

RESTORING THE PROMISE
OF AMERICAN LABOR LAW

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Making Postindustrial Unionism Possible

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The transition to a postindustrial future requires a sea change in labor-management culture and institutional practice and a radical revision in relevant public policy. As Secretary of Labor Robert Reich has emphasized, our current labor relations system was designed for a mass-production industrial workplace. It is no longer appropriate in a service-dominated, computer-based global economy in which success comes as much from quality, innovation, and the maximization of employee expertise as from quantity, standardization, and the efficient use of semiskilled labor.

Industrial relations scholars have delineated the problems embedded in the so-called New Deal industrial model and its inadequacies in the face of changing technology, workforce diversification, and economic restructuring (for example, Kochan, Katz, and McKersie 1986; Heckscher 1988; Kochan 1993a). This chapter will reinforce and extend these critiques by focusing on the specific ways in which the New Deal framework fails to address the representational needs of the new service workforce and, in so doing, fails to meet the needs of the majority of women workers. Some 84 percent of wage-earning women work in the expanding service economy (Sullivan 1989:405). Without a representational system designed with their realities in full view, the gender gap in employee representation that historically has existed between

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The labor relations framework that rose to dominance in the 1930s and 1940s has two glaring assumptions embedded within it that make it increasingly inappropriate for today's work world, and in particular the work world of women: its worksite orientation and its adherence to Taylorist practices.² The new unionism of the 1930s was fundamentally different from the unionism that preceded it, in that it was worksite rather than occupationally based (Cobble 1991a; 1991b). Union benefits, both in economic returns and "voice," were tied to the individual employer. Recognitional processes and bargaining structures assumed a long-term, continuous, on-site, and full-time commitment to a single employer, in part because the New Deal system took the male-dominated, blue-collar industrial plant as the norm.

This worksite orientation is inadequate for the new contingent workforce, many of whom are highly mobile and only tenuously attached to a single employer. The contingent or "nonstandard" workforce—part-time, temporary, leased, on-call, subcontracted workers—is estimated to make up 25 percent of the workforce, and continued expansion is projected (Belous 1989).³ A disproportionate number of these workers are female (Pearce 1987; Carré 1992).⁴

In addition, firm-based bargaining is not an effective approach for small employers with limited resources or for a workforce governed primarily by the exigencies of an external labor market. In contrast to manufacturing, the service sector (with the exception of government services) is often character-

1. Until the last decade, men consistently enjoyed unionization rates more than double those of women. In the 1980s, the gender gap in union membership lessened but did not close. By 1990, unions represented 21 percent of men and 14 percent of women (Cobble 1993:6).

2. Taylorist refers to the managerial philosophy of Frederick Winslow Taylor. Much of his advice for managing workers and for organizing production, laid out in his influential *Principles of Scientific Management* (1911), had been adopted by American manufacturers by World War I.

3. Indeed, the former general counsel to the National Staff Leasing Association predicted recently that the increasing use of staffing services will "culminate sometime in the next 10 or 50 years at a point when no one will ever again be employed by the people for whom they perform services" (*Daily Labor Report*, Aug. 12, 1993).

4. Diana Pearce, for example, estimated that in 1985, 52 percent of women, but only 33 percent of men, worked part time or part year. Carré notes that women accounted for 64.2 percent of temporary help services.

ized by small firms operating in local competitive markets.⁵ In the private sector, women are much more likely than men to work for small firms and at worksites with fewer people (Brown, Hamilton, and Medoff 1990:1-15).

Moreover, many women's jobs in the service sector and throughout the economy are occupationally based, not worksite-based, functioning more in an external than an internal labor market. Women move from employer to employer and from industry to industry more frequently than do men.⁶ But low job tenure is often combined with relatively high occupational tenure. Waitresses, nurses, and clerical workers, for example, move across industries and firms but stay within the same occupation (Cobble 1991a; Leigh and Hills 1987).

Women also rely less frequently than do men on training and opportunities for promotions within a firm-based internal labor market. Training for female occupations is usually external to the employer and less firm-specific. Opportunities for promotions are limited but linked to firm rather than job mobility; that is, one finds a better firm or a better employer rather than a better job within the same firm. A collective bargaining system that weds higher wages, benefits, skill upgrading, and employee voice to a specific firm will deny these basic employment enhancements to many women and will perpetuate the new forms of labor segmentation developing in the external labor markets that characterize service economies (Christopherson 1991).

In addition to its worksite orientation, certain Taylorist notions of work organization and management guided the formulation and subsequent evolution of the New Deal model. The most efficient organization of production would be achieved through a hierarchically structured, micro-managed workplace with narrow job titles, detailed work rules, and strict separation of managerial and worker functions. In this context, unions were adversaries, not partners with management. The typical grievance process, for example, fixed the union role as the reactor or objector to management actions rather than as the cocreator. In a classic division of labor, management retained authority over the design and organization of work; the union declined (and in some cases was denied) responsibility for supervisory functions, efficiency, and productivity.⁷

5. According to Wial's (1993) calculations, the average service-producing establishment has about thirteen workers; the average manufacturing about fifty-one.

