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0521535999 - From Widgets to Digits: Employment Regulation for the Changing Workplace

Katherine V. W. Stone

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From Widgets to Digits

FROM WIDGETS TO DIGITS provides an integrated framework with which to understand and address problems generated by the changing nature of the workplace. For most of the twentieth century, employers fostered long-term employment relationships through the use of implicit promises of job security and well-defined paths for career progression. Today, employers no longer value longevity, nor do they seek to encourage long-term attachment. Instead they look for flexibility. The labor and employment laws of the twentieth century are based on an outmoded model of a stable employee-employer relationship. FROM WIDGETS TO DIGITS analyzes the impact of the new flexible workplace practices on the issues of employment discrimination, ownership of human capital, worker representation, income distribution, and employee benefits. It proposes legal and institutional reforms to ensure the conditions of success in today's boundaryless workplace. Professor Stone contends that a progressive program for workplace justice must provide continuity in wages, ongoing training opportunities, transferable skills, unambiguous ownership of individual human capital, and portable health and retirement benefits. She also advocates the creation of a reliable social safety net to ease transitions and cushion the fall for those who are left behind by the boundaryless workplace.

Professor Katherine V. W. Stone is an internationally recognized authority in the fields of labor law, labor history, and employment policy. She is Professor of Law and the Anne Evan Estabrook Professor of Dispute Resolution at Cornell Law School and Cornell University's School of Industrial and Labor Relations. Professor Stone has also taught at the Yale Law School, Stanford Law School, the University of Chicago Law School, New York University Law School, and Cardozo Law School. She is the author of *ARBITRATION LAW* (Foundation Press, 2002) and *PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION* (Foundation Press, 2000). Her articles have appeared in the *YALE LAW JOURNAL*, the *STANFORD LAW REVIEW*, the *UNIVERSITY OF CHICAGO LAW REVIEW*, the *UCLA LAW REVIEW*, and numerous other journals.

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For Matthew Drennan and Erica Drennan

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Employment Regulation for the Changing Workplace

KATHERINE V. W. STONE

Cornell University



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Preface

It is difficult to comprehend social change when living in the midst of it. It is easier to study periods of social change in the past – to describe the elements, evaluate the impact, search for linkages, and adumbrate the unintended consequences of change. Many historians have mined these rich veins to describe the changes that occurred in employment relationships as production shifted from an artisan-based system in the nineteenth century to the industrial system of the twentieth century. We are now undergoing another fundamental transformation of the workplace, and this book is an attempt to understand this current metamorphosis, to place it in historical context, and to explore its ramifications.

We are accustomed to thinking of history as divided into a series of parallel realms. Economic history, labor history, history of technology, intellectual history, political history, military history, and legal history are usually treated as separate enterprises, each with its own narratives of stability and change, its own moments of necessity and accident, and its own cast of insiders and outsiders. At times, one type of history imports another to enhance its own story, as when social historians weave in events from economic history to support their narratives or when intellectual historians use examples from legal history to strengthen their assertions of intellectual trends. But by and large, each type of history is studied as a separate story that happens to share with other types of history only a common moment in time. This book is based on a different understanding of how histories fit together and how they together bear on the present.

Both the past and the present look different if you regard all aspects of a production regime as a whole. That is, the technology of production, employment relationships, managerial strategy, worker responses, union organizational possibilities, legal regulation, and social ideology are all interlocking and multidimensional aspects of an era. The interrelationships between these phenomena form a structure, an era, or what I prefer to call a production regime. But the regime is neither static nor predetermined. Each element of

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the regime conditions the others and defines the realm of possibilities for the people within them. Within the realms of possibilities so framed and constrained, people shape their social lives, form associations, and make their histories.¹ Thus by understanding the interrelationships between the many elements in a production regime, we can understand the prospects for social action and the possibilities for social justice in an era.

