lobel, however, the holding "leaves untouched the legitimacy of interpersonal requirements"[457] on human resource decisions. This oversight is particularly troubling since job descriptions have given way to "person descriptions"[458] in the modern workplace. Essentially, improving policy for transparency against the backdrop of discrete power alliances is relatively enigmatic when discrimination is a question of affability and charisma.

4. Are Workplaces Optimizing Relationships with Deterrence Initiatives?

Cynthia Estlund describes two occurrences in the legal arena which impact the way corporations view protecting employees from workplace violations,[459] sexual harassment specifically. First, over the span of two cases, *Burlington Industries, Inc. v. Ellerth*[460] and *Faragher v. City of Boca Raton*[461] the courts rewarded defendants who took "reasonable care to prevent and correct . . . sexually harassing behavior"[462] with an affirmative defense[463] against hostile-workplace harassment suits. Second, in *Kolstad v. American Dental Ass'n*,[464] "the [c]ourt hedged an employer's liability for . . . damages by establishing an affirmative defense that these actions were contrary to good-faith efforts by the employer 'to detect and deter' discrimination."[465] These examples illustrate the tenuous relationship between rewarding prevention and requiring the exercise of real problem-solving in the workplace.

Typically, EEO claims for workplace violations are brought to mediation in order to settle disputes "quickly, amicably and cost-effectively."[466] A perceived problem with Title VII protection, however, is

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456. *Id.* at 168; *Price Waterhouse*, 490 U.S. at 257-58.

457. *Id.* at 168.

458. Stone, *supra* note 2, at 562.

459. *See* Estlund, *supra* note 1, at 336-37; *see also* Berger, *supra* note 12, at 541.

460. 524 U.S. 742 (1998).

461. 524 U.S. 775 (1998).

462. *Faragher*, 524 U.S. at 807 (1998).

463. Estlund, *supra* note 1, at 336; Berger, *supra* note 12, at 541.

464. 527 U.S. 526 (1999).

465. Berger, *supra* note 12, at 541(citing *Kolstad*, 527 U.S. at 546).

466. Occhialino & Vail, *supra* note 6, at 690.

the view that "statutes provide protections to individuals not as workers, but as members of a particular group."[467] This means that "employers are prohibited only from acting in a discriminatory manner [against a particular group]; they are not required to act on the basis of some more expansive notion of fairness or cause."[468] Therefore, timely, amicable, and cost-effective goals for the resolution of workplace disputes are not necessarily aligned with real time problem-solving of potentially endemic workplace issues, like for example, sexual harassment.

In sum, the new workplace does little to improve job confidence, address policy issues, or improve professional relationships in a manner that develops real social capital. Unavoidably, diminished social capital means little possibility of authentic democratization of the workplace. One result is the workplace becomes a breeding ground for conflict.

VI. UNDERSTANDING THE NEW WORKPLACE AS A NATURAL BREEDING GROUND FOR CONFLICT

With the rewards globalization has provided corporations, businesses are easily encouraged to maximize profit by minimizing employee returns on their work. For example, private business entities do not have to provide employee benefits or services, require optimal workplace conduct, or even reduce workplace conflict. The legal treatment of most employment contracts still allows companies to hire and fire virtually at will,[469] to offer, or fail to offer, and even alter benefit packages at their discretion. Additionally, companies can deny most employees jury verdicts for employment claims through privatized dispute resolution mechanisms. And why not? Firing an employee is typically the easiest, cheapest way for businesses to control employment issues[470] and often the remedy companies prefer.[471]

In short, today's work environment is best described as a corporate "as is" contract strategy, so buyers beware. This strategy undermines deliberative democratic efforts, which inescapably results in the loss of

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467. Befort, *supra* note 7, at 379-80 (citing Stephen F. Befort & Holly Lindquist Thomas, *The ADA in Turmoil: Judicial Dissonance, the Supreme Court's Response, and the Future of Disability Discrimination Law*, 78 OR. L. REV. 27, 68-70 (1999)).

468. *Id.* at 380.

469. Craver, *supra* note 109, at 590.

470. Jessica Oser, *The Unguided Use of Internal ADR Programs to Resolve Sexual Harassment Controversies in the Workplace*, 6 CARDOZO J. CONFLICT RESOL. 283, 309 (2005) (citing Interview with Peter Phillips, Vice President, CPR Institute for Dispute Resolution, in N.Y., N.Y. (Nov. 11, 2003)).

471. *See id.* at 308-09.

employee rights, individual standing, and professional power over the employment experience.

