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**From the Selected Works of Helen LaVan**

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2008

# Legality of Employer Control of Obesity

Helen LaVan, *DePaul University*

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# JVR

JOURNAL OF **WORKPLACE  
RIGHTS**

Editor: JOEL P. RUDIN

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## FROM THE EDITOR

Welcome to the first issue of the *Journal of Workplace Rights*. Until this issue, we were known as the *Journal of Individual Employment Rights*, but we now have fifteen new Editorial Board members, a new Manuscript Editor, and a new research focus. Our new Editorial Board members are Paul Adler, Victor Devinatz, Theresa Domagalski, Kelly Dye, John Hassard, Steve Jaros, John Jermier, Tom Keenoy, John Logan, Bernhard Mark-Ungericht, Mary Meisenhelter, Albert Mills, Jean Helms Mills, Leah Ritchie, and Maxim Voronov. They will join our five returnees from the old Editorial Board: Phillip Beaumont, Charles Coleman, Douglas McCabe, Hedayeh Samavati, and Hoyt Wheeler. Our new Manuscript Editor is Ann O'Hear, and the quality of her work is impeccable.

The *Journal of Workplace Rights* is dedicated to the proposition that human rights should not be compromised by employers. It uses an expansive definition of human rights, based on the Universal Declaration of Human Rights as passed by the United Nations in 1948. A list of proposed topics can be found on our website at <http://baywood.com/journals/previewjournals.asp?id=jwr>. The *Journal* invites prospective authors to submit articles that are completely unrelated to these topics as long as their focus is on workplace rights.

Before I preview this issue's articles, I wish to pay special thanks to the following Editorial Board members who did a terrific job of reviewing them in a timely yet thorough manner: Phillip Beaumont, Victor Devinatz, Kelly Dye, Steve Jaros, John Jermier, Douglas McCabe, Hedayeh Samavati, and Hoyt Wheeler. In addition, Trevor Bain, David Jacobs, Jeff Mello, and Rahul Varman took time from their very busy schedules to excellently serve as ad hoc reviewers for this issue.

The first article is by Steve Jaros, and it is entitled, "Labor, knowledge, and value in the workplace: Implications for the pay of low-wage employees." It contains a great deal of practical advice to assist workers in pressing their claims to fair pay. The second article, by Susie Jacobs, is "*Doi Moi* and its discontents: Gender, liberalisation, and decollectivisation in rural Viet Nam." Its proposals, if

enacted, would improve the quality of work life for millions of women in that country. The third article, by Tanya Marcum and Elizabeth Campbell, is entitled, "Peer review in employment disputes: An employee right or an employee wrong?" The authors argue that proper application of peer review procedures could be greatly beneficial to workplace rights. The fourth article, by Marsha Katz and Helen Lavan, is "Legality of employer control of obesity." Its aim is to increase the success rate in the courtroom for victims of obesity discrimination in employment.

The final two articles in this issue constitute the New Scholars section. Each issue of our journal will feature work by doctoral students and untenured faculty, as they have fewer rights than those of us who have completed the tenure and promotion process. Anthony Yue wrote "Acquired disability and returning to work: Towards a stakeholder approach." This article advocates a more humane and employee-centered process through which injured employees could negotiate the terms of their return to work. Last but not least is a article by Connie Bygrave and Scott Macmillan, entitled "Spirituality in the workplace: A wake-up call from the American dream." This article points out the moral bankruptcy of work in the United States and offers the Canadian way as an employment system worth emulating.

If you have as much fun reading these articles as I did while editing them, you are in for a very good time indeed. We trust that our existing readers will enjoy the transition and appreciate the increased publication frequency of our journal. Our plan is to retain our subscriber base while simultaneously reaching out to progressive thinkers throughout the world. Readers with any questions about this journal should contact me electronically at [jwr@rowan.edu](mailto:jwr@rowan.edu)

*Joel P. Rudin*  
*Editor*

## **LABOR, KNOWLEDGE, AND VALUE IN THE WORKPLACE: IMPLICATIONS FOR THE PAY OF LOW-WAGE EMPLOYEES**

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### **ABSTRACT**

The issue of worker pay, particularly the pay of low-wage workers, is one that often surfaces in Western political and academic discourse. This article contributes to the discussion in a number of ways. Theoretically, I address the issue by leveraging insights from critical and “mainstream” research on determinants of worker pay, specifically the work of Marx (1867/1976) and Coff. First, similarities between Coff’s (1999) resource-based strategic management model of rent generation/appropriation and Marxian conceptualizations of subsistence wages are outlined, with an eye toward forging some common ground between “mainstream” and “critical” formulations of how value is created and appropriated in organizations. Having established this, I explore some key endogenous and exogenous factors that influence worker pay, and I discuss the ways in which workers and academicians can leverage them to improve the pay of low-wage workers. Ultimately, the goal of this article is to help critical scholars develop practical ideas about strategies for raising the pay of low-wage employees.

Critical scholars should be concerned about the pay that workers receive, since pay is a fundamental component of quality of life. There is evidence suggesting that worker pay, particularly in advanced countries, has shown little growth. Rousseau and Batt (2007) argue that while productivity has risen in recent years, pay has tended to lag behind. They note that according to the Organization for

Economic Cooperation and Development, despite productivity gains in all three countries, workers' share of gross domestic product fell by 3.1% in Germany in the past five years, by 3% in Japan, and by 2.5% in the United States (Porter, 2006). Furthermore, the divergence of chief executive officer (CEO) pay from the average worker's pay has increased from 24 times in 1965 for U.S. CEOs in major firms to 300 times at the end of the year 2000 recovery, falling to 185 in 2003 (Mishel, Bernstein, & Allegretto, 2005). Thus, workers, particularly the lowest-paid workers, appear to be falling behind other stakeholders, particularly top management, in terms of organizational wealth appropriation. In the United States, data of this kind have prompted renewed calls for an increase in the minimum wage. On July 24, 2007, the minimum wage was increased to \$5.85 an hour.

The fight to raise compensation for society's poorest takes place at several levels. At the national and subnational levels, "living wage" laws and minimum wage increases have had a positive effect. According to the Economic Policy Institute (2002), a "living wage" is the wage needed to support a family above a city, state, or federal poverty level. It thus varies by locale, depending on the particular area's cost and standard of living.

For example, on October 1, 2007, Maryland became the first U.S. state to implement a living wage law, which mandates that contractors doing business with the state pay their workers \$11.30 an hour in urban areas and at least \$8.50 an hour in rural areas (Office of the Maryland State Labor Secretary, 2007). While the economic impact of these initiatives is controversial, most research has found that job losses from the implementation of these initiatives is more than outweighed by the benefits to low-wage workers (Pollin & Lucie, 1998; Luce, 2004; Neumark, 2002). Groups such as the ACORN (Association of Community Organizations for Reform Now) Living Wage Resource Center have led the fight in the United States to raise the pay of low-wage workers, organizing multiple successful campaigns across the country to raise local minimum wages to a "living" level. These efforts have borne fruit and are worthy of support. But beyond participation in these kinds of political campaigns, what can be done?

The struggle for higher pay also takes place within each workplace, which is where this article aims to make its contribution. Given a pool of organizational money that changes in the long run but is finite at any given moment, anything that goes to the lowest-paid employees must be taken away from some other potential recipient of the funds, such as shareholders or high-paid employees. Some critical researchers have addressed the question by focusing on increasing the skills of lower-wage workers. For example, in their analysis of skill formation and economic competitiveness in the United Kingdom, Lloyd and Payne (2004) call for the development of a "political economy of skill" that would integrate workplace dynamics with institutional changes in British government policy toward skills training and vocational education, a political economy that could make a contribution toward the creation of a more "just and egalitarian"



society. Lloyd and Payne argue in favor of governmental policies that will compel businesses to change their strategies away from what Lloyd and Payne call the current focus on short-term profits and quarterly stock market price increases and toward a long-run focus on producing high-quality products that demand the use of high-skill labor, as well as the adoption of organizational structures that provide workers with more autonomy and freedom on the job; the point of all this is to improve the skill level of jobs, and thus the pay, of workers who are currently stuck in low-skill, low-wage jobs.

While I sympathize with Lloyd and Payne's desired outcome, I do not think the path of government compulsion is, by itself, likely to bear much fruit. Rather than being a simple function of a management vs. labor de-skilling dynamic (see Sturdy, Knights, & Willmott, 1992), wealth appropriation is a complex process involving multiple stakeholders and resource bearers. Beyond that, in Western capitalist countries, government does not have the inclination, and probably does not have the ability, to force other stakeholders to set aside their interests and share additional rent with workers by compelling them to provide training or enriched jobs. Workers, like everyone else, are likely to get what they can bargain for, and what they can bargain for is largely influenced by the power that they can command. To appropriate additional wealth, workers must make themselves more valuable to other organizational stakeholders, who would rather pay them as little as possible.

Thus, this article addresses the question of improving the wages of low-wage workers from a within-firm perspective. One place to start such an analysis is the work of Marx, since Marx provides both an account of both political economy and an analysis of what happens "at the point of production" to influence worker pay. Additionally, in an influential "mainstream" strategic management article, Coff (1999) addresses the issue of revenue allocation among organizational stakeholders. Part of his discussion involves an analysis of how workers, even low-wage workers, can appropriate revenue that otherwise might go to other stakeholders. However, one problem with Coff's analysis is that he neglects the insights of the Marxian tradition and thus does not embed workplace revenue sharing within a broader political-economic framework. On the other hand, Marxian analyses often hinge on an all-or-nothing approach, in which revolution, the overthrow of capital by labor, is the only outcome likely to improve the pay of low-wage workers (see Braverman, 1958 Adler's (2004) discussion of the "neo-Marxian" perspective that makes this argument; and Sakolosky, 1992). Coff's analysis suggests that there are practical ways to improve the pay of low-wage workers short of a revolution that might be a long time, if ever, coming.

Thus, my approach is to explore some possible points of intersection between Coff's (1999) resource-based strategic management model of rent generation/appropriation and Marxian conceptualizations of surplus value generation/appropriation, with an eye toward forging some common ground between "mainstream" and "critical" formulations of how value is created and appropriated

in organizations. The ultimate goal is to help critical scholars develop ideas about strategies for raising the pay of low-wage employees, with a focus on the Western context. Additionally, I hope to sensitize “mainstream” researchers to the value of Marxian concepts in helping us make progress in the area of wage equity.