I have arrived at this interrelated approach through a personal history of my own. Many years ago as an aspiring labor historian, I set out to study the development of employment relations and work organization in American industry. I used the steel industry as a case study to trace the implementation, transmission, and impact of scientific management and other forms of workplace rationalization in the late nineteenth and early twentieth centuries. My work showed how American corporations adopted the theories of Frederick Winslow Taylor and other industrial engineers of the early twentieth century to develop the internal labor markets that dominated American industry throughout most of the twentieth century. I also showed how issues of work organization are intricately bound up with issues of organization, activism, and power that radiate outward from the shop floor to many aspects of social life. And finally, my study illustrated the contested nature of the transition from the artisanal era to the industrial era, and showed how each group tried to retain its relative position as it was being undermined by changes in technology and the social organization of the workplace.²

In a later incarnation, as a legal scholar, I studied the postwar U.S. collective bargaining system and mapped the underlying ideological structure of the regulatory regime. I discovered that through judicial interpretation of the labor law statutes, a legal architecture was constructed in which labor and management were empowered to engage in joint self-regulation of the workplace. I named that system of self-regulation “industrial pluralism” to emphasize its aspiration to form a mini-democracy within the private sphere, and I showed that the practical consequence of the industrial pluralist system of regulation was to subject the unionized workplace to private rule making and to keep external oversight and public policy out. It was a system of deregulatory regulation. I argued that the insular nature of the self-regulatory system of collective bargaining weakened the labor movement by making unionized workplaces impervious to social protective legislation and by isolating the labor movement from other social groups.³

¹ For an eloquent discussion of the role of human agency in the face of social transformation, see the Preface to E. P. Thompson, *THE MAKING OF THE ENGLISH WORKING CLASS* (1963).

² Katherine Van Wezel Stone, *The Origins of Job Structures in the Steel Industry*, in *LABOR MARKET SEGMENTATION* 27 (D. Gordon, M. Reich, & R. Edwards, eds., 1975).

³ Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 *YALE L. J.* 1509 (1981); Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 *U. CHI. L. REV.* 575 (1992).

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Only recently have I come to understand that there is a deep relationship between these bodies of work. Because I myself had been operating on separate tracks in my scholarly pursuits, I did not realize initially that they were both part of a bigger story about the U.S. labor relations regime in the twentieth century. But as that twentieth-century regime became eclipsed by another, I began to see how its parts fit together with a new clarity. Thus I came to understand that the regulatory regime of industrial pluralism that I had described in detail was built upon the foundation of the job structures ushered in by scientific management. The industrial pluralist labor law regime assumed the existence of a particular type of workplace. The labor and employment laws we have inherited from the New Deal were built upon the template of an employment relationship characterized by internal labor markets – an employment system that offered long-term attachment between the employee and the firm in which the employee advances up the job ladder of a particular employer for most of his or her working life. Thus the labor law regime was compatible with and tailored to the job structures of the industrial era.

Now the workplace is changing and the teachings of scientific management have been discarded. New ideas about how to organize work have generated new work practices that are proliferating throughout American enterprises. Indeed, the very concept of the workplace as a *place*, and the concept of employment as involving an *employer*, are becoming outdated. As a result of the transformation of work, the regulatory regime is seriously out of alignment with the reality of today's workplace. One consequence of this transformation is that it is necessary to rethink the nature of employment regulation at a fundamental level. Further, it is not only the regulatory regime that is out of alignment – it is also the private organizations, public institutions, social programs, and activist strategies that have constituted progressive politics in the social welfare state. Because of the metamorphosis of the production regime that I describe in the first part of the book, we need to rethink the entire infrastructure of policies and practices that has defined the aspirations of progressive social thought. This book interweaves the story of production techniques, organization of work, managerial ideology, union strategy, and legal regulation in order to make apparent the choices we now face for social policy.