A.   *Employees Have Lost Rights Through Corporate Compliance*

Much of the impetus behind the self-help philosophy is a corporate effort to "maintain[] the status quo of the organization."[472]   Maintaining status quo creates a maze of conflict in the boundaryless workplace because management efforts are opportunistic, protectionist, and self-serving. However, protectionist behaviors are increasingly rewarded.

In the case of sexual harassment, for example, companies have been given the opportunity to use an affirmative defense against harassment allegations which "targets victim behavior, as well as that of the employer and the harasser."[473]   A corporation's use of an affirmative defense requires that a victimized employee "unreasonably fail[s] to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[474]   The problem with this defense is the following:

> Sexual harassment victims have traditionally tended not to utilize internal complaint procedures or otherwise formally report problems of harassment. Filing a complaint with an employer is in fact the least likely response for a victim of harassment. According to a recent study of federal employees, forty-four percent of those who had experienced sexual harassment took no action, while only twelve percent reported the conduct to a supervisor or other official . . . . [S]eventy-eight percent of survey respondents reported knowing about the formal complaint channels available to them.[475]

"Power undoubtedly plays a significant role in workplace harassment."[476]   If true, then something intrinsic in the corporate environment creates significant fear in reporting harassment, and diminishes self-interest to a bare minimum.   At issue here is the ability courts have

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472.   Amber McKinney, *The ACLU and the Propriety of Dispute Resolution in Civil Rights Controversies*, 6 PEPP. DISP. RESOL. L.J. 109, 129 (2006) (citing Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497, 512 (1993)).

473.   Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 21 (2003).

474.   Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); *see* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

475.   Grossman, *supra* note 473, at 23 (citing U.S. MERIT SYS. PROT. BD., SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, AND CONTINUING CHALLENGES 13, 30-33 (1995)).

476.   *Id.* at 37.

given corporations to undermine civil rights with proper compliance behaviors.

One way corporations shift internal power is by refocusing corporate conciliation processes toward compliance-driven outcomes.[477] When this happens, DR processes are in jeopardy of "remov[ing] 'the focus from legal rights to good organizational governance' . . . in favor of corporate efficiency."[478] These tactics have been sanctioned by the Supreme Court, which upheld "the use of IDR [internal dispute resolution] mechanisms before an employee can file a formal complaint of sexual harassment with the court system."[479] Essentially, "[w]hile appearing benevolent, these processes may in fact mask a hidden agenda to maintain order."[480]

Rules like these are part of a systemic process of shifting control from the courts to companies, and power from the workforce to the corporation. It is a shift which leaves employees with empty hands. As a result, the protection of legal workplace rights evolve into management issues, whereby an employee loses the right not to be victimized to proper corporate governance. Her avenue of grievance is wrought with agenda-laden outcomes toward improved managerial control of the workplace, rather than resolution of an individual dispute.[481]

B. Employees Have Lost Standing as Workplace Citizens

Workplace democracy presumes active participation of a citizenry of worker stakeholders.[482] This presumption centers on worker involvement through information sharing, decision-making, negotiating, and grieving offenses, among other things,[483] essentially enabling a "voice to the regulated group."[484] In the context of the workplace, "[c]itizenship provides

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477. *See id.* at 21-23 (explaining that courts have generally required that employees show that they first adhered to corporate policy handbook before filing complaint a sexual harassment).

478. McKinney, *supra* note 472, at 129; *see* Robert Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality*, 59 N.C. L. REV. 531, 540 (1981).

479. Oser, *supra* note 470, at 285 (citing Joanna L. Grossman, *The First Bite Is Free: Employer Liability for Sexual Harassment,* 61 U. PITT. L. REV. 671, 710 (2000)).

480. Susan Oberman, *Mediation Theory vs. Practice: What Are We Really Doing? Re-Solving a Professional Conundrum*, 20 OHIO ST. J. ON DISP. RESOL. 775, 817 (2005) (citing CHRISTINE HARRINGTON, SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT 78 (1985)).

481. *See* Grossman, *supra* note 473, at 21-23.

482. *See* Guy Mundlak, *Industrial Citizenship Social Citizenship, Corporate Citizenship: I Just Want My Wages*, 8 THEORETICAL INQ. L. 719, 721 (2007).

483. *See generally id.* at 719.