## **SUBSISTENCE, QUITTING COSTS, AND CLASS WEALTH GENERATION/REALIZATION**

### **Marxian Theory**

In what sense are workers, as a class, compelled to generate wealth for capital, and how does this lead to very low, subsistence, wages? Marxian theory argues that workers are constrained by structural pressures: the capitalist system renders a worker unable to sell “anything but his skin,” which thus renders him or her powerless to avoid a “tanning” at the hands of the employer. This tanning takes the form of a “subsistence” wage, which Braverman (1958) defined as a wage necessary to produce the physical presence of the worker at work each day, and to propagate the working class as a whole. Thus, the Marxian concept of subsistence assumes a number of points. First, workers earn a subsistence wage because that is the minimum they *can* earn. By definition, this wage is at a level such that the worker would not be able to buy enough goods and services to physically and “morally” survive. While at the firm level this is not necessarily a problem for the capitalist, at a class level it is a problem: if all workers are unable to “survive,” then there will be no one left to continue to generate surplus value for the capitalist. Thus, as a class, capitalists are compelled to pay workers enough to subsist on. Second, the worker must earn enough to raise a family, thereby perpetuating the existence of a working class and therefore the ability of capitalists to profit from surplus-value extraction. Third, the workers earn this minimum subsistence wage because of the decisive power advantages that the liberal economic order gives the capitalist: in contrast to capitalists, workers lack a store of wealth to survive on in the event that they are unemployed, and they are thus compelled by necessity to be employed *now* under whatever terms are being offered. Furthermore, workers tend to lack other survival alternatives, in the broad sense of alternatives to being workers, and are thus “stuck” in their class.

It bears noting that by “subsistence,” Marx does not necessarily mean that all workers will earn a poverty-level wage. Unlike some variations of the Ricardian and Malthusian “Iron Law of Wages,” which proposes that wages should fluctuate around a bare “physical” minimum (i.e., enough to merely provide for the physical existence of the worker), in Marxian theory “subsistence” is to an extent a socially constructed concept, not a purely physiological one, and therefore the actual wage received will vary depending on contingencies associated with circumstance. I say “variations” because in the original formulation, Ricardo’s and Malthus’s ideas imply that subsistence income for a society is just the income at

which birth and death rates are equal, and this can be at a level considerably above that needed for bare physical survival (Clark, 2007).

As Mandel (1990) notes, the Marxian concept of subsistence has a “historical-moral” component that reflects the path of capitalist development, including political struggle between capital and labor, within a particular society. Social norms about what “subsistence” means, as reflected in political policies such as minimum wage laws, welfare benefits, unemployment insurance, and so forth, are all components of this historical-moral aspect of subsistence, which is analogous to the notion of “socially necessary labor” in the Marxian labor theory of value (Jaros, 2005). Thus, what qualifies as “subsistence level” in a country in the early stages of capitalist development, such as Vietnam, may be quite different from what qualifies as “subsistence” in an advanced capitalist country such as the United States.

One final point that bears noting is that Marx’s analysis is pitched at the “social,” not organizational, level. Its intent is to describe power dynamics and wage consequences for classes of employees. It is not intended to account for vagaries in wage differences among firms within a particular industry. Specific workers and firms are interesting only to the extent that they act as bearers of class relations. But, since real workers are not paid by the “capitalist class” in general but by particular firms, this is a theoretical blind spot that seemingly begs for illumination. On this point, Coff’s (1999) analysis of value (rent) generation and appropriation, which is pitched at the organizational level, is therefore worth considering.

### **Coff’s Theory of Value Creation and Distribution**

Coff’s within-firm view of value creation and distribution focuses on two key concepts, quitting costs and rent. *Quitting costs* are essentially the same as opportunity cost: the employee will tend to earn that amount needed to keep him/her from seeking another job or wealth-generating opportunity. Coff’s analysis of quitting costs focuses on factors that are internal to the firm. For example, the primary limitation on alternatives is the firm-specific skills an employee might have accumulated. These skills limit the employee’s options because they are not valuable to competing firms, thus tending to “trap” the employee in the organization.

*Rent* may exist at the nexus (firm) or stakeholder or individual employee level. Nexus rent is a composite: it refers to the sum of all rent within the firm. At the individual level, rent is a “surplus wage,” a wage above that which is necessary to keep the employee from quitting. Thus, an employee’s total pay is composed of his or her quitting cost equivalent and rent. In Coff (1999), it is proposed that the rent one receives is a result of bargaining among stakeholders, all of whom seek to maximize the residuals that come their way. “Residuals” means profit, that is, what accrues to the ownership after other stakeholders have received their pay.

### **Marxian and Coffean Analyses: Can They Be Integrated?**

There are both similarities and differences between Marx's and Coff's ideas about what determines an employee's wage rate. The key similarity between them is that both posit that a firm faces the problem of "producing and reproducing" the worker who contributes to the profits of the firm. The firm must pay the worker enough money to enable the worker to appear at work and to make him or her want to do so. In other words, both theories acknowledge that sustainable competitive advantage requires the leveraging of a reasonably constant flow of human resources. Also, neither subsistence pay nor quitting costs are fixed, but can fluctuate depending on changing circumstances. And both theories also draw our attention to the key role of bargaining (in Marxian terms, "class struggle") in determining the wage rate.

However, there are differences between these concepts as well. In Marxian theory, any locally contingent factors that can cause bargaining to produce different outcomes for different workers both within a firm and across firms are significantly constrained by a firm-exogenous factor: the systemic features of capitalism that, at least in the short run, constrain "the worker" to membership in the working class, the defining characteristic of which is the inability to earn a living other than by selling one's labor power as a commodity in a market in which the worker is at a power, and therefore bargaining, disadvantage vis-à-vis the firm. In contrast, Coff's theory does not emphasize factors that are exogenous to the firm. In Coff's view, bargaining power over rent is a function of factors that are largely endogenous to the firm.

Despite these differences, the Marxian and Coffean perspectives on worker wages are not incommensurable. One reason for this is that to an extent, Marx and Coff operate at different levels of analysis. Coff is concerned with explaining the behavior of firms and of subunits (work teams, stakeholders, individual employees) within the firm. Marxian theory is interested in the behavior of social classes, capitalists and workers, and therefore takes note of the behavior of individual firms and/or employees only to the extent that they are "bearers of class relations." Thus, because the two theories largely cover different terrain, there is not much ground for conflict. But then how can they be integrated in a way that helps students of organizational analysis understand work behavior?

In my view, the two approaches to wage valuation are complementary. Coff's theory provides a comprehensive analysis of the bargaining dynamics that characterize stakeholder interactions and the within-firm factors that provide power and leverage to the competing interests. But it lacks the systemic perspective that explains why, despite local contingencies, wage rate bargaining is consistently characterized by income inequality between workers, managers, and owners. On the other hand, while Marxian theory identifies the systemic factors that tilt the "game" in favor of some classes at the expense of others, its theoretical blind spot

lies in a failure to appreciate what happens inside the firm, despite Marx's claim to take us "inside the hidden abode," the point of production, where stakeholders struggle over rent appropriation. Thus, by leveraging Coff's theory with Marxian analysis, we can gain a more complete picture of the intra- and interinstitutional forces that shape bargaining power within the firm.

### **EXOGENOUS AND ENDOGENOUS FACTORS THAT CAN ENHANCE WORKERS' RENT APPROPRIATION**

I conceive of a critical organizational theorist as one who tries to derive ways of empowering those who are at a power disadvantage within organizations. Thus, the issue to be engaged is "what can be done to build the wealth-appropriation abilities of workers in today's organizations"? From a purely Marxian point of view, that question is answered by modification of the exogenous, structural characteristics of capitalism that make the worker power disadvantaged in the first place—the sale of labor power as a commodity, and so forth. But Coff's analysis allows us to consider ways in which worker power can be enhanced in the short run, via the leveraging of factors that are both exogenous to and endogenous to the organization and thus under the worker's personal control or over which the worker can have immediate influence.

Specifically, from the low-wage worker's perspective, some critical factors that determine bargaining power are, formulated in question form, as follows. First, is the worker capable of *acting in a unified manner* with other similarly situated stakeholders who share his or her interests (e.g., as in a union)? Second, does the worker have *access to key information* that others within the nexus depend on? Additionally, does the worker have access to *information about the overall rent that is generated by the firm* and that stakeholders are currently receiving? The final question pertains to "ease of movement": Does the worker have a *high replacement cost* to the firm and does the worker face *low costs if she or he moves to another firm* or otherwise seeks outside employment opportunities?

#### **The Ability to Act Collectively**

This implies issues of (a) unionization and (b) efforts by labor unions, religious organizations, and community groups that seek to partner with low-wage workers to pressure government at all levels to pass living-wage laws in an effort to provide the low-wage workers with a wage commensurate with a "reasonably comfortable standard of living," which will vary depending upon the target standard of living and the local cost of living. In the United States, labor unions have, overall, provided their members with higher wages than "market forces" alone would provide (see Lafer, 2004). This is probably why conservative forces have waged a decades-long campaign to weaken the labor movement in the United States, a campaign that has largely succeeded, as evidenced by

declining union membership rates. Low-wage workers, such as those employed by largely nonunion companies such as Wal-Mart, would benefit from unionization. For *that* to happen, political changes, such as the election of a progressive Congress and president, who would enact labor-friendly federal legislation, would have to occur.

In contrast to setbacks on the unionization front, the living wage movement has achieved notable recent successes. As of 2007, more than 120 cities and counties have passed living wage laws that have boosted the pay of low-wage workers (Wayne State University Labor Studies Center, 2007), and as previously mentioned, Maryland recently became the first state to do so. Living wage advocates have also succeeded in raising public awareness of the relationship between pay rates and globalization processes, by linking the sweatshop-level pay of workers in third-world nations to outsourcing efforts by U.S. companies that not only cost jobs but also set U.S. workers in wage competition with exploited workers in these developing nations. Since outsourcing has recently become a threat not only to low- and unskilled labor but also to professional and hence “middle-class” work such as computer software and hardware design (Friedman, 2005), it may be possible for living wage advocates and the left-leaning critical scholars engaged in such efforts to merge, or align, the interests of low-wage U.S. workers with those of at least some of their white-collar counterparts in the quest for enhanced employment security and the struggle against the erosion of pay rates.

### **Knowledge of Information Flows and Technology**

Coff, Coff, and Eastvold (2006) note that firms face a knowledge paradox: on one hand, in many employment settings they need workers to master an explicit skill, information technology, because mastery of information technology not only allows the employee to utilize it directly to increase productivity but also equips workers to develop tacit knowledge that can make them even more efficient and productive. And, to achieve scale and thereby meet demand or otherwise realize these efficiencies on a firm-wide scale, firms desire that this tacit knowledge be codified and routinized.

But codifying and routinizing means the knowledge is no longer tacit, and is therefore imitable by competitors, which removes its competitive advantage. Historically, since the days of Frederick Taylor, who argued that management must codify and routinize the craft (tacit) knowledge that workers generate, this paradox has been resolved in favor of codification. But Coff, Coff, and Eastvold argue that in a dynamic, highly competitive globalized economy, this resolution must yield in favor of maintaining the tacit nature of the knowledge: Firms should view information technology as an “enabler and amplifier” of tacit knowledge and therefore competitive advantage but not, by itself, as a source

of competitive advantage. This means that to maximize profits, firms will train their employees, even low-wage workers, to understand and use information technology to improve their tacit knowledge generation ability, and thus their personal productivity and efficiency, *without* attempting to codify or “capture” this knowledge formally.