Because we are in a time of transition, many of the particular policy recommendations in this book will no doubt be controversial. Times of transition are challenging because the old structures do not work, but it is difficult for social actors to recognize or respond to the fact of change. This was the problem faced by the American Federation of Labor in the 1920s, when the craft era was giving way to the industrial era but the unions could not alter their craft structures even though craft unionism had little appeal or meaning for industrial workers. As a result, union membership declined from 19 percent of the workforce to 10 percent in less than a decade, and the

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union movement was powerless to respond to the social crisis of the Great Depression that was just around the corner. We are at a similar moment today, when organized labor is built upon a particular understanding of the production process that makes it institutionally and ideologically difficult to recognize the changes that are occurring in the production regime or to formulate an effective strategic response. At the same time, progressive social thinkers and activists also lack an adequate description of the past or the present that opens up horizons for social policies and effective personal action. This book, by integrating and synthesizing academic disciplines that are normally kept separate, attempts to provide a picture of the present time of transition that can inspire and empower us to reimagine and reengage with the social world.⁴

I want to add one thought about methodology. To write about social change almost invariably requires one to develop a typology of eras. Without eras to designate distinct phases, change is difficult to identify or describe. Minute, evolutionary changes in a rock or a species become notable only when it is possible to say that the rock has transformed from an igneous into a metamorphic rock, or that the species has evolved from a fish to an amphibian. So too with history: the minutiae of everyday life, while ever changing, do not lend themselves to historical description or become objects of analysis unless we can see them as embedded in distinct stages. Whether we call these different stages eras, models, periods, phases, structures, systems, or formations, they are all attempts to give meaning and shape to incremental change. In doing so, we gain an analytic handle on both the past and the present. The typology of change enables us to foreground certain features of daily life as immutable and others as contestable. Yet in doing so, we invariably lose some of the richness of the world we describe. We necessarily simplify, stylize, and tidy up an admittedly messy and ambiguous reality. Any narrative of the past that breaks up time into eras or stages is necessarily oversimplifying; any characterization of a stage in the past or the present is necessarily both over- and under-inclusive.

This book shares in such defects. By organizing my discussion of production and regulatory regimes into periods, I am without doubt oversimplifying both the past and the present. But as with Max Weber's use of ideal types to describe Protestantism and the rise of capitalism,⁵ the wisdom of my choice of periods and the accuracy of my characterization of each period should be judged by the plausibility of my story and by the usefulness of my analysis.

The academic enterprise could not occur without the generosity of many selfless people who give hours of their time to listen to, engage with, and

⁴ Discussions with Elizabeth Long, professor of sociology at Rice University, have helped me to theorize the contribution of a synthetic and integrated approach to the past.

⁵ Max Weber, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (1968).

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improve upon the works of others. As I was writing this book, many friends and colleagues have shared with me their insights, offered me challenging criticisms, and given me support and encouragement. I particularly want to thank Bruce Ackerman, Greg Alexander, Harry Arthurs, Jim Atleson, Rosemary Batt, Richard Bensele, Francine Blau, Barry Bluestone, Jeremy Brecher, Bruno Caruso, Susan Christopherson, Hugh Collins, Alexander Colvin, Simon Deakin, Matthew Drennan, Bill Eskridge, Martha Fineman, Joan Fitzgerald, Mark Freedland, Donald Gibson, Dirk Hartog, Bob Hepple, David Howell, Alan Hyde, Larry Kahn, Harry Katz, David Kennedy, Duncan Kennedy, Alex Keysser, Tom Kochan, John Langbein, Elizabeth Long, Paul Osterman, Jeremy Paul, Dan Raff, Nick Salvatore, Vicki Schultz, Bill Simon, Sasha Skenderija, James Whitman, and Ed Zelinsky.

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The intellectual workplace, like the other workplaces I describe, has become truly boundaryless. My work is done not only at my computer, but also in the classroom and in workshops and conferences where ideas are discussed. I am indebted to students in my seminars at Cornell and Yale where I have discussed the ideas of this book, and to participants in numerous faculty workshops and conferences who came, listened, and debated with me about the ideas that have gone into the book. These include workshops at the Yale Law School, Cornell Law School, Connecticut Law School, N.Y.U. Law School, Boston University Law School, Hofstra Law School, UCLA Law School, Georgetown Law School, George Washington School of Law, Emory Law School, Wharton School of Management, Case Western Reserve Law School, Chicago-Kent Law School, Cornell Sociology Department, Cornell University Social Science Seminar, Princeton Program in Law and Public Affairs, St. John's College of Oxford University, Clare College of Cambridge University, the Law and Society Association, the Industrial Relations Research Association, the AFL-CIO Lawyers' Conference, and the law firm of Cohen, Weiss & Simon.

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