6. As Hartmann (1993) and others have noted, job tenure, or the number of years spent at any one particular job or job site, is lower for women than for men.

7. It is important to note, however, that the Wagner Act of 1935 did not enshrine adversarialism or create the rigid demarcations between employer and employee that were later to evolve. Before the Taft-Hartley Act of 1947, for example, supervisors organized extensively in the printing trades, in retail grocery stores, in maritime, and in other sectors. The Supreme Court upheld their rights to organize under the National Labor Relations Act in early 1947,

As manufacturing has shifted toward "batch production,"⁸ team work, and computer-based technologies, Taylorist management practices have become increasingly suspect (Piore and Sabel 1984; Zuboff 1988; Voos, Eaton, and Belman 1993). Yet these practices have always been ill suited to the realities of the service and white-collar work world with its heightened personalism and the blurring of employer and employee roles. Service and white-collar workers, for example, tend to be found not only in smaller establishments (restaurants, dental offices, retail shops) but in situations of close personal contact with their immediate boss (for example, clerical work). The line between employee and employer is more indistinct than in the traditional blue-collar, mass-production factory. Employee-employer relations may be personal and collaborative, rather than adversarial, formalized, and highly bureaucratic.

In addition, in the direct service environment, management efforts to deskill or to exclude employees from decisions affecting the quality and delivery of the service product have never been as successful or as widespread as in mass-production manufacturing. At times, management as well as labor realized that friendly service and attentive caring were not best extracted through authoritarian, top-down supervision; nor could creativity and problem-solving in white-collar employees be "mandated" from above. Hence, many nonfactory workers, professional and nonprofessional alike, have always engaged in certain "managerial" functions, such as planning, organization, and quality control. They work more autonomously or in self-managing teams (what I've termed peer management), where the senior member takes responsibility for organizing the flow of work, supervising less skilled coworkers, and maintaining work quality (Cobble 1991a; Benson 1986).

Given these divergent realities, it should come as no surprise that the traditional modes of organizing and representation that evolved within the New Deal and post-New Deal framework never appeared to work well in many service and white-collar workplaces. A labor relations system that allowed workers to exercise some managerial prerogatives, such as control over quality, work organization, and standards for worker competency, would be a better match with the ongoing practices of service and white-collar workplaces. Moreover, organizing and representational processes that empha-

noting that no basis existed in law for their elimination despite their "dual status" as agents of the employer and as employees (Leiter 1949:312). See Barenberg 1993 for an argument that the Wagner Act scheme was profoundly cooperationist, not adversarial.

8. In "batch production," as opposed to mass production, a smaller number of items are produced in any one production run. The technology is flexible and can be reconfigured quickly to produce numerous batches of slightly different products rather than a quantity of homogeneous items.

size greater participation, less adversarial proceedings, and more consensus-style "win-win" bargaining would be more appropriate.⁹

Lastly, in large part because of the worksite and Taylorist biases of the New Deal and post-New Deal framework, some 20 million women, or 38 percent of the female workforce, are now explicitly exempted from exercising their rights to collective bargaining under the National Labor Relations Act (see table 20.1). If one excludes public-sector workers, a good proportion of whom have some degree of bargaining rights under other enabling legislation, a fourth of the private-sector female workforce is excluded.¹⁰ In large part, these workers are not defined as "employees," because they do not resemble blue-collar industrial workers: Their work world is not "industrial" (but domestic and agricultural); nor are they behind the Tayloristic curtain, removed from all "managerial" knowledge and responsibility.¹¹

Moreover, although not legally excluded from coverage under the law, another large sector of the female workforce—perhaps as much as 25 percent—are "effectively barred" from collective representation. Almost insurmountable barriers exist to the organization of these nonstandard employees—a disproportionate number of whom are female. The low percentage of organized part-timers (8 percent) as opposed to organized full-timers (20 percent) and the virtual nonexistent unionization of at-home, temporary, and subcontracted employees (with the exception of janitorial) are suggestive of the difficulties in organizing nonstandard workers (U.S. Department of Labor 1992). Short-term contract workers, from musicians to data processors, may have dozens of different employers in a year's time. For them, the long, drawn-out NLRB election procedure is unworkable. Moreover, many part-timers,

9. Marion Crain (1991, 1992a, 1992b) and other feminist legal theorists reach conclusions similar to mine but for different reasons. Relying on the work of Carol Gilligan (1982), they argue that because women as a group value connection and shared decision-making, they are more comfortable with participatory, less adversarial forms of problem-solving. I would argue that these identifiable differences are as much the product of occupation as of gender. See also the account by Richard Hurd (1993) of the experience of Harvard clerical workers and Patricia A. Gwartney-Gibbs and Denise H. Lach's (1993) study of gender differences in grievance processing.