The interesting area from my point of view is the within-firm political implications of this prescription. If firms behave as Coff, Coff, and Eastvold (2006) believe they should, the net result will likely be an expansion in the nexus bargaining power of low-wage workers, since the locus of value becomes the mind of the individual worker, not the information technology “system” or the rules/procedures that normally flow from it. The individual worker would benefit from possession of a “bilateral monopoly,” that is, a monopoly of the possession of useful tacit knowledge, as against other nexus stakeholders. Of course there would be constraints on the worker’s ability to bargain with this knowledge. Like all tacit knowledge, it would be to a certain degree firm-specific, thus reducing its value to other firms that might otherwise bid for the services of the worker. But only partially, since a key aspect of this knowledge is the tacit understanding of how to leverage information technology to create tacit knowledge, a skill that would be portable to other employment opportunities. Thus, the proliferation of information technology and its dissemination beyond the realm of experts to all employees could, if combined with Coff, Coff, and Eastvold’s prescription, be a case of the capitalist providing workers a rope with which they may not “hang” the capitalist but at least may wring more rent from him.

Thus, knowledge of information technology (an explicit, not tacit, skill), is a critical bargaining-power factor because (a) information technology is a major value-producing resource, such that all those who master its use can make themselves more valuable to the firm-nexus; and (b) doing so not only makes one more valuable to the firm as a value-producer but is also likely to increase the “expert” and “referent” power of the person who masters the use of information technology and make him or her a nexus node within the information-communication web within the firm, all of which improve his or her bargaining power vis-à-vis other stakeholders.

As Coff (1999) explains, in some cases, if a worker occupies a strategic location within the firm nexus, he or she might be able to increase his or her personal bargaining power. However, for most low-wage workers, this is likely to be most effective if they act collectively rather than individually. If workers are dissatisfied with their share of rent, they can implement what amounts to a “work to rule” strategy until their rent demands are met.

Although not he does not directly address the matter, Lafer (2002, 2004) would likely take issue with this discussion of tacit skills development and information technology mastery on the grounds that it falls within the same field of play as governmental attempts to enhance the “supply side” of the skilled



workers—high-paying jobs equation but that it neglects the “demand side,” that is, the creation of high-paying jobs. In his analysis of the U.S. job market for low-wage workers, Lafer (2004) argues that attempts to make low-wage workers more valuable to firms via traditional skills training (e.g., “skills-based pay” schemes) and by improving their work-related “attitudes” have largely proven to be failures. Partly this is because such programs have focused on the perceived psychological problems of low-wage workers (i.e., in motivational seminars to increase their “low self-esteem” and disciplinary instruction that is ostensibly aimed at improving “work habits,” such as how to get up for work on time) but the programs actually have a right-wing ideological element in that they also teach the worker how to be compliant and obedient to the bosses’ demands (see Hampton, 2004).

But partly it is because in Lafer’s view, there is a “shortage” of high-wage jobs, in the sense that there are more low-wage workers than there are good jobs being created by employers. Lafer argues that the solution to this shortage problem does not potentially lie in the psychology or even skill-set of the individual worker (see Lafer, 2002) but (a) in governmental intervention that creates a more level playing field between capital and labor, and (b) in worker collective action. Like me, Lafer rejects the first alternative on the grounds that at least for the time being, with Bush in power, there is little hope for movement in that direction, and that even if the Democrats take over they are unlikely to take meaningful action either, since they too are beholden to corporate interests. (As I write this, the newly elected Democrat-controlled U.S. Senate just voted against a major labor union-sponsored bill that would have made it easier for unions to win recognition votes in U.S. workplaces.)

So Lafer argues that the key to creating high-wage jobs lies in the second alternative, trade union activity, because by combining their strength, workers can force companies to create high-wage jobs. Efforts to create such jobs on the supply side (i.e., increasing the supply of highly skilled workers by improving the skill-set or mind-set of workers) are useless because companies simply will not create high-paying jobs unless they are compelled to, either by the government (which is unwilling) or by the collective force of mobilized workers. Thus, Lafer argues that the focus of the critical scholar should be on the demand side of the equation: encouraging workers to develop the “solidarity” needed for collective mobilization.

Viewing the situation through the lens of Coff’s analysis, Lafer’s point about unionization is well taken. Unions are composed of people who may be individually quite powerless (unable to muster much bargaining power within the resource nexus) but who collectively are able to press for a larger share of the pie. Historically, unionization is indeed positively correlated with wage gains for workers. However, in my view, Lafer errs in emphasizing unionization to the exclusion of all supply-side stratagems. For one thing, in the United States, unionization rates have steadily declined over the past 40 years, and that trend



shows no signs of abating. For another, a demand-side focus on unionization is not incompatible with a supply-side focus that aims to improve the bargaining power of individual workers, apart from collective mobilization. The two stratagems can work hand in hand.

### **Knowledge of Rent Distribution**

At the social level, what kinds of advances in intellectual-capital formation could undermine the social structures that give capitalists a prohibitive advantage over workers in determining the conditions under which value is created and who appropriates it? Here, Marx's analysis of social structure is insightful, but in some sense also problematic, since contrary to his predictions the revolutionary overthrow of capitalism by the working class is not on the horizon. But acknowledging this, what viable structural changes can improve the rent-appropriating ability of workers?

There is something to the notion that workers are typically at a structural disadvantage vis-à-vis management/ownership in understanding the logic of the firm's technical and administrative processes, and that this structural disadvantage, which reflects information asymmetry about how the firm is managed, makes it difficult for workers to make value/rent claims when bargaining with other stakeholders. Workers, who do not typically occupy nodal positions, would seem to be cut out of the rent-appropriating loop. As Coff (1999) notes, low-wage workers are often at a disadvantage in that they lack knowledge of the "residuals" that ownership earns from the firm, or of how firm rent is specifically distributed to other stakeholders. That is, they lack information about how much money the firm is making out of their labor. It is difficult to bargain for a larger share of the pie if you lack information about how large the pie is. Critical management scholars can fill a need in this area by volunteering to teach management and corporate finance courses for low-wage workers.

Closing the information asymmetry gap means providing workers with management skills so as to arm them with the knowledge necessary to critically evaluate the rent claims of management. Since it is unlikely that many low-wage workers can afford to enroll in college and attend their classes, my recommendation is that critical management scholars should offer to do "pro bono" work for unions and other workers' organizations—donating our services to workers. Also, information technology can be leveraged to create online resources—primers on management topics and online course resources—to provide access to low-wage employees who may not have the time to attend classes or weekend seminars but who have Internet access. In the long run, this could mean establishing something akin to the National Labor College at the George Meany Center for Labor Studies in Silver Spring, MD, except that in addition to teaching union-organizing skills, the emphasis would be on teaching

basic management skills, and the focus would be on helping low-wage workers, whether they are union members or not. Critical management scholars could volunteer their time to teach and/or provide course materials to enhance the intellectual capital, and therefore the bargaining position, of these employees.

### **Ease of Movement**

Two factors that influence the wages of low-wage workers are their replacement costs to the firm and the cost they must bear to leave. As Marxian analysis informs us, global political economy is not isolated from the concerns of low-wage Western workers and the determination of their wage rates within specific firms, since exploitation abroad facilitates exploitation at “home”: If, for example, Vietnamese or Mexican workers are being paid 40 cents an hour, this constitutes a global “reserve army” of labor that can be tapped by U.S. companies if their low-wage workers demand higher pay, thus reducing their bargaining power by making them easy to replace should they threaten to withhold their labor. It also means that their low pay will make moving to alternative careers difficult, since they lack the wealth cushion to cover the transition costs. Traditionally, the mainstream media have presented the interests of developing-world and low-wage U.S. workers as adversarial, disguising the degree to which global capital exploits both.

This implies the need for critical management scholars to educate workers in business management and administrative skills, so that they can critically evaluate management’s rent claims and the claims of the mainstream corporate media. Ironically, as information becomes cheaper and is transmitted faster, the entire value-chain becomes more transparent than it was in Marx’s day, perhaps diminishing the information-distorting effects of market and mainstream global corporate media structures. Evidence for this comes in the form of new social movements resisting WTO-sponsored global trade initiatives, environmental depredations, and child/sweatshop labor in third-world countries; and in the form of alternative Web-based media that can provide analysis that Fox News and CNN have no interest in providing. However, most of these initiatives have come not from “working-class” leaders in the West but from academic and social elites. What is needed is scholarly and practical work linking the interests of the Western working class (e.g., sweatshop labor in China costs jobs in the United States) with the activities of these social elites. Critical management scholars can educate low-wage U.S. workers about the way in which their behavior as consumers reduces their bargaining power as employees, and such scholars can partner with critical colleagues in areas such as communication and media studies, to provide alternate media sources to disseminate analyses of how global capital pits low-wage workers in different countries against each other.

## CONCLUSION

This article has attempted to meld some of the insights of traditional Marxian analyses of value production and appropriation and the inter- and intrafirm factors that perpetuate capital/labor inequality and depress the pay of low-wage employees with insights from recent theorizing (Coff, 1999) within the “mainstream” strategic management and information-as-value literature on similar topics. In my view, these theories are not only commensurable but compatible, because each addresses issues given relatively short shrift by the other: Marxian theory does not take seriously enough what happens at the firm level and to individual workers, while the new strategy literature on value/rent appropriation is somewhat neglectful of the import of broader systemic aspects of society that profoundly shape the bargaining power of “agents” and “resource groups” within the firm. Each can thus shed some light on how we, as critical scholars, can develop ideas to improve the value added and value appropriated by low-wage workers. Coff’s (1999) article has been influential in the mainstream strategic management literature; it has been cited by scholars attempting to help transnational corporations improve their global information technology strategy (Aguila, Bruque, & Padilla, 2003), in investigations of sources of global competitive advantage (Branzei & Thornhill, 2006), and in studies of the strategic importance of knowledge management (Foss, 2007). It is ironic that an article that pointedly ignores any discussion of “class conflict” might be useful in helping low-wage workers capture more residuals from management and ownership.

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**DOI MOI AND ITS DISCONTENTS:  
GENDER, LIBERALISATION, AND  
DECOLLECTIVISATION IN RURAL VIET NAM**

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**ABSTRACT**

This article explores the ways in which liberalisation processes and the decollectivisation of agriculture have impacted on gender relations in Viet Nam. In Viet Nam, decollectivisation entailed a highly egalitarian land redistribution and so presents a nearly unique case study. I discuss two sets of theories: market transition theory and feminist theories analysing the household and household production processes. While market transition theories offer some insights into the differential effects of liberalisation, they do not address aspects of women's work outside the formal economy. In contrast, feminist theories are able to comprehend the complex and interlocking nature of households, lineages, and the wider economy for women's lives and work.

I argue that collectivisation of agriculture presented some advantages for women, in that some work was socialised, and earning work points made their work more visible than it had been within peasant households. Decollectivisation and capitalist market relations have offered opportunities for some: for instance, Vietnamese women's role as market traders has been restored. Agricultural productivity has risen, and this has benefited women as well as men. However, this process also restores much more control to male household heads. New property laws give wives the right to have their names on title deeds, along with husbands; however, this is rarely enforced. The majority of peasant women face a loss of services, increased economic instability, and increased risk. New forms of labour organising may be needed to assist rural women in realising land and other rights.