484. Kraweic, *supra* note 61, at 489-90.

a theoretical framework for tying rights with obligations, adding to the discourse of human rights."[485]

In this framework, deliberative participation creates employee "standing," or the entitlement to protect interests and assert objections as a party imbued with workplace rights. When worker involvement is not participatory, then employees are less able to tie rights to the obligations of their employers. Further, if employers can diminish their obligations to employees, then companies succeed in minimizing employee standing. If this is true, then the less often workers are able to assert themselves, the fewer employment rights they will have to protect.[486] In today's private workplace, for example, an employee who loses her pension plan or health insurance has not only lost her right to a pension or to health coverage, but has lost standing as a worker, and with it the power to make assertions against her loss. This is the practice of at-will doctrine in the workplace. It is the impetus for work environments of third world countries, of sweat shops, and of child labor practices. It is also, unbelievably, a potential reality for American employees who are becoming increasingly desperate for employment. This reality, the reality of desperation, is the primary goal of the self-regulating workplace and its survival code for success. Controlling avenues and outcomes of grievance is central to achieving that goal.

The ability to resolve dispute in the work environment is a primary source of employee standing because the process is necessarily tied to legitimizing employee status and to protecting rights in the workplace. When employees have no meaningful way to grieve issues concerning their rights, no substantive way to voice workplace conflict, then they have no means by which to assert standing in the workplace. Diminishing standing is not hard for a company to do.

Essentially, minimizing employee standing is as simple as the paperwork.

> [Employers] use disclaimers and signed acknowledgements in employee handbooks in order to ensure that employees do not have just-cause employment. Employers have imposed pre-dispute arbitration agreements as a condition of employment in order to cut off access to courts and, in some cases, to try to eliminate legal rights and remedies altogether.[487]

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485. Mundlak, *supra* note 482, at 721.
486. *See* Dannin, *supra* note 5, at 259.
487. *Id.*

By institutionalizing corporate grievance processes and privatizing legal claims with mandatory IDR and arbitration, private enterprise has successfully reduced an employee's ability to assert her standing to almost zero. In a domino effect, therefore, she holds no rights, no standing, and ultimately, no power.

C. Employees Have Lost the Power to Manage Conflict

Self-regulating organizations have gained the power to "promulgate their own rules and implement their own mechanisms to enforce these rules."[488] "This 'shifts the locus of lawmaking activity inside the corporate hierarchy, often with substantial consequences.'"[489] As a result, corporate policy enforcement strategies can produce a maze of conflict in the workplace. With enough conflict, what I call a "distressed system" emerges.

A *distressed employment system* is generally one in which barriers to workplace community-building, or deliberative democratization of the workplace, exist due to systemic disparity between employers and employees in the interpretation and exercise of employment practices. What are generally described as natural boundaryless shifts in employment dynamics in the modern workplace are, in reality, signs of a distressed employment system. Some examples are employment transience, benefits reductions, and grievance restrictions, to name a few.

Put simply, these practices are signs of systemic distress emerging from the vacuum of democratic applications of cooperative enterprise. The few corporate efforts in the boundaryless environment to have empowered the worker have been industry "experiments" involved in merging private corporate initiatives with union management, like the Saturn experiment. Otherwise, in the words of Gary Loveman as president and CEO of Harrah's Entertainment, "jobs [don't] belong to people; jobs [belong] to a company."[490]

The reality that jobs do not belong to employees burdens the modern workplace with conflict and results in surging workplace violation claims.[491] As described, it has been reported that an average of 81,000 charges of employment discrimination alone have been filed with the EEOC each year

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488. Oser, *supra* note 470, at 306 (citing Erwin Chemerinsky, *Decision-Makers: In Defense of Courts*, 71 AM. BANKR. L.J. 109, 111 (1997)).

489. *Id.* at 306 (quoting Lauren B. Edelman, *When the "Haves" Hold Court: Speculations on the Organizational Internalization of Law*, 33 LAW & SOC'Y REV. 941, 961 (1999)).

490. Avery & Crain, *supra* note 176, at 75 (quoting Gary Loveman, Harrah's CEO).

491. *See* Craver, *supra* note 5, at 141-42; *see also* Dannin, *supra* note 5, at 259; Kohler, *supra* note 5, at 106.

over the last decade.[492]   Another report illustrates that over the last thirty years employment litigation has grown at a rate almost ten times greater than that of all other types of civil litigation.[493]   One commentator added claims filed in courts with other administrative agencies to describe statistical growth rates at roughly twenty-three percent increase each year,[494] ultimately reminding observers that distress is present and far reaching.