10. These high figures should come as no surprise since earlier estimates of the percentage of the total workforce not covered by the act have ranged from 50 to 63 percent (Rosenthal 1951; Sockell 1991:137n). I would argue, in fact, that my estimates are quite conservative. For example, in calculating the number of supervisory employees, I included only those occupational groupings specifically categorized as supervisory by the Census Bureau. Workers in many other occupational categories have also been found to exercise supervisory duties and are hence excluded from NLRA protection.

11. Some are exempted by statute, others by NLRB and court rulings. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274–75 (1974), excluded managerial employees. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 103 L.R.R.M. 2526 (1980), found faculty professionals to be managerial employees and hence ineligible.

Table 20.1. Estimates of Numbers of Workers Excluded from NLRA Coverage, 1990
(in thousands)

	Total no. of workers	Total excluded	Total no. of women	Total no. of women excluded
Domestic workers	1,012	1,012	896	896
Agricultural workers ^a	2,861	2,861	554	554
Supervisors ^b	7,614	7,614	2,279	2,279
Managers	14,619	14,619	6,171	6,171
Self-employed workers (nonagricultural)	8,927	8,927	3,166	3,166
Professional employees ^c	16,648	2,945	8,941	722
Confidential employees ^d	250	250	175	175
Others ^e	335	335	92	92
Public-sector workers ^f (not elsewhere included)	12,019	12,019	6,441	6,441
Total excluded		50,582		20,496
Total employed		116,983		53,270
Percent of total excluded		43		38
Total private-sector excluded ^g		32,643		10,859
Total private-sector employment		99,044		43,633
Percent of private sector excluded		33		25

Sources: Domestic and agricultural workers: U.S. Department of Labor 1991, table A-24; supervisors, managers, self-employed workers, and confidential employees; U.S. Census Bureau 1992, table 2; others: U.S. Census Bureau 1991, table 860-1; public-sector workers, total employed, and total private-sector employment: U.S. Department of Labor 1991, table A-24.

^a Includes wage and salary workers and self-employed workers in agriculture.

^b Estimate based on totaling all occupational categories specified as supervisory except those included in other exempt categories.

^c Estimate based on totaling figures for those professional occupations facing possible exclusion (postsecondary teachers, physicians, dentists, computer scientists, and others). The figure was then reduced by half.

^d Based on the number of employees in personnel and labor relations managers category, plus estimates of confidential secretaries and assistants to persons with managerial functions in the field of labor relations.

^e Based on estimates of employees in businesses with receipts below board requirement and number of employees in noncommercial, nonprofit religious operations.

^f There were 17,939 government employees in 1990. The proportion of public-sector workers in the categories above were estimated and that number was subtracted from the total number of public-sector workers.

^g The total number excluded (50,582) minus the total number of public-sector workers (17,939).

temporaries, and other casuals without likelihood of continued or regular employment are often exempted prior to NLRB elections because their inclusion is contested by the union or by management (Bronfenbrenner 1988c). In the case of leased and subcontracted employees, unless the business that hires the subcontractor is seen as a "joint employer," organizing is usually futile because the unionized contractor will simply be replaced and the bargaining unit lost (Bronfenbrenner 1988c; Howley 1990).

In short, then, by my estimates, the current legal and institutional framework of the NLRA disenfranchises more than half of the current female workforce. And, although a smaller proportion of women than men are legally

excluded from coverage, because of their concentration in nonstandard employment, women may have even less opportunity than men to realize their desire for collective representation in the workplace.¹² Unless public policy shifts, access to collective bargaining for both men and women will become even more limited, since many of the exempted and barred categories—managers, supervisors, professionals, independent contractors, at-home and other nonstandard workers—are among the most rapidly growing sectors of the economy.¹³

Why Unionism Is Still Necessary

Yet despite the problems with the New Deal and mass-production model, there are tenets of the system that should be preserved. As with any realistic proposal for reform, elements of the old must be joined to the new. Let me specify three.

First, the old system rightly recognized that collective power for employees was essential for the existence of a genuinely collaborative relationship between labor and management. The most productive partnerships are between those relatively equal in power in which both parties have some degree of autonomy and security (Eaton and Voos 1992; Cornfield 1987:387). Yet the historic inequities of power between individual employees and their employers have widened not lessened since the 1930s. Employee representational schemes that fail to ensure autonomous, independent mechanisms for collective employee participation or that create joint committees in which management retains ultimate decision-making authority are in fact *out of touch* with the realities of today's workplace. The extension and stabilization of unionism and collective bargaining, albeit as transformed institutions, should remain at the heart of labor policy. As Karl Klare has argued; "Power-sharing is and should be on the agenda in the era of postindustrial transition" (1988:41).