## INTRODUCTION

This article concerns gender and workplace rights in an unusual setting: small farms in an economy in transition from state socialism to a capitalist market. For most people in the West or global North, the term “workplace” brings to mind images of factories, shops, offices, or computer terminals. However, it is only as of 2006 that the majority of people in the world have become urban (People and the Planet, 2007). Thus, for many women, the “workplace” is a farm, a plantation, or some other type of agricultural unit.

The concept of “rights at work” is virtually never applied to peasant women. Most of their work takes place within households and smallholdings, under the direction of husbands or fathers, and so is invisible and easily forgotten. Yet their situation is similar in some ways to that of labourers. In some parts of the world (especially sub-Saharan Africa), women carry out most of the farm work, but women in the main do not have property rights on the same basis as men. With the exception of some matrilineal societies, land rights are usually held by men, either individually or collectively.

A large number of settings in which rural women work are Soviet-type transitional societies: a large reorganisation has taken place, affecting millions of rural people. The advent of capitalist market relations has had mixed implications. Some social groups have become more prosperous as a result of transition, and a minority of women who are well positioned in class terms may gain economically. At the same time, the majority of peasant women face a loss of services, increased instability and risk, and a return to privatised household-based production.

The article focuses on a case study of transition, that of Viet Nam, and also offers some comparisons with other transition countries. It discusses the ways in which decollectivisation of agriculture and liberalisation processes more generally have impacted on gender relations and upon women’s lives. The article explores the question of which theoretical frameworks might assist in conceptualising the situation of rural women in Viet Nam and elsewhere in the developing world. It briefly examines market transition theory, and concludes that this is of some applicability. However, the theory and variants of it focus primarily on the formal economy and so cannot capture the work and household situations of rural/peasant women, who rarely earn wages. Instead, theories derived from the feminist economics, development, and social anthropological literature are able to analyse women’s lives and situations in a more holistic manner. In other words, it is not possible to understand rural women’s work lives and the need for workplace rights narrowly, without considering other aspects such as household and community relations.

The article is organised as follows. It first discusses market transition theory and some applications that explore gender dimensions of market transition such as wage differentials. It then outlines the ways in which feminist theories of household economies and of gender subordination might assist in understanding

the gender implications of transition, particularly in rural areas. The second section gives an overview of the gendered implications of collectivisation and of decollectivisation. The bulk of the article discusses the Vietnamese case, ending with a brief comment about prospects for employment within export-oriented industry. The concluding section suggests some ways forward for rural women.

## THEORETICAL FRAMEWORKS

### Market Transition Theory and Its Applications

Market transition theory, first proposed by Nee (1989), aims to predict (some) socio-economic impacts of transitions to market-based economies. The theory posits that in former state socialist societies, the shift from “hierarchies” or a redistributive economy to a market-based economy changes the basis of power and privilege from those in charge of redistributive decision making to groups exercising market or market-like power. Nee (1989) predicted that direct producers would gain in relation to those managing redistribution in relevant sectors of the economy, including agriculture. In market conditions, there exists a greater return for individual effort, as indicated by higher returns for education, a good predictor of human productivity. Finally, Nee’s “market opportunity thesis” indicated that alternative avenues of mobility would be opened up within market conditions; these would be based on entrepreneurship and control over market/capitalist activities. Cao and Nee (2000), although they noted that the theory could be applied to urban settings, discussed rural settings in China because agricultural decollectivisation combined with private entrepreneurship represented a relatively simple form of market transition. They noted that there existed a general consensus over the predictions concerning returns to human capital and the new opportunities created by the private sectors. Debate exists, however, over the role of cadres and ex-cadres in new economic situations and over the extent to which ex-cadres were/are positioned to benefit to retain power or control in the new market conditions. Although this debate is of importance, it is beyond the scope of this article. Nevertheless, market transition theory is of some relevance to the argument here. It indicates that some social groups who acquire market control benefit while others (for example, cadres or other state functionaries) tend to lose out within transitions. This insight is of value, particularly as most rural men are better positioned than women within their households to grasp any advantages within market economies. But the theory as presented initially did not discuss the gender implications of transition. For instance, it is posited that “direct producers” (peasants) gain when central controls over agricultural prices are relaxed. Although this is the case, the fact that peasants are female as well as male is overlooked: Chinese rural women do not exercise the same degree of control over the production process as do (most) men.



One aspect of the gender differentials has been explored in the literature, however: wage differentials between women and men. The prediction of market transition theory in this respect (Brainerd, 2000; Liu, 2004) is that the relaxation of central controls may allow employers to discriminate against women or other groups; however, discrimination is assumed to be “costly” in conditions of competition. Therefore, markets may foster different tendencies but overall should narrow the gap between male and female wages. Brainerd (2000), for instance, carried out a comparison of data on gendered wage differentials from several transition countries in eastern Europe and the ex-Soviet Union. She found that in all eastern European cases the gender wage gap did decrease as predicted, as expected in market transition theory. It is worth noting that in the case of the former German Democratic Republic, the wage differential appeared to decrease in part because many formerly employed women *left* the labour force due to retrenchments. In Russia and the Ukraine, the gender wage gap widened considerably (Brainerd, 2000). Brainerd posits that this was due to the very low minimum wage that was set, which disproportionately affects women as low-waged workers. Additionally, in more developed (European) market economies, central planning has been replaced with other regulatory mechanisms such as collective bargaining and incomes policies. In contrast, Russia and the Ukraine are much less regulated economies. It could be inferred that state regulation within market conditions may advantage women workers whereas market competition alone may not.

#### *Vietnamese Studies of Market Transition and Gender*

Two Vietnamese studies exploring gendered aspects of market transition are outlined here, one concerning wage differentials and the other concerning down-sizing. Liu (2004) discusses gender wage differentials, comparing data from the Vietnam Living Standards Surveys for 1992/93 and 1997/98. In general, she found that Viet Nam has more pay equality than most transition economies; however, women’s wage position relative to men’s declined between 1993 and 1998 (2004: 587), the period after large-scale closures of state enterprises. One of Liu’s findings was that most educated women employed in the state sector left the formal for the informal, unwaged labour force, whereas most men remained in waged employment (2004: 588). Overall, Liu found that discrimination against women in Viet Nam, based on the Confucian ethic, remained an important obstacle to gender wage gap convergence. She argues that further market deregulation would increase competitiveness and reduce discrimination in Viet Nam.

Another Vietnamese study presents a somewhat broader view of gendered aspects of transition (Rama, 2002). Rama acknowledges that comprehensive liberalisation is likely to affect men and women differently; however, little is



known about the gendered effects of transition within developmental contexts. The scant literature, Rama writes, can be summed up in four hypotheses:

1. Women's prospects for salaried employment should improve. This is because whereas import substitution industrialisation and capital intensive industry benefit men as the main employees in these sectors, export-oriented "lighter" industry tends to employ women (World Bank, 2001, cited in Rama, 2002).
2. Economic reforms can affect gender wage gaps through the "decompression" (that is, widening) of labour earnings. If, for instance, women have lower educational levels than men, earnings gaps will increase. However, reforms give incentives to employers to hire lower-cost female labour.
3. Where downsizing has occurred, women suffer disproportionately. Women tend to suffer redundancy and larger drops in compensation, and with the loss of employment comes the loss of valued services in the state sector, such as maternity pay; childcare, and more flexible work.
4. Women are more likely than men to withdraw from the labour force after downsizing.

Rama undertakes a detailed analysis of the gendered effects of downsizing in state-owned enterprises in Viet Nam, which took place in the 1990s. However, only 5% of the labour force worked in such enterprises (Rama, 2002: 169). He argues that although the massive downsizing of state enterprises undertaken during the 1990s harmed women disproportionately, further reform would not. This is because new export-oriented industries have developed, industries in which women are more likely to be employed. Prospects in the export-oriented sector are discussed briefly below; however, it is worth noting that Rama's own data indicate that "female" industries such as footwear production are also the industries most likely to offer only short-term and temporary contracts. Thus, the "gender gap" is greater than is revealed by earnings alone: women face greater economic insecurity than do men within transition (Rama, 2002). The grounds for optimism evoked in the study are, therefore, not entirely clear.

From the short reviews offered above, it is evident that analyses in terms of market transition theory do take some aspects of gendered experience into account. However, they concentrate on the formal economy or else on measurable outputs such as those of small farmer production for the market. The concentration on wages and the wage gap when discussing gender fails to capture the experience of most women (or of many men) even in urban sectors, since most people in developmental contexts work in the informal sector, and many are unwaged. Even fewer rural women earn wages as a main livelihood source. As noted, women peasants in most social contexts are positioned very differently from men in their own households and beyond.

Women like men are "direct producers" in agriculture in many societies, but decollectivisation has affected them differentially. In order to understand the

gendered impact of decollectivisation and liberalisation, it is necessary to turn to other theoretical frameworks, developed within feminist writing.

### **Feminist Critiques**

Feminists working in political economy, sociology and anthropology, and development studies have analysed the household and household relations, including domestic labour, as a prime—although by no means the only—basis of gender subordination for women, over more than three decades. Folbre (1986) commented that both neo-classical and Marxist analyses tended to treat the household as a “black box” ruled over by a benevolent dictator (the “household head”). The household and women’s labour within it were therefore not in need of further analysis. An alternative is to view the household as a particularly privileged site of exercise of gender power and (often) of gender inequality in several spheres, including production, consumption, “reproduction” or care of children, and the exercise of power and autonomy. Households may, of course, also be sites of cooperation, commensality, care, and nurturance; a mixture of “cooperative conflicts” is often entailed (Sen, 1990). Not only are women’s lives lived more within the physical confines of houses than are men’s, but their life-chances are also more linked to household and kinship roles and much of their labour is organised within households. The composition and organisation of households have a direct impact on women’s lives and on their ability to gain access to resources, labour, and income (Moore, 1988). As Razavi (2000: 243) notes in a discussion of women in export-oriented industry, “The . . . implications of labour market entry cannot be divorced from context-specific kinship and familial relations that pattern the relation between work and well-being.” Moreover, gender is a status that women in nearly all societies and social positionings are unable to leave: they are virtually always seen as gendered and sexualised beings (Whitehead, 1979/2006).

Gendered norms are not evident only within households and household relations: communities and societies more widely are of great importance. But households are of prime importance in discussing the situation of rural women. This is because in smallholder or “peasant” economies, “productive” (agricultural and craft) work is not easily separated from “reproductive” work (Edholm, Harris, & Young, 1977), that is, biological reproduction, the reproduction of labour, and social reproduction. These types of work take place largely in the same place—the household/farm—meaning that this type of economic unit may be particularly constraining for women smallholders.

Market transition theory implicitly assumes that capitalist market relations will erode the gender inequalities stemming from traditional sources such as kinship or religious and social beliefs. Whether or not this is the case for more advanced capitalist societies, it is of little applicability to the case of agricultural decollectivisation within developmental contexts.

“Transition” to the market has had the effect of re-privatising women’s work within smallholder households. Thus, as indicated above, a broad understanding of the notion of workplace rights is needed. For smallholder/peasant women, the workplace is not only constituted in gardens and fields but also within the home. Workplace relations are not (or not only) those of employer/employee; they are also relations of kinship, marriage, and sexuality.

At this point in the discussion, I provide an overview of the gendered effects of collectivisation and decollectivisation, before examining Viet Nam as a specific case study.