VII. ADDRESSING POWER DISPARITY IN BOUNDARYLESS WORKPLACE DISPUTE

In today's boundaryless employment environment, employees have lost rights, standing, and an essential foundation of power in their employment experience. In this difficult scenario, what would a meaningful mechanism for resolving grievance in the boundaryless workplace have to look like? What function could dispute resolution possibly play in the era of self-regulating private enterprise where employees are fungible, disposable, and desperate? Answers to these questions are key to understanding why current employment Dispute Resolution (DR) design is failing to resolve distressing levels of dispute in the private workplace. The answers, however, have been dismissed in large part by practitioners in the DR field in almost conspiratorial efforts to galvanize facilitative DR pedagogy. Therefore, employee's problems are two-fold: the protectionism of private enterprise and that of DR design scholarship.

A.   Where DR Design Stands in Its Facilitative Pedagogy

Facilitative mediation is the predominant method of private workplace dispute resolution used today, for a couple of primary reasons. Facilitation predominates, in part, because the EEOC uses facilitative process management in discrimination cases, and the application has been replicated into common convention.[495] More fundamentally, however, is the resolve of some segments of DR scholarship to advance facilitative mediation with firm exclusivity. This essentially makes any departure from the facilitative

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492.   Occhialino & Vail, *supra* note 6, at 704.

493.   Befort, *supra* note 7, at 399-400.

494.   Balc, *supra* note 8.

495.   John R. Sutton & Frank Dobbin, *The Two Faces of Governance: Responses to Legal Uncertainty in U.S. Firms, 1955 to 1985*, 61 AM. SOC. REV. 794, 800-01 (1996).

model an "oppositional[] rather than expansive" debate.[496] The irony for Leonard Riskin, creator of the "Riskin Grid," an early discourse on the scope of mediator influences as they exist along a spectrum of mediation styles, is that "so many practitioners of mediation who are committed to searching for common ground (myself included) have characterized much of the treatment of this issue in the literature as a debate rather than a dialogue or discussion."[497]

Realistically, it is unlikely that originalist DR scholars would ever affirm alternative methodologies that depart from a facilitative DR framework. Consequently, my overview of facilitative mediation is the starting point in my deviation from conventional wisdom. I offer a candid guarantee that efforts toward mediating power disparity in the workplace will never fit the mold that conventional mediative facilitation demands. However, in the interest of common advantage, DR scholarship will either have to break the mold and evolve into a broader scope of public service, or fail in its relevance. I urge choosing the former.

B. An Overview of Facilitative Interventions, and the Undermining Effects of Power Disparity

Facilitative mediation is traditionally "a process in which a third party neutral assists disputants in reaching an agreement that meets their needs"[498] in order to resolve a shared dispute. It is a private, confidential, and voluntary process that values participant self-determination as a primary goal. Most mediation practices generally follow the strategic process of moving disputants through systematic stages of information exchange including, in very general terms: sharing viewpoints, discussing needs and interests, generating options for resolution, and finally co-authoring a settlement agreement. Few of these stages, if any, directly address issues of power disparity and, within the general facilitative framework, were not historically designed to do so.

Generally, "'facilitative' interventions . . . are focused on drawing out the disputants' views and enhancing the disputants' communication and mutual understanding to enable the disputants to find their own way to a

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496. Oberman, *supra* note 480, at 777.

497. Leonard L. Riskin, *Decision-Making in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 18 n.63 (2003).

498. Ellen Waldman, *The Challenge of Certification: How to Ensure Mediator Competence While Preserving Diversity*, 30 U.S.F. L. REV. 723, 728-29 (1996).

settlement."[499]   Facilitative mediation is oriented toward parties reaching resolution through mutual agreement; the result of assisted negotiation performed by a process manager or mediator. Facilitation values fairness of process, mutuality in problem-solving, mediator neutrality, and self-determined resolution of the parties involved. However, even in the best of circumstances where all of the assistive attributes are present, modern facilitative DR practices are fundamentally unable to resolve the systemic distress occurring in the boundaryless workplace. This is so for one primary reason: private enterprise is by nature a power-based environment.[500] "Scholars have demonstrated that informal dispute resolution is often more advantageous to those who already possess greater power and advantage."[501] There are a few reasons for this kind of result in today's private workplace DR, where facilitation is failing to make headway against systemic distress.