Second, the need for both adversarial as well as cooperative encounters between employers and employees was acknowledged within the New Deal framework (Barenberg 1993). That need still exists. The interests of employers and employees overlap as well as diverge. Setting up a system that provides no way of expressing conflict and exerting pressures for its resolution will be a system that denies the fundamental realities of our economic system.

12. See Freeman and Rogers 1993b for a discussion of worker desire for collective representation. Research has consistently shown that women are more desirous of collective representation than men, and, in fact, when elections are held in their workplaces, they now vote for unions more frequently than do men (Kochan 1979; Bronfenbrenner 1990). Women are less organized than men in large part because they have less opportunity to participate in choosing a union.

13. See, for example, table 11, Bureau of Labor Statistics (1993) for the managerial and professional categories and duRivage (1992b) for the contingent work force.

The issue is not how to do away with "adversarialism" but how to minimize unhealthy and unnecessary adversarialism. Unions must be encouraged to accept more responsibility for the overall health and well-being of the enterprises with which they are linked, whether they be schools, hospitals, or auto factories. Yet the destructive adversarialism that has thrived in the last twenty years has been fueled not just by a limited unionism but by an American management culture deeply skeptical of the benefits of power-sharing and democracy at the workplace. American management's penchant for unilateral control, as Sanford Jacoby (1991) has argued, is the true American exceptionalism. Public policy must dampen the current adversarial culture by ensuring the institutional security of unions. Introducing "employee participation committees" or plant-level works councils might help close the "representation gap" for those 85 percent of the workforce without union representation.¹⁴ But the widening "union gap" between the United States and other industrialized countries must also be closed if these committees are to function effectively and if a genuine realignment of power and decision-making is to occur.

Third, strong, autonomous unions act to counter gender, class, and racial divisions in our society and to further economic justice. Unionization raises the wages of women and minorities more than those of white men, especially in the public sector and in white-collar settings, where women have achieved the most power within their unions (Freeman and Leonard 1987). Unions with large female constituencies have also pushed for pay equity, family and medical leave, and other advantageous policies for women (Cobble 1993). Unions are rapidly feminizing. These transformed and feminized unions could be quite effective as vehicles for advancing the needs of women in the future. Yet without a shift in public policy supportive of collective bargaining, their potential will be thwarted.

Historical and Contemporary Alternatives

Much of the current critique of the New Deal system falsely equates all unionism with the form of unionism that became dominant by the 1940s. Thus, the argument goes, if industrial unionism is obsolete, so is unionism *per se*. This historical amnesia hampers attempts to create new forms of collective representation. Postindustrial unionism does not need to be invented out of whole cloth: It can be reassembled, reshaped, and extended from elements of past and current institutional practice. The institutional practices of what I

14. Freeman and Rogers (1993b) argue that a "representation gap" exists because a large majority of workers desire some form of representation yet only 15 percent are unionized. They conclude, therefore, that alternative forms of representation are needed to close this gap.

have termed "occupational unions" and the nontraditional approaches to representation taken by female-dominated professional and semiprofessional groups such as teachers, nurses, and clericals offer the best guide to the formulation of a postindustrial unionism.

Occupational unionism, the primary model of unionism before the New Deal, was neither Taylorist nor worksite-based (Cobble 1991a, 1991b). Although not every trade adopted "occupational unionism" in toto, before the New Deal the majority of organized trades and virtually every single trade that successfully organized mobile workers relied on some elements of occupational unionism. Occupational unions recruited and gained recognition on an occupational or local market basis rather than by industry or individual job site. Their representational systems emphasized occupationally based rights, benefits, and identity rather than worksite-based protections. Longshoremen, janitors, agricultural laborers, food servers, and garment workers, as well as such classic craft unionists as printers, building tradesmen, and performing artists, strove for control over hiring through closed-shop language and through union-run employment exchanges, rosters, and hiring halls; stressed employment security rather than "job rights" at individual worksites; offered portable benefits and privileges; and took responsibility for monitoring workplace performance.¹⁵

Occupational unionism flourished because it met the needs of workers and employers outside of mass-production settings. In local labor markets populated with numerous small employers, the unionization of garment workers, restaurant employees, teamsters, and others brought stability and predictability, inhibiting cutthroat competition. Employers gained a steady supply of skilled, responsible labor and an outside agency (the union) that ensured the competence and job performance of its members. In many cases, the union took responsibility for expanding the customer base for unionized enterprises. A floor for minimum wage and working conditions was established. Workers did not gain long-term job tenure but the opportunity to invest in their own "human capital" through training and experience at a variety of worksites. As long as the unionized sector remained competitive—a goal to which both labor and management were committed—unionized workers also gained real employment security, in that the union helped make them more employable individually and helped ensure there would be a supply of high-wage, "good" jobs. This unionism, then, in contrast to industrial unionism, never developed rigid seniority rules at individual worksites; it was committed to maintaining employee productivity, high-quality service and production, and to ensuring the viability of unionized firms. In short, it was flexible, cooperative as well as

15. The line between employee and employer was blurred as well. Not only did unions take responsibility for personnel decisions but many organizations (teamsters, musicians, retail workers, for example) included supervisors and small employers (Christensen 1933).

adversarial, and dedicated to skill enhancement and to the creation of a high-performance workplace (for examples, see Christensen 1933; Millis 1942; Slichter 1941; Cobble 1991a).