## COLLECTIVISATION AND DECOLLECTIVISATION

### Gender and Collectivisation

Collectivisation was carried out with little explicit attention to any implications for gender relations. The implications for the household and the wider gender relations of collectivisation were in a sense recognised: however, they were recognised rather by the common rumours and counter-propaganda to the effect that agricultural collectivisation would also mean the collectivisation of women. Such fears of very dramatic change in gender relations were mainly unfounded. However, to the extent that various collective forms took economic functions away from smallholder and tenant households, these affected their workings and the roles of men and women within them. In particular, collectivisation took some (or all) direction of agricultural labour away from the “head of household” to another body such as the collective committee, to cadres or to an administrative authority (Asztalos Morrell, 1999; Nolan, 1988). To the extent that welfare services were provided (for example, medical services, childcare, schooling, and care of the elderly) (Meurs, 1999) women’s burdens of work were eased.

Collectivisation did not provide equality for rural women, but it did effect some advances. In most cases, women became members of collective units. It was very rare, however, for collectives to take responsibility for reproductive/domestic labour (Disney, 2004), so that the dual burden of collective and domestic work was very heavy. In situations of wartime mobilisation, women are more likely to become full collective members, to undertake highly skilled work, and to assume leadership positions, as in Viet Nam (Korinek, 2003).

Women’s work in collectives, like men’s, was rewarded with work points, although fewer than those that men received. Despite this discrimination, women’s work was made visible and it thus gained public status. In the removal of (part of) women’s work from the direct sphere of “household” control, some of men’s customary power and status may be undermined. It is this aspect that is the subject of most “resistance” and conflict (Asztalos Morrell, 1999; Wiergsma, 1991). Individual husbands and fathers in many societies have property-like rights

over women in their families, and this is particularly important where the household also constitutes an economic unit.

Women may benefit from collective governance or from related institutions such as special women's organisations (Howell, 2000). These were nearly always a feature of Soviet-type states. An advantage of the existence of public governing bodies on which women had the right to some representation was their ability to raise some, even if limited, issues (Kandiyoti, 2003). Alternatively the women's organization or committee might intervene in disputes. The existence of governing councils in cases where there is official attention to gender equity may provide a degree of protection for women's legal rights.

### **Gender and Decollectivisation**

After the collapse of the Soviet Union in the late 1980s, collectives and producer cooperatives were usually privatised, in line with wider liberalisation and privatisation policies. Land was sometimes returned to the "original" owners; alternatively, it was redistributed to peasant smallholders. Decollectivisation concerns, in the first instance, privatisation or parcellisation of land. However, its repercussions are wider. Decollectivisation is nearly always accompanied by marketisation, withdrawal or diminution of the state and state services, and wider economic changes.

Forms of landholding vary, but the most common is the redistribution of land to a household or household "head." (Jacobs, 1997, 2006). Alternatively, land may be held by spouses jointly. In some cases of decollectivisation, wives gain land rights along with husbands, and female heads of household usually gain some rights. In practice, however, wives often find it difficult to assert such rights, particularly where land is customarily held by and passed on to males.

Widespread unemployment or underemployment is a feature of many transition economies (Holzner, 1995; Meurs, 1997). This is due to a variety of factors linked to privatisation, deregulation, and general economic contraction. In rural areas, jobs in former state enterprises are lost, affecting women disproportionately. In eastern Europe, women often formed the majority of white collar employees on collectives, and sometimes filled technical positions (Holzner, 1995). The general retreat of the state also affects employment, since women are often employed in service positions within the health or education sectors. Some accounts (e.g., Kandiyoti, 2003, on Uzbekistan) noted the nostalgia with which women remembered their former waged employment. Further, the withdrawal or diminution of services and state benefits usually increases women's workloads. With the end of services provided by collectives, such as day care for children and the elderly, retirement homes, and health care, women may assume near-total responsibility for these services.

Feminisation of agriculture or of related sectors such as forestry (Liljeström, Lindskog, Ang, & Tinh, 1998) has taken place in many places across the world

(Jacobs, 2006). This is heightened by general processes such as increased migration with liberalisation and the need to diversify livelihoods. A related trend, especially evident in Europe, is the ageing of the agrarian labour force (Holzner, 1995). All of these processes accompanying decollectivisation further increase rural women's workloads.

More positively, marketisation does present opportunities for trading and enterprise. In Hungary, some rural women have successfully set up enterprises and find that this fits in with family responsibilities (Momsen, Szörényi, & Timar, 2005). However, these opportunities are more often outside agriculture. In most ex-collectives, women are "weak" players with little capital and are unlikely to be able to set themselves up as small capitalist farmers. Some women are likely to find success as smallholders or entrepreneurs, but it is an open question whether such experiences can be generalised.

The case of Viet Nam illustrates some of these general points as well as features unique to the country.

## VIET NAM

Viet Nam is a largely agrarian country and approximately 74% of the population live in the countryside (*World Guide*, 2005: 602). This contrasts with eastern European cases in which agriculture may now constitute only a small sector of the economy, or cases such as Russia, which have experienced *re*-agrarianisation with economic collapse (Burawoy, Krotove, & Lytkina, 2000). Viet Nam is one of the few cases of egalitarian decollectivisation in existence: this presents a nearly unique opportunity to discuss its effects within a peasant-based economy.

### Notes on Traditional Society

Traditionally, three types of tenure obtained: state, communal (that is, the land of the village or the pagoda), and private, constituting 80% of land (Tran, 1999: 96). In the early 19th century, 92% of northern households had holdings categorised as "small" (under 3.6 ha). In the south, with a smaller population, larger holdings were common (Tran, 1999). Throughout the country, the great majority of peasants cultivated the land of landlords.

Gender regimes for the majority of Vietnamese, the ethnic *kinh*, were framed by Confucian ideas due to 10 centuries of Chinese colonial rule. Lineage systems emphasised patrilineality and son preference (Luong, 2003). Sons afforded and afford status and legitimacy to their parents within the community. They also have important religious functions since only they can perform funeral and ancestral cult rituals. The "three obediences" for women (to father, husband, and adult sons) were enjoined.

Kinship patterns in Viet Nam, however, were and are also influenced by the more egalitarian gender patterns of southeast Asia. Unlike the situation in Han

China, women were *recognised* as being economically active. This applied particularly to women in their positions as traders (Pham, 1999). Due to this and to the accompanying recognition that women could handle money, women often controlled the family “purse” (Pham, 1999). Women were also involved in agricultural activity, and agriculture in Viet Nam has long been seen as an activity involving both sexes. Men usually ploughed but could not farm without women to perform tasks such as transplanting rice seedlings (White, 1982). Additionally, a minority of women inherited family property. In Viet Nam, women were able to maintain links with maternal kin, due to endogamous marriage norms (Luong, 1989). However, women’s rights to houses and land are much less strong than men’s. As elsewhere, marriages were accompanied by bridewealth and dowries; child marriage was frequent, and polygyny and concubinage were permitted (Luong, 2003). Residence was patrilineal and husbands’ families usually had custody of children in case of divorce. Again, as elsewhere, violence against wives, particularly younger wives, was common.

### **Collectivisation and Gender in the North**

Women in the north were first mobilised by the (then) Indochinese Communist Party in the anti-colonial movement through its organisation, the Women’s Union (WU). Partly due to the influence of the WU, the Viet Minh in the newly divided north gave women a share of land in areas they controlled (Tétreault, 1994). Several writers note the interrelation between women’s later mobilisation in the American war, their politicisation, and the eventual success of the war and land reform campaigns (Tétreault, 1994; White, 1982). Women often emerged as radical activists in anti-landlord campaigns, protesting against sexual as well as economic abuse (Eisen, 1984). During such campaigns, women were sometimes elected to village leadership posts, an entirely new phenomenon.

The movement for collectivisation, from 1960, was Party led and included little democratic participation but, as noted, was nonetheless relatively non-coerced. Women, especially young women, were among the first to join the cooperatives. It is not coincidental that the new marriage regulations were introduced at the same time that cooperativisation campaigns attempted to widen the agrarian unit (White, 1987). Women who were trapped in traditional arrangements joined the cooperatives in order to gain independence from in-laws.

Marriage laws were aimed at outlawing “feudal” practices and bringing women into the formal workforce. In the North, the 1960 Marriage Law outlawed polygyny, concubinage, child marriage, and forced marriage; it banned dowries and bridewealth and set minimum marriage ages for men at 20 and women at 18 years (Pham, 1999). Although these measures were standard in socialist marriage laws, the Vietnamese law went further, giving women more rights to child custody, legitimising children born out of wedlock, outlawing wife beating,

giving wives rights to communal property, and banning the exercise of power by one spouse over the other. Thus the law eliminated most of the articles of the Gia Long Code, which was based on Confucian principles (Pham, 1999). Later, in 1986, the marriage law was strengthened (see below).

Within collectives, women remained disadvantaged vis-à-vis men, despite being awarded work points as individuals. They were responsible for domestic labour and a great deal of work in garden plots, and much of the work they did gained fewer work points than men's work did (Eisen, 1984; Wiergsma, 1988). One day's transplanting earned a woman 10 points and fertilising earned 8 points. Men's work earned more: a workday ploughing earned 12 points; a day's carpentry, 14 points (Tran, 1999: 99). In some cooperatives, nevertheless, women's tasks earned maximum work points (Houtart & Lemercinier, 1984). Meanwhile, men remained more reluctant to join cooperatives due to the threat to their independent status and their control over women. The war was also important in shifting gender roles. Women moved into diverse economic roles, backed up by the state, which absorbed some tasks of social reproduction, such as childcare. Nevertheless, women remained responsible for most domestic labour along with collective production and therefore had extremely heavy workloads (Luong, 2003).

Cooperatives predominated, but conflicts between the collective and family economies were apparent. The collectives lacked the administrative capacity to supply many basic necessities. The importance of the family economy was most visible in the persistence of garden plots. Wiergsma (1988, 1991) gives a powerful analysis of male peasant influence on the reconstitution of patriarchal authority; she links the preservation of patriarchy to the preservation of a middle peasantry, which remained influential at local party levels.

Thus, the socialist state made large concessions to traditional male-centred family norms.

After the war ended in 1975, demobilisation caused changes within cooperatives. Many female managers were replaced by returned male officers who considered it demeaning to be directed by women (White, 1989). Most "higher"-level, more technical work came to be more dominated by men, into the 1980s. The state's intention had been to further collectivise agriculture; however, agricultural productivity, which had risen, now fell. Although Viet Nam managed to return to pre-conflict levels of food production by 1982, growth then stagnated (Kabeer & Tran, 2002: 109). The American war had devastated the country, leading to the death of at least a million people (Korinek, 2003: 264), causing ecological and economic devastation, mass displacement, destruction of infrastructure, and lasting ecological damage. This war was followed by other, although less pervasive, conflicts in the 1980s, with China and then Cambodia. The effective U.S. embargo and the withdrawal of Soviet aid inflicted more economic damage, so that a discussion of Vietnamese economic performance must be understood in this context.