First, external public dispute resolution programs that serve the private sector, like the EEOC, fail to resolve distress because they are cumbersome and limited in scope. Conventional EEO mediation takes place against the backdrop of formal investigation and threat of legal action[502] with no inherent mechanism for transforming relationships or changing behavior. The result is a formulaic process that lacks true mutuality and is only minimally empowering because many participants have been terminated from employment by the mediation stage, and often remain terminated after settlement. One report puts the number of mediation settlements that do include an agreement to reinstate at only seventeen percent of EEOC cases.[503]

Private institutional DR practices, on the other hand, fail to resolve distress because they diminish employee self-determination and undermine legal safeguards.[504] The private sector's self-help paradigm embodies new values intrinsic in corporate self-regulation, many of which are self-preserving. By association, corporate designs for dispute resolution tend to

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499.   Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 576 (2004).

500.   *See* Hoffman, *supra* note 6, at 55.

501.   Hoffman, *supra* note 9, at 56; *see* Oser, *supra* note 470, at 305; *see also* Lauren B. Edelman & Mark C. Suchman, *When the "Haves" Hold Court: Speculations on the Organizational Internalization of Law*, 33 LAW & SOC'Y REV. 941, 941 (1999).

502.   Occhialino & Vail, *supra* note 6, at 671.

503.   Balc, *supra* note 8, at 250-51.

504.   *See* McKinney, *supra* note 472, at 129-30.

adhere to core values of a new protectionist paradigm. Increasingly, the private sector uses closely controlled alternative dispute resolution design to craft internal dispute systems, which keep workplace issues firmly in corporate command.[505] The reality of institutional DR programs such as these creates a "Catch-22," whereby companies are highly interested in resolution but wholly uninterested in deliberative processes. Because companies may have much less invested in deliberative workplaces than they do in controlling potential legal grievances at the corporate level, benefits to employees are questionable.

In the end, significant increases in workplace disputes illustrate that both public and private dispute systems have failed to curb workplace distress. Why? The primary problem is the fact that both systems are poorly suited for addressing issues of power disparity between private companies and their workforces. Facilitation focuses on mutual problem-solving tasks and offers participants arms-length, self-determined results. Yet mutuality and self-determination, key elements for creating a deliberative work environment, have been removed by the boundaryless paradigm. Therefore, in a fundamental way, facilitative DR practices are not equipped for successful outcomes in today's mediated workplace. This is because facilitation is not designed to manage power imbalances between parties in dispute who come to the table without experiences of mutuality or self-determination in the workplace.

In short, the systemic distress experienced by today's boundaryless workforce demands an evolution in dispute resolution theory, one that incorporates an approach for acknowledging power imbalance and addressing issues of hierarchy as they surface in workplace conflict. Such an approach must be power neutralizing, must integrate affirmative experiences of mutuality, and must increase self-determination as specific efforts of the mediation process. Ultimately, the absence of a power-neutralizing approach to private employment issues builds a provocative case for developing new methods better able to address issues of power disparity as improved deliberative functions of workplace dispute resolution and with enhanced democratic substance at its core.

VIII. CONCLUSION

Years ago, renowned social psychologist Kurt Lewin put forward a durable theory of organizational development that describes successful

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505. *See* McKinney, *supra* note 472, at 129.

systemic change as a matter of timing.[506] His "freeze" theory suggests that *timing* is critical in intervening to make positive change in an organization.[507] For example, according to Lewin, the unfreezing or thawing of structural norms and systemic functions is the best time to impact organizational change, alongside changes in law, politics, and the economy.[508]

America's recent economic hardships have produced an unfreezing of economic, legal, and social mores, causing many to investigate the way government, business, and the people interact. With this thawing, a window of opportunity opens to rebuild the confidence of the American worker and to create a new paradigm for managing conflict in the private workplace. Change essential to an improved workplace will require reform of the at-will employment doctrine, recovery of legal safeguards workers have lost to private enterprise, and a new approach to addressing conflict in the boundaryless workplace specific to power disparity issues. These tasks are comprehensive in nature, requiring the foresight of a philosophical shift in the valuation of the American workforce. Why is this urgent business? In the words of the legal scholar, Orly Lobel, "Work has always been central to social reform, not only because of the intrinsic importance of the workplace arena, but because of the broader effects of workplace organization on the society at large."[509] American workers have made this country great through centuries of sweat equity. Now is the time to honor their work with protections equally valuable.

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506.   *See generally* Kurt Lewin, *Frontiers in Group Dynamics, Concept, Method and Reality in Social Science; Social Equilibrium and Social Change*, HUM. REL. 1, 5-14 (1947).

507.   *See generally id.*

508.   *See generally id.*

509.   Lobel, *supra* note 26, at 140.