Occupational unionism declined dramatically in the postwar era, in part because of shifts in union institutional practice, as I have detailed extensively for the hotel and restaurant industry (Cobble 1991a). Legislative and legal decisions also severely hampered the ability of occupational unions to exert control over their members, to pressure employers for recognition, and to provide services to members and employers. Closed-shop, top-down organizing, secondary boycotts, the removal of members from the job for noncompliance with union bylaws and work rules, and union membership for supervisors all became illegal. Unions lost their ability to organize new shops, to maintain multiemployer bargaining structures, to set entrance requirements for the trade, to oversee job performance, and to punish recalcitrant members (Cobble 1991a; Millis and Brown 1950:636-42; Levinson 1980:135-37).

By the 1960s, occupational unionism was but a mere shadow of its former robust self. Only the building and construction trades (which obtained special legislative language exempting them from some of the new postwar legal restrictions on unions) and certain highly specialized professional groups (such as the performing arts occupations) retained some degree of power and influence (Kleingartner and Paul 1992; Mills 1980). Yet by the 1960s other alternatives to mass-production unionism were emerging. The professional and semiprofessional employee organizations built primarily by women, for example, initially focused less on extracting economic concessions from individual enterprises and more on the well-being of their industry or sector and on responding to the "professional" interests of their members. As state bargaining laws and other forces moved them toward more traditional "bargaining" relations with employers, they shed some of their occupational and associational orientation. Yet, as Charles Taylor Kerchner and Douglas E. Mitchell (1988) have argued for teacher unions, many are now moving toward a third stage of labor relations, in which they are as concerned with the welfare of the overall educational system and with meeting the needs of their clients as with protecting their own interests as employees. It is these alternative models of unionism that hold promise for the future.

Encouraging Postindustrial Alternatives

Fully integrating the realities of women's work—its mobility, its external and local market context, the personalized aspect of its work relations—into labor relations theory and policy would cause a reevaluation of the most fundamental assumptions on which our labor law and institutional practice rely. I cannot undertake that project in a comprehensive fashion here. Never-

theless, I can point to the kind of transformations that should occur and suggest a number of concrete steps that would help crack the industrial union mold.

Let me make it clear that I am not arguing that the industrial model should be abandoned *wholesale*. Manufacturing itself is not going to disappear, and some of the practices of industrial unionism may continue to be appealing and advantageous to a wide variety of workers. Nonetheless, just as industrial unionism superseded craft unionism as technological change and economic restructuring transformed the workplace, so too must industrial unionism give way to other alternatives. We must now begin to think *once more* in terms of multiple and competing forms of unionism. A single model of labor relations cannot meet the needs of all workers. Multiple models must be allowed to thrive. In other words, we must make possible not just postindustrial unionism but postindustrial unionisms.

Toward that end, I have twelve recommendations to offer. My emphasis here is on creating structures that facilitate self-governance and mutual problem-solving in the work world as alternatives to regulatory intervention and unilateral decision-making.

1. *Expand the definition of "employee" under the NLRA to include those currently excluded either by statute or by case law.*

Some 50 million workers (43 percent of the workforce) are now explicitly exempted from exercising their rights to collective bargaining under the act. Of the private-sector workforce, a third (or some 32 million workers) are without access (See Table 20.1). The law must not discriminate against those such as domestic and agricultural workers whose worksites are still linked to the household economy. Nor should categories of workers be excluded simply because these workers exercise certain "managerial" or "supervisory" responsibilities and authority. In a post-Taylorist workplace, virtually every employee will participate in decisions once thought to be managerial prerogatives.

2. *The law must ensure that bargaining relations are structured to promote meaningful and maximum exchange. Where subcontracting and leasing arrangements exist, a narrow approach to determining joint employer status should be reconsidered. Also, part-time, temporary, and short-term hires should be included in bargaining units.*

Without such reforms, the growing ranks of the contingent workforce will be disenfranchised. In contrast with the expansive interpretations of joint liability taken by courts in considering Fair Labor Standard Act or Title VII cases, under the NLRA, as presently interpreted, host employers bear "little responsibility for the economic conditions of their contractors' employees" (Hiatt and Rhinehart 1993:20). Yet the client or host employer decides

whether or not there will be jobs for those "employed" by the subcontractor. It is this ultimate power to give or withhold employment that makes the contractor the relevant bargaining party and a codeterminer of "the essential terms and conditions of employment." The "right to control" and the degree of supervision is no longer an appropriate determinate of employer status in a post-Taylorist work environment.¹⁶