The mixed popularity of collectives was a factor in stagnation in agriculture. Peasants, especially male peasants, often resisted collectives, resistance taking the form of everyday actions such as cutting corners in fieldwork, appropriating small amounts of collective land, or overusing draft animals (Houtart & Lemerminier, 1984; Kerkvliet, 2006; Scott, 1985).

### **Decollectivisation and *Doi Moi***

A new subcontracting system was instituted from 1981, ceding a great deal of control to male family heads. In this system, the cooperative contracted for the delivery of final products with individual households. From 1988, household rights over land were further strengthened and a much fuller decollectivisation was initiated in the *doi moi* (renovation) policy. Cooperative lands were leased to farming households for 10–15-year periods (Tran, 1999).

The redistribution of former collective farm lands was egalitarian (Luong & Unger, 1998: 65). Very low land ceilings of 2–4 ha. were imposed, so that peasant holdings became relatively equal (Watts, 1998). Decollectivisation was very rapid and a Chayanovian<sup>1</sup> peasantry has been established (Watts, 1998).

In 1993, a new land law was enacted, giving longer periods of use rights to households: 20 years for annual crops and up to 50 years for perennials such as trees and coffee bushes (Tran, 1999: 101). In effect, a land market was permitted (Dao, 1995). Use rights can be transferred between individuals and families, and landlessness and differentiation became more of a possibility. By the late 1980s, much of the land in the south had been returned to pre-collective owners and a sizeable rural landless class had emerged (Kabeer & Tran, 2002; Korinek, 2003: 62). In the north, landlessness remains much rarer, but the poorest people risk confiscation of their land if they cannot meet production quotas (Gammeltoft, 1999).

Land rights certificates are issued by local authorities. Unmarried women, widows, and women with absent husbands should receive land use certificates in their own right: these categories constitute 17%–32% of rural households (Food and Agriculture Organisation of the United Nations [FAO], 2005a; FAO, 2005b: 67). Wives should also be allocated land along with husbands. However, men are often the only people named on household certificates (Gammeltoft, 1999), meaning that wives' rights to land and housing may become highly contingent. Kabeer and Tran found in four northern and southern villages that land

<sup>1</sup> A. V. Chayanov held that a particular "peasant economy" existed, which was separate from feudalism or capitalism, and which was egalitarian in nature (Chayanov, 1989). My use of "Chayanovian" here is loose, and does not imply agreement with Chayanov's theory, which tends to ignore differentiation among peasants, or that a wider capitalist (or other) economy exists. However, Viet Nam's conditions do approximate to the conditions envisaged by Chayanov.



had been registered in most households only in the man's name. Co-ownership was far more common in the north, with figures for the two villages studied being 20% and 27% as against 1–3% in the south (Kabeer & Tran, 2002: 183). Many of the women respondents in their study complained that the distribution process had been unfair, and that the land committees—mainly populated by men—had not consulted them.

With *doi moi*, other features of the collective period were curtailed or ended. The cooperative structures were in the main liquidated and state marketing structures abolished (Watts, 1998). The household registration system had (as in China) controlled migration; this was loosened and so migration became very common. The marketing sector and the informal economy have flourished, and this has enabled women to re-enter traditional roles as market women (White, 1989). Productivity rose sharply as did food consumption: child malnutrition became much less common (Korinek, 2003). Viet Nam has become the world's second largest exporter of rice, and exports of other crops such as tea, tobacco, and coffee have risen dramatically (Korinek, 2003: 145). Improvements in productivity are due to the intensification of and inputs to cultivation and to the greater care with which plots are tended. The extent of severe poverty decreased from 70% in the mid-1980s to approximately 33% (World Health Organization [WHO], 2006).

In general, however, Viet Nam remains a poor country, with per capita incomes of U.S.\$690 in 2006 (World Bank, 2007). In rural areas in 2006, however, the average monthly income was only U.S.\$31.62 (approximately \$380 p.a.), and poor rural households have average monthly incomes of only \$12.50 per month (Viet Nam News, 2008). Despite state efforts, industrialisation has not taken place on the Chinese scale. Severe and chronic poverty is especially evident in rural areas (Kabeer & Tran, 2002), and the poorest villages tend to be those in remote rural areas that depend solely on agriculture. Thus it is difficult to constitute a livelihood solely from agriculture, and households try to diversify (Scott, 2003).

Diversification in general, throughout the world, is a strategy to help minimise economic and social risks in a context of great impoverishment (Ellis, 2000). Several writers stress that these have been constant themes among Vietnamese rural informants (Gammeltoft, 1999; Kabeer & Tran, 2002). Household survival often depends upon women's activities, whether as farmers, operators of small enterprises, or wage labourers (Korinek, 2003). Bélanger's Red River Delta study, conducted in 2000 in a village 40 km from Hanoi, gives an indication of livelihood strategies (Bélanger, 2002). All the informants were rice farmers, and the pressure on land was described as "tremendous." Many combine farming with other activities: 20% of men and 8% of women received regular wages locally, as cadres, midwives, teachers, doctors, and so on. All village market stalls were operated by women, and 5% of women worked as traders. One-third of men worked as day labourers, and 40% worked further away, usually in Hanoi as construction workers. Those with no other income sources outside farming, 35%

of the total, constituted the poorest stratum of the village (Bélanger, 2002: 325). Thus diversification in Viet Nam is—as elsewhere—a survival strategy.

An important change is that user fees have been imposed for health care and education, which were formerly free. Fees for health care impact heavily on incomes, especially in peasant households (Bélanger, 2002: 330), and gaps in access to health services have widened in recent years (WHO, 2006). Improvements in health indicators are mainly among the non-poor, and women's per capita expenditure on health is less than men's (WHO, 2006). The market reform period has also meant a contraction in women's representation in higher status employment as teachers, and as administrative and health care workers (Korinek, 2003; Rama, 2002).

The example of educational provision indicates some of the countervailing trends evident with liberalisation. Viet Nam has very high literacy rates, stemming in part from the socialist era as well as from the value accorded to education. Fees for schooling were imposed from the very early 1990s onward and increased rapidly. Households are responsible for over half of primary school fees, 67% for lower secondary, and 72% for upper secondary school; some fee exemptions and reductions are available for inhabitants of remote areas and for ethnic minorities as well as for the severely impoverished (Bélanger & Liu, 2004). Despite the imposition of fees, the gender gap in primary school enrolment had nearly disappeared by the early 21st century, which was a considerable achievement (Bélanger & Liu, 2004). This is mainly due to the diminution of severe poverty with marketisation, as well as to the fact that parents realise that the market economy requires basic skills. In 1998, the cost of a child's primary schooling constituted 31.5% of average non-food budgets; the cost of secondary schooling was largely beyond the reach of the poorest households. Girls' school enrolment was found to be much more responsive to household income than was boys', and the gender gap in school completion was rising among the younger cohort, the first to be affected by user fees (Bélanger & Liu, 2004). In 2006, World Bank country figures indicated that primary school enrolment was 98% for boys but 91% for girls (World Bank, 2007).

### **Some Gendered Aspects of *Doi Moi* in Rural Areas**

For most rural women, decollectivisation means that they spend more time on household-based economic and reproductive activities. Decollectivisation has had mixed effects, as indicated above. In terms of work organisation, women's work has become less visible with the retreat of cooperatives and the work point system; husbands have enhanced authority over wives and children. However, women may have more leeway in how to apportion tasks over a day. Liberalisation, as noted, has also meant that women can take up their traditional niches as market traders, and this is welcome to many.

In general, however, there has been a move for women to be confined, or more confined, to household-based activities with *doi moi*. As noted above, the form and composition of the household has important implications for women's lives. How have relations within households altered?

In the sphere of family law, regulations benefit women. In particular, the 1986 Family Law, drafted by the WU, affirms joint control of household property, joint consent to economic transactions, and equal household domestic responsibility. It also attempts to protect wives from spouses' violence. Although it is highly unlikely that the law is fully enforced in the countryside, it has raised women's legal status.

Although women-headed households should now be able to access land in their own right (see above), rural practice continues to disadvantage women. Divorced women encounter major problems in land access. Divorced women should receive compensation for any loss of land rights, but divorcées are often underpaid, as well as being left landless (Scott, 2003; Tran, 1999). Divorcées have extra problems if they originate from "outside" villages. Unless she remains in her ex-husband's village, a divorcée will lose her use rights (Tran, 1999). Similarly, a married-out woman might have to walk or cycle to her own village daily to work land in order to keep her rights "active" as well as to tend crops (Gammeltoft, 1999). Women are less likely to inherit land than men; and they rarely inherit forest land (Scott, 2003). One of the causes of poverty for female-headed households is disadvantaged access to land (Kabeer & Tran, 2002).

With the partial retreat of the state, there is more reliance on kin networks. The transfer of land between generations has been restored, and the kinship system has been reinforced (Bélanger, 2002), with detrimental results for women. Larger numbers of households are nuclear; nevertheless, decollectivisation has increased the importance of lineages. For instance, there has been an increase in attention paid to weddings and funerals and in their expense (Luong, 2003; Sikor, 2001). The longstanding preference for sons has been strengthened with the importance of lineage rituals. Sons also have economic value in taking care of elderly parents, and this is considered the eldest son's proper duty. In Bélanger's (2002) teams' interviews, fear of illness and ensuing health costs was an important motivation for having at least one son.

A distinctly non-traditional phenomenon, however, is that single women have established their rights to be mothers and to head families (Liljeström et al., 1998). This has perhaps been aided by recognition of the sex imbalance due to war. The established practice is that liaisons are secret; the child takes the mother's name, and the identity of the father is never revealed (Pham, 1999). This can cause hardships but is seen by many, including the Women's Union, as preferable to the strengthening of de facto concubinage (Liljeström et al., 1998). Single mothers have rights to house and land but in practice theirs are among the worst-off among peasant households. They have rights to only one adult land allocation, and they may receive inferior land.

Gammeltoft shows how the gains and losses due to decollectivisation and the dismantling of accompanying welfare systems affect women at an emotional level. Women she interviewed *in the north said that in the past, they had more time to rest and to talk to other people—they were more happy (joyful, vui)* to go to work because everyone worked together (Gammeltoft, 1999: 32). Today, people's work is arranged more autonomously, but work is also more demanding and time consuming. Women's retreat into the household means that they have less contact with others. Because women realise that they may be responsible for the welfare of their family, they are often impelled to work to their limits, sometimes imperilling their health (Gammeltoft, 1999). Women's responsibility for household survival weighs heavily upon them, often affecting their well-being (Gammeltoft, 1999). Some women in Bélanger's study indicated their understanding that women's lives are usually much harder than men's, and "felt sorry" for girl babies for this reason (Bélanger, 2002: 328). Women's lack of time also means that they are less able to attend political events or to improve their skills (Korinek, 2003; Pham, 1999). Today, success or failure is seen as a *personal* responsibility, whereas previously everyone (in the north) was equally poor. New opportunities exist now, but so does greater risk and uncertainty, and this is accompanied by increased stress (Gammeltoft, 1999).