The exclusion of nonstandard workers from bargaining units diminishes access for that one-fourth of working women who are so categorized. As the work world continues to shift toward nonstandard employment contracts, increasing numbers of both men and women will lose access to collective representation. If workplace democracy is to be retained as employers and employees move away from standard contractual arrangements, public policy should not penalize those who work off site, on other than full time schedules, or whose tenure is undefined. As Virginia duRivage (1992b: 116-21) argues, part-time, temporary, and short-term hires should be included in bargaining units based on "the content of their work rather than the classification of their employment."¹⁷

3. *For effective bargaining to exist in a service economy of numerous small employers, mechanisms are needed that facilitate the extension of collective bargaining to other relevant employers in the service or labor market. Marketwide, multiemployer bargaining is necessary for stable, effective collective bargaining relationships.*

Decentralized, firm-based bargaining is increasingly unworkable. It heightens the economic burdens on unionized employers and fuels employer resistance to unionization. It is also simply too labor-intensive to bargain individual contracts with hundreds of small employers. The Hotel Employees and Restaurant Employees International Union, for example, cannot bargain individually with the thousands of independent and family-owned eating establishments that exist in even one major metropolitan area.

The law should facilitate the establishment of bargaining relationships that act as "patterns" or as "master contracts" with other employers. Marketwide, multiemployer bargaining could also be encouraged by certifying multiemployer bargaining units, by penalizing employers that withdraw from voluntarily

16. Rep. William Clay recently introduced a bill that would redefine "single employer" in the construction industry to include "any two or more business entities with substantial common ownership, management, or control" and would require such an employer to bargain collectively with the union. This bill should be expanded beyond the construction and building trades (*Daily Labor Report*, Dec. 11, 1993).

17. If "employee participation committees" are mandated, as Weiler (1993) and others propose, mechanisms for the participation of non-standard, high-turnover workers must be devised.

constituted multiemployer agreements, and by implementing "sectoral bargaining" legislation. Sectoral bargaining, as it exists and is being proposed in Canada, mandates that the minimum standards of an agreement be extended to other employers on an industry, occupational, or geographical basis (see Eaton 1993 for further elaboration).

Multiemployer bargaining could also be facilitated by removing the restrictions on the economic tools allowed labor organizations (See recommendation 4). Increasing the power of labor historically has often meant that employers—especially small employers in highly competitive markets—voluntarily sought multiemployer bargaining (for example, see Feinsinger 1949). This alternative approach would lessen rather than increase government regulation.

4. The legal restrictions on prehire agreements, recognitional picketing, secondary boycotts and other "secondary activities," such as so-called hot cargo agreements, need to be removed when the object is securing or helping to secure recognition.

Numerous commentators have made excellent proposals aimed at improving recognitional procedures (for example, Weiler 1990). Reforms such as increased penalties for employers that fire union activists, expedited election procedures, enhanced worksite access for union organizers, card check recognition, and first-contract arbitration would "level the playing field" and do much to facilitate the establishment of bargaining relationships. Yet with the dramatic decline in the willingness of employers to recognize unions voluntarily or to agree to "consent elections," unions must be allowed to exert heightened economic pressure on employers to secure recognition (Friedman and Prosten 1993). Increased government regulation and litigation are not the solution.

In particular, if a mobile, decentralized service workforce is to have representational rights, unions must once again have the ability to organize "top down" and to exert many of the economic pressures on employers that were once legal. Historically, the millions of nonfactory workers—teamsters, longshoremen, waitresses, cooks, musicians, and others—who successfully organized between the 1930s and the 1950s relied on prehire agreements, recognitional picketing, secondary boycotts, limitations on nonunion or substandard subcontractors, restrictions on the handling or transporting of nonunion goods, and other approaches to secure bargaining rights (for example, Cobble 1991a; Slichter 1941). Making these approaches legal once again would make possible the organizing of workers from home-based legal transcribers and domestic cleaners to the millions of newly mobile professional consultants and managers. Only when representatives of the occupation

can negotiate wages and working conditions for *future* as well as current employees will meaningful bargaining relationships be possible.¹⁸

Unions organizing mobile workers need to be able to conclude a contract without having first to demonstrate majority status through elaborate and cumbersome election proceedings. Election procedures, if requested by the employer, could be conducted subsequent to recognition. The presumption should be that majority status exists and that bargaining in good faith is required *unless* lack of majority status is demonstrated. Indeed, as we move toward occupationally based employee institutions rather than worksite-based, democracy will best be protected by ensuring democratic governance at the level of the association or union level, not the workplace.

5. *The notion of what is "protected economic activity" should be broadened. Not only should certain "secondary activities" be legal, but employees who honor concerted actions against employers other than their own should be fully protected.*

Many of these restrictions assume that "employers" are distinct entities, easily defined and delineated, and that they occupy distinct and immobile worksites. The lines between primary and secondary employers and hence between "primary and secondary economic activity" are no longer clear. Rigid distinctions between primary and secondary are particularly problematic for unions attempting to organize and bargain in industries and sectors with high degrees of transience and subcontracting.

6. *Promote the formation of employee-run or state-run employment bureaus, exchanges, and hiring halls as key institutions that can structure external labor markets, prevent "casualization" and disorder, and serve the needs of a mobile workforce.*

Worker-run or state-run employment agencies would appeal to today's mobile workforce just as they did in the past. Historically, these institutions—especially where they were worker run and linked to unionization—were critical in decasualizing the workforce. Operating among waitresses, agricultural workers, garment workers, performing artists, janitors, teamsters, long-shoremen, and many other groups, they raised wages in the local labor market, offered portable, high-quality benefits that did not penalize intermittent workforce participation, and provided workers with control over their hours and work schedules without jeopardizing their employment security (Cobble 1991a). Increasingly, many workers desire mobility between employers and flexibility in their work lives. In particular, those balancing work and family are concerned with flexible scheduling and shortened work time. Nonprofit

18. The case of musicians offers a concrete example of the necessity for reform. The American Federation of Musicians has recommended that the prehire exemption allowed for the building and construction trades be extended to musicians and that the definitions of "employee" and "employer" be amended to once again allow for meaningful bargaining (Massagli 1993).

agencies could provide such variety and flexibility, and presumably they could offer higher wages than agencies run for profit.

Employee-run or state-run agencies would need to be subject to strict antidiscriminatory procedures that would guarantee the rights of minorities. Groups of workers or so-called neutral agencies can discriminate in hiring just as do employers. It is important to recognize, however, that hiring halls have not been solely the creature of the building trades and other male-dominated occupations. Historically, they served the interests of women and minorities in a wide range of industries, including garment, agricultural, and food service.

Although some employers might rely on such agencies voluntarily, most would seek cheaper labor if it were available. Hence, for these mechanisms to flourish, the union must be able either to exert control over the labor supply within a local labor market or to pressure employers through recognitional picketing, secondary and customer boycotts, and prehire and preferential hiring agreements (see recommendation 4).

7. Promote institutions and practices that support higher probabilities of employment and income security as well as those that promote job security with an individual enterprise.

The historic commitment of the occupational unions to providing employment and income security rather than merely guaranteeing job security at an individual worksite should be revived. Occupational unions fostered employment and income security by taking responsibility for employee competence and productivity and by promoting the health and viability of unionized employers. These practices helped preserve high-wage union jobs by creating an incentive among employers to be unionized.

The crisis in job growth and the decline in real earnings should be as serious an issue for those concerned about employee security as amending the "employment-at-will" doctrine and extending "just-cause" provisions to unorganized workplaces. Indeed, in some sectors of the economy, making a commitment to creating high-wage jobs, retraining workers, and providing income guarantees is more rational than tying the fates of individual employees to sinking enterprises. In the postindustrial future, employees who are mobile may in fact have greater long-term security (Hallett 1986).

8. Promote statutes that raise wages and secure benefits for employees on a marketwide rather than an enterprise basis. Specifically, prevailing wage legislation (such as the Davis-Bacon Act or the Service Contracts Act) should be strengthened and extended to sectors of the economy in which subcontracting is proliferating. Benefit portability should also be guaranteed.

The Davis-Bacon Act requires that employees working on federally financed construction projects be paid wages and offered fringe benefits at a rate equal

to that prevailing in the area. The Service Contracts Act has a similar mandate for employees under service contracts with government agencies. Numerous states and municipalities also have prevailing wage legislation that protects employees working under state-financed contracts. Similar legislation should be extended to the private sector in those arenas in which subcontracting predominates.

Prevailing wage legislation promotes wage stability and establishes a floor below which wages and benefits cannot fall. It prevents the downward spiral of wages and hinders the reliance on wage cutting as the prime competitive strategy. It also provides institutional stabilization for unions by lowering employer resistance to unionization.

9. Restore to unions the right to participate jointly in decisions concerning hiring, discipline, discharge, and training. Legal restrictions in these areas are numerous, but first steps should include repealing the prohibitions on closed shops and ending the restrictions on the ability of employee associations to recommend discipline and discharge actions.

Historically, occupational unions, like professional associations, set standards for admission to the occupation, oversaw training and upgrading programs, and took responsibility for disciplining incompetent work performance. Members might lose their certification, their membership in the association, or in some cases be removed from the job (Cobble 1991a; Slichter 1941:9-52). Postindustrial unions could help promote a high-performance and humane workplace by once again taking on these "management" responsibilities. And, as Arthur Stinchcombe and others have argued, the substitution of craft and professional administration for bureaucratic managerial supervision is a more economically viable, efficient, and rational approach in the many sectors of the economy that require flexibility (Piore and Sabel 1984; Stinchcombe 1959; Block 1990).