### PROSPECTS FOR EMPLOYMENT?

Decollectivisation and market reforms have pushed many rural women back into the home. In the early 1990s, Moghadam (1992) as well as Einhorn (1993) discussed the revival of ideologies of domesticity and women's "place" in eastern Europe and other transition societies. Moghadam argued that these served to legitimise economic reorganisation and mass unemployment. Employment outside the home coupled with housework represented a "double burden" for some. Nevertheless, with loss of employment or work point entitlements and greater encapsulation in the domestic sphere, rural women are likely to find their influence within households reduced.

Rama (2002) and others argue for an optimistic view of market transition, writing that women's loss of employment will be compensated for in future by the growth of export-oriented industry (EOI), which recruits women workers. While this is not the place to explore this topic at length, *two* observations are apposite.

Jenkins' (2006) examination of foreign direct investment and employment in Viet Nam during the liberalisation period found that the employment generated has been limited. Most people are still employed in agriculture and services, and factors such as the crowding out of local firms by foreign affiliates mean that positive employment effects have been reduced. In the Vietnamese case, the claim of creating employment is not to date borne out (Jenkins, 2006).

Second, increasing evidence points not only to poor conditions and low wages in EOI but to increasing informalisation (Pearson, 2007). In the initial years of

export factory growth, there was an assumption that women workers would have remuneration and benefit packages that compared favourably with other occupations (Razavi, 2000), but the scenario that has emerged does not fit this picture. Instead, low wages, excessive working hours, and the absence of security or social protection have become commonplace in east and southeast Asia. Conditions of work for the mainly rural migrant workers bear little resemblance to the ideal of regulation and protection (Pearson, 2007: 204). Thus, if—as seems likely—the percentage of Vietnamese women employed in EOI increases, the future looks uncertain. Luong (2003: 211) reports, ominously, that prostitution, the sex industry and commodification of women's bodies has increased with marketisation.

Market transition as advocated by Nee (1989), Cao and Nee (2000), and others posits that the effects of the market may be differential; the discussion of Vietnamese rural gender relations and transition here bears out this hypothesis. Most people have gained through increased prosperity, and in a situation of food insecurity this factor cannot be dismissed. However, in general, rural women have lost out in comparison with rural/peasant men. In part, this is due to changes such as the imposition of user fees and the loss of formal sector employment—factors that can be encompassed by market transition theory. Market transition theory, however, is too narrowly focussed to yield suggestions for policy that encompass peasant women's working lives. Peasant women's lives lie not only in the formal economy but also within households, lineages, and communities.

This article has argued that a fuller understanding of the situation of women is provided by feminist ethnographic and political economy accounts. Rural women have lost out in the dismantling of the collective economy because peasant households have been reinstated as the primary economic units, constituting a structural basis for women's subordination. Features such as patrilineality or the ancestor cult are not, of course, creations of neo-liberal policy. However, the juxtaposition of the market and peasant household units has allowed lineage practices and son preference to flourish.

The Vietnamese case and others referred to here indicate that decollectivisation and liberalisation often mean widespread female unemployment; the feminisation of subsistence farming, the diversification of livelihood strategies, and the strengthening of traditional gender norms and patterns. In general, women are being pushed back into unremunerated, informal work with increased responsibility for family welfare. This is usually accompanied by the reinstatement of the husband/father as manager of the farm and of wives' labour. Feminist theories are able to elucidate the interlocking nature of households, lineages, and the wider economy. Such an understanding is valuable in seeking to formulate policies that might better the conditions of work and life for peasant women.

The final section of the article considers what types of changes or processes might benefit rural women within decollectivisation and liberalisation schemes. What might make for a more gender-egalitarian land redistribution?

## CONCLUSION: WAYS FORWARD

The first and most crucial factor to consider in policy terms is how land has been redistributed. Where land permits or titles are allocated to the “head of household,” then men will benefit at the expense of wives and daughters (Jacobs, 2003, 2006.) Only a minority of women, albeit a growing minority, are considered to be household heads. In many societies, where an adult man is present, he is considered to be the head of household. Thus women, especially wives, must be named on any permits or deeds. Women are in stronger positions where they have their own deeds or titles.

Having claim to some land presents many advantages for women (Agarwal, 2003). Within market conditions, of course, many are likely to lose this land, as will many poor male peasants. However, being named on land permits or titles does put women on a more equal footing with men.

Due to the discrimination women face, however, simply having formal rights will not ensure equity. A series of other measures would have to be enacted and attempted in order to give rural women a measure of security. Those suggested here concern enforcement, representation, and the addressing of other obstacles to women’s ability to use their rights.

Legal changes have to be enforced to be effective: there are many examples of beneficial gender changes “on the books” that remain there. Changes affecting peasantries are particularly difficult to legislate for, as households are often geographically spread. Reforms in favour of peasant women must depend upon state action and state capacity for enforcement, as well as upon willingness to enforce the law.

Second, some form of representation for rural women is needed. In Viet Nam, the quasi-governmental Women’s Union has long had and still has advocacy functions. However, with the disappearance of collective committees and party organisations, even the limited voice these allowed is missing. As in other Soviet-type states, civil society organisations have been discouraged, and so few exist to take their place. In contemporary circumstances, nongovernmental organisations (NGOs) sometimes take on functions of representation on an informal basis. Some forum may be better than none, but this is not a wholly satisfactory solution: NGOs are often external, and they are not representative bodies.

Where decollectivisation leads to the consolidation of large farms, trade unions may be able to provide representation through women’s sections or similar organisations, as women may be agricultural workers. However, a great deal of decollectivisation entails restructuring into individual family plots. On these, husbands and fathers retain or regain authority. Wives and daughters are unlikely to have any forum for the discussion of gender issues, since village and family councils are usually dominated by village/lineage elders.

There exists no easy answer to the question of what could be put in place. Labour movements in transition countries are often weak or nonexistent.



However, where they do exist or are forming, they may need to consider how rural women's organisation can be facilitated. The model of the Self-Employed Women's Association (SEWA) in India may be apposite (Rose, 1993). SEWA is a women's labour organisation, and it represents people not normally considered as proletarian.

Effective land rights also need to be backed up by other legal measures. In particular, women seeking to assert land and property rights often face violence from husbands and their relatives, or sometimes from their own (natal) relatives. Violence is the most immediate way of divesting women of any new property rights and of intimidating them so that, even where they keep land, they are not able to exercise its use (Jacobs, 1997). Thus, ensuring securing women's economic rights may entail the enactment and enforcement of laws in "non-economic" realms, in order to take account of the complex circumstances many women face.

A marriage of concerns for bodily integrity and protection from violence with concern for economic rights is needed. In practice, women's movements have often been the "bearers" of the former type of concerns, and other organisations, such as political parties or trade unions, have been involved with the latter. However, some feminist organisations with a labour movement slant have understood the need for "joined-up" strategies in thinking of women's needs and of workplace rights (Hale & Wills, 2007). Rural women have no organic or ready-made means of organising, because their homes and workplaces are the same: creative solutions must be sought.

There is no suggestion here that attempting to organise in rural areas and among peasant-housewives would be a straightforward matter. It is not sufficient, however, simply to note that rural women have lost rights due to decollectivisation and liberalisation. In a globalising age, new ways of envisaging "work," workplaces," and "workers" are needed.

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## **PEER REVIEW IN EMPLOYMENT DISPUTES: AN EMPLOYEE RIGHT OR AN EMPLOYEE WRONG?**

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### **ABSTRACT**

One of the boldest initiatives in the legal field in the last few decades has been the increased use of alternative dispute resolution methods to resolve employment disputes. Judicial enforcement of arbitration and other forms of alternative dispute resolution methods have been imposed on all facets of business and domestic activities. In the employment arena, especially in nonunionized settings where employees do not enjoy the benefits of collective representation, the search for mechanisms to achieve the resolution of employment disputes has resulted in innovative techniques and processes. This article will focus narrowly on the use of peer review, a type of dispute resolution in the employment arena where the panel consists of coemployees who are peers of the very employee involved in a dispute with the employer. Many legal issues are raised concerning this form of alternative dispute resolution process, and this article will examine each of them, as well as the risks and benefits inherent in the employee's use of peer review processes to resolve employment disputes.

### **INTRODUCTION**

In the employment arena, especially in nonunionized settings where employees do not enjoy the benefits of collective representation, the search for mechanisms to

achieve resolution of employment disputes has resulted in innovative techniques. Such procedures, as a group, are referred to as alternative dispute resolution (ADR). Arbitration is the most widely recognized form of ADR. Peer review is one method currently increasing in popularity within the employment setting. In order to resolve an employment dispute, peer review utilizes a panel of coemployees who are peers of the very employee involved in a dispute with the employer.

Every form of ADR has both advantages and disadvantages. Specifically, peer review has inherent benefits and risks to the employee. The legal issues of neutrality, management dominance, and the denial of the fairness of due process are some of the major risks to the employee when peer review is used.

Labor union agreements with an employer and private employment contracts in nonunion settings often contain a clause requiring that disputes arising out of either the collective bargaining agreement with a union or a private employment contract be submitted to arbitration. Even if there is no predispute arbitration clause in a contract, parties can always agree to submit a dispute to some form of arbitration after a dispute has arisen. Once an arbiter renders an award, the parties may appeal to a court; however, only in rare or unique circumstances will a court overturn an arbiter's decision. According to the Federal Arbitration Act (FAA), there are only four grounds for overturning an award: when the award was obtained by corruption or fraud, when there is evidence of partiality or corruption on the part of an arbiter, when there is arbiter misconduct, or when the arbiter has exceeded his/her power. An appeal to a court that attempts to attack the integrity of an arbiter is rarely successful.

The traditional methods of ADR have been expanded by the creativity of the legal profession. Gone are the days of the use of only mediation and arbitration as processes to resolve employment disputes. Today, other processes, such as peer review, have been developed, and their popularity is increasing (Association for Conflict Resolution, 2003). Peer review raises some serious legal questions that must be addressed.

### **MANDATORY ARBITRATION OF EMPLOYMENT DISPUTES**

In the unionized workplace, grievance arbitration of employment disputes was institutionalized by important U.S. Supreme Court decisions (Leroy & Feuille, 2007). More recently, the U.S. Supreme Court addressed the case of *Gilmer v. Interstate/Johnson Lane Corp* (1991), which involved mandatory arbitration of an employment dispute regarding a statutory right created by the Age Discrimination in Employment Act (ADEA). Gilmer was required, as part of an application to become a registered securities representative with the New York Stock Exchange, to fill out the application and accept its terms. The arbitration clause at issue in the contract was entered into with the securities exchange, not with the employer.

The employer moved to compel arbitration on the basis of a predispute agreement to arbitrate. Gilmer's employer argued that the dispute must be determined by utilizing arbitration, not litigation. The Supreme Court held that Gilmer, by agreeing in his security application to arbitrate any dispute arising out of his employment, had waived his right to sue his employer under the ADEA. Thus, the statutory ADEA claim could be the subject matter of arbitration in a non-unionized private employment setting as long as the agreement when made between the parties was fair. The essential holding of the case was that an ADEA claim can be subjected to compulsory arbitration, as long as the "prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum" (*Gilmer v. Interstate/Johnson Lane Corporation*, 1991: 27). The Gilmer Court noted that the availability of judicial scrutiny of arbitration awards would ensure that such awards would comply with the requirements of the statute.