Of equal importance, placing more responsibility in the hands of marketwide employee associations rather than individual enterprise-based work teams is crucial to the advancement and equity of those in external labor markets. Most proposals for enhancing joint decision-making recommend giving increased responsibilities for hiring, discipline, and training to employee teams at individual worksites. These proposals do little for employees at small worksites where training and promotion occur through the external market or for employees who move from employer to employer and hence are excluded from site-based training opportunities.

10. Unions must help enhance the "human capital" resources of individual employees and address issues of promotion, career advancement, and opportunity. In some cases,

unions should consider supporting individualized, performance-based compensation and recognition policies as well as continuing their support for more merit-blind mechanisms, such as seniority systems and across-the-board wage increases.

The union movement must reclaim the emphasis among occupational and associational unions on representing the individual as well as the collective interests of employees. In addition to offering training and other skill-enhancing services, occupational unions rewarded individual initiative and performance by devising pay schedules that combined seniority-based scales with wages pegged to skill. The performing arts unions still negotiate a collective contract that sets minimum standards while allowing individuals to bargain supplemental enhancements.

Taking more responsibility for compensation criteria can be difficult, but as Albert Shanker has argued in explaining the American Federation of Teachers' consistent support of a peer-determined merit pay system: "We will never convince the public that we are professionals unless we are prepared honestly to decide what constitutes competence in our profession and what constitutes incompetence and apply those definitions to ourselves and our colleagues" (1985:46-48).

It is critical that the labor movement rethink its institutional practices in light of survey data that repeatedly show that although the majority of workers want collective representation, they are not satisfied with the way in which most unions respond to the need for opportunities for promotions and their desire for recognition of individual effort and achievement (Freeman and Rogers 1993b).

11. Collective bargaining practices and procedures must be redesigned to enhance employee participation and to broaden the band of communication between employee and employer.

The efforts of Harvard University and the Harvard Union of Technical and Clerical Workers (HUTCW) are perhaps the most instructive. Their agreement was primarily a statement of "value and principles, not an elaboration of rules and procedures" (Hoerr 1993:68). The interpretation of these principles was then left in the hands of groups of employees. Rigid, detailed work rules became less important in an environment in which decision-making and problem-solving had been shifted downward and in which trust and good relationships between parties was deemed of value. In addition, Harvard employees relied on large bargaining teams during contract negotiations and set up a system of joint problem-solving teams and councils that have involved hundreds of workers (Crain 1992a; Hoerr 1993). These new cooperative, participatory representation mechanisms were effective in large part because the local union vigorously maintained ties with its own members and relied on well-organized and traditional economic pressures when necessary.

HUTCW skillfully combined cooperative and adversarial strategies (Hurd 1993).¹⁹

12. *Restructure labor organizations to promote greater membership participation and intraunion bargaining. The leadership and participation of minorities and women can best be encouraged through redesigned union structures rather than by repealing the "exclusivity doctrine."*²⁰

The protection of minority rights is critical to employee participation and productivity. The repeal of the "exclusivity doctrine," however, and its replacement with a system of "coordinated diversity" and "multilateral bargaining" will not necessarily safeguard minority interests.²¹ In fact, such a system might result in less participation by minority groups because their interests would no longer be protected through legally guaranteed union democratic procedures and formal, intraunion bargaining structures. They would be competing in an unstructured, open arena with every other interest group. Structurelessness tends to perpetuate existing power relations rather than help dismantle them.

Union structures, however, need to be redesigned to facilitate participation better and to protect the rights of minorities. Setting up small, occupationally or other interest-based units within the large, heterogeneous general unions—many of which are products of the current merger wave—would help reduce bureaucracy, provide a sense of community, enhance union democracy, and protect the rights of minorities. Effective multilateral bargaining has and does occur *within* union institutions. Historically, it has often relied on the institutionalization of diverse interests, sometimes in small locals or caucuses organized along gender, ethnic, or occupational lines. These smaller units were then *each* guaranteed representation on joint boards or councils that functioned institutionally both to represent and reconcile competing interests (Cobble 1991a).²² In contrast to the repeal of the exclusivity doctrine, the promotion of such formalized intraunion bargaining structures would ensure that the class needs of employees are met along with the needs that flow from their different racial, ethnic, and gender identities.

19. The Saturn-UAW case is another example of how extensive employee participation is compatible with collective bargaining (Rubinstein, Bennett, and Kochan 1993).

20. Once a union is secured as the majority union for a group of employees, it becomes the exclusive representative of all workers, as defined in Section 9 of the NLRA. Employers are not permitted to bargain with groups of workers other than those designated as union representatives.

21. See Crain 1992b and Heckscher 1988 for the contrasting viewpoint.

22. Representation was often some combination of interest and proportional, not unlike the representational system operating in the House of Representatives (proportional) and the Senate (interest).