Even though the *Gilmer* Court determined that an agreement to arbitrate could include arbitration of a statutory right, in this case a right under the ADEA, it left open a question that was raised concerning the proper interpretation of the FAA regarding the arbitration of employment disputes. The argument made by Gilmer to the Supreme Court was that arbitration of employment disputes in private nonunionized settings was precluded by virtue of language in section 1 of the FAA, which states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." However, the Supreme Court avoided making a decision on this question.

Thus, the *Gilmer* decision simply held, with a vigorous dissenting opinion, that under the specific circumstances of the case, an employee who signed an agreement to arbitrate would be preempted from litigating an age discrimination suit in court but would be required to submit it to arbitration. Thus, the question raised regarding the interpretation of the language of section 1 of the FAA and the argument that the statute was not applicable to the arbitration of employment disputes went unanswered. The stage was set for another case.

Due to the controversy generated by the *Gilmer* decision, the U.S. Supreme Court agreed to hear another case involving the arbitration of employment disputes. In *Circuit City Stores, Inc. v. Adams* (2001), the question concerning the language of the FAA was finally answered. A provision in the application for employment at Circuit City required all employment disputes to be settled by arbitration. Saint Clair Adams completed such an application for employment. After Adams was hired as a sales counselor, he filed an employment discrimination suit against the employer in state court, a suit that was removed to federal district court. The U.S. Supreme Court held that the language of the FAA, section 1, confined the exemption from the statute to transportation workers (seamen and railroad employees), thereby rejecting the argument put forward in the *Gilmer* case that the statute precluded the arbitration of all employment disputes.

One would have thought that the issue regarding the arbitration of employment disputes was finally settled, but to date this is not the case. Ongoing controversies continue, regarding the use of arbitration in employment disputes and whether or not these types of clauses are revocable.

After the U.S. Supreme Court announced its decision in *Circuit City*, the case was remanded to the Ninth Circuit Court of Appeals for further consideration in accordance with the Supreme Court's decision. Upon reconsideration of the issues in the case, the Ninth Circuit Court issued its opinion, revoking the Circuit City arbitration agreement on the grounds that it constituted a contract of adhesion and was "both procedurally and substantively unconscionable" (*Circuit City Stores, Inc. v. Adams*, 2002: 893). This type of decision invalidating an arbitration agreement can be found in a variety of other cases. For example, in the case of *Hooters v. Phillips* (1999: 943), the Fourth Circuit Court of Appeals held that the employer's arbitration agreement was invalid and unenforceable because the arbitration clause was "egregiously unfair," "utterly lacking in the rudiments of evenhandedness," "crafted to ensure a biased decision maker," and designed to "undermine the neutrality of the proceedings"; it "deviated from [the] minimum due process standards" established by the American Arbitration Association. In essence, the Fourth Circuit Court held that the contract violated public policy. In the case of *Walker v. Ryan's Family Steak House* (2003: 921), the U.S. district court held that the arbitration agreement was invalid and unenforceable because there was a "virtual assurance of bias when a for-profit entity seeks to provide a 'neutral' arbiter service, while simultaneously relying on the continuing satisfaction of its employer-clients for its livelihood, and tailors many of its crucial procedures to favor employers."

Despite numerous legislative attempts to mandate judicial enforcement of arbitration agreements, it is apparent from lower federal and state court decisions that there remain continued judicial resistance and an outright refusal to enforce certain types of arbitration clauses in nonunionized employment contracts. Unionized employers are not able to insist that arbitration provisions in collective bargaining agreements bar litigation over violation of rights (*Alexander v. Gardner-Denver Co.*, 1974). In general, the justification for the refusal by courts is either that the current employment practice of requiring newly hired employees to agree to an arbitration clause as a condition of their employment is unfair and one-sided or that the mechanism for the arbitration process is skewed in favor of the employer. This is particularly true in times of economic hardship. In a nonunionized private employment setting, an employee usually has little or no bargaining power to negotiate a fair arbitration clause in the employment contract or to determine the specifics of the arbitration procedures that must be followed if an employment dispute arises. The arbitration clauses are drafted by employers and presented to job candidates on a take-it-or-leave-it basis.

The mood now is that employers are uncertain and cautious about relying on arbitration agreements to resolve employment disputes. The prospects for the



passage of legislation making arbitration imposed as a condition of employment unenforceable are most uncertain, but consideration of such legislation reflects the uneasiness over the use of such agreements (Walsh, 2004). In view of the judicial concerns regarding the enforceability of arbitration agreements, other techniques for dispute resolution have been devised and are in the process of being tested. This brings us to the growing practice of conducting a mandatory dispute resolution process using a panel of workplace peers, in other words, a peer review.

### PEER REVIEW

The term “peer review” is not relegated only to the resolution of employment disputes. Indeed, the approach has been employed in many decision-making contexts, including those regarding professional conduct. Where employment disputes are concerned, the processes that have been devised lack certain characteristics of arbitration, and as such, peer groups generally have no authority to make binding decisions. Many companies have adopted participatory workplace organizations, with names such as quality circles, work teams, committees, peer review boards, and the like. They take part in an arbitration-like process, but the arbiters are not attorneys but workplace peers. The peer review process has been described by the Equal Employment Opportunity Commission (EEOC) as a nonbinding problem-solving process brought before a panel of fellow employees and managers who volunteer to resolve the dispute (Equal Employment Opportunity Commission, 2003). In addition to the EEOC, other government agencies that have employee peer review processes or programs include the Department of the Army (2007), the Department of Health and Human Services (2003), and the National Transportation Safety Board (2007).

Educational institutions have also established employee peer review processes wherein a panel of employees functions generally in an advisory position with no universal authority to make a binding decision; it simply functions to provide recommendations to appropriate employer authorities. Kansas State University has developed a peer review policy for its employees. Its policies and procedures manual indicates that its employees are entitled to a “fair hearing before an impartial panel of classified employees” (Kansas State University, 2006).

The utility and functions of such advisory panels of organizational peers have been analyzed and discussed by numerous scholars, and some cautionary notes have been struck. In *Workplace Justice Without Unions* (Wheeler, Klass, & Mahony, 2004: 11–14), the authors point out that

Peer review, which originated in the mid 1980's, was originally intended to be primarily a union-avoidance strategy. . . . The procedures used by peer review vary considerably. . . . However, they follow a general pattern of having worker complaints go to a hearing-like stage where a panel that is comprised of employees makes a decision regarding the worker complaint. . . . On its face, peer review appears to be an extraordinary

delegation of power by management to rank and file employees. From the point of view of traditional analysis of management/employee relations, it is certainly an anomaly. . . . The avoidance of unions is certainly among the motivations, and peer review may provide a substitute for one of the main advantages of unionism—an effective grievance system. . . . The most important effects from both the employer and employee perspectives may be more subtle and long-range. It may well be that supervisors take greater care with disciplinary actions when they know that a relatively objective review of the actions will be made. . . . From a management perspective, it may be extremely helpful in the long run to have a group of rank and file employees (trained review panel members) who have a sympathetic understanding of the difficulties that managers face in discipline cases.

Thus, a new form of dispute resolution, particularly focused on disputes between employer and employees, has now been devised. This method has attributes similar to those of arbitration, but rather than using an external arbiter, the peer review arbitration process utilizes employees as the arbiters of disputes between employees and employer. It has become an increasingly popular method of dispute resolution and is used by such businesses as Darden Industries (Red Lobster, Olive Garden), TRW Inc., Rockwell International Corp., and Marriott International, Inc. (Jacobs, 1998). Peer review is dispute resolution in the employment setting using coworkers as the decision makers. Disputes and grievances involving employment issues such as demotion, termination, and discipline are common subjects of peer review. The panels of fellow employees can take testimony, conduct document reviews, and make decisions.

Peer review processes may be as different as their names. Common names given to peer review groups include associate review board and joint employer-employee grievance board. Peer review panels may be set up by contract, but generally the peer review process is created by the employer and described in employment handbooks or employment manuals. Depending on the particular wording in the handbook or manual, the peer review process by its very existence may create a contractual relationship between the employer and the employee, in contrast to a relationship in which the employee can be discharged at any time, that is, an “at-will” employment relationship (*Toussaint v. Blue Cross*, 1980). As will be seen below, questions can always be raised regarding the validity and legality of these newly developed processes for the resolution of employment disputes. These questions are of particular importance when a peer review process results in a binding decision in preclusion of litigation.

The main purpose of peer review committees and their movement into the workplace is to engage all employees at all levels of a company by giving them a greater voice in improving company operations. Companies would want to do this in order to make their businesses more competitive. Employees often are beneficiaries, finding greater fulfillment in their jobs and greater control over the content of their jobs. Many employees want to have a voice in their work and their

workplace. Peer review gives employees an awareness and appreciation of the company's needs and obligations. The management strategy of encouraging worker-management cooperation by increasing employee involvement in decision making and enhancing the cooperative spirit in the workplace is increasingly being used in companies and government. Many companies find that peer review groups often lead to organizational innovation, which is one of the key components of economic growth.

Federal law guarantees the right of employees to organize and to form unions for the purpose of collective bargaining with their employers. In the National Labor Relations Act (NLRA), the term employee includes most employees, but not supervisors. A supervisor is defined as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances." According to the U.S. Department of Labor, Bureau of Labor Statistics, union density has declined in the U.S. to the point that there are 5 states (North Carolina, South Carolina, Virginia, Georgia, and Texas) in which less than 5% of the workforce is unionized and 18 other states in which less than 10% of the workforce is unionized. Also, federal labor law protections have not been extended to supervisors, and the courts have applied a broad definition of the term supervisor to include even college professors (*NLRB v. Yeshiva University*, 1980). But peer review is feasible for supervisors and for employees in states with very low union density. In businesses that utilize peer review to resolve employment disputes, this process is available to all, regardless of their status as supervisors or employees.

### A SAMPLE PEER REVIEW PLAN

Recently, a local small, private, nonunionized automotive parts manufacturing company<sup>1</sup> has considered a predispute peer review process to deal with potential disputes regarding employees' "just cause" discharges. The purpose of the proposed procedure, devised by the employer, is to allow an appeal by any nonmanagerial employee (called an associate) who has been discharged from employment by the company. The proposal creates an associate review board that is empowered to conduct a hearing regarding the disputed discharge; both the discharged associate and company management may be present at the hearing and may present arguments for and against the discharge. The proposed policy provides that the associate review board, after consideration of the evidence presented by both parties, will make a final *binding* decision regarding the disputed discharge. The proposed policy also provides that any discharged

<sup>1</sup> The name of this small manufacturing company is withheld due to current labor issues involving the company.

employee *must* utilize the review board procedure and that failure to do so will preclude any other legal action to appeal against the discharge decision.

The proposed plan sets forth the creation of an associate review board committee. The committee is to have 14 members consisting of associates working for the company, excluding managers and supervisors, who will be elected through a secret ballot by all company employees (associates) and who will sit on the committee for a one- or two-year term. Each May, seven nonmanagement employees are to be elected by secret ballot. When an appeal for a review before the associate review board is made, nine members of the committee will be randomly selected to conduct an adversarial hearing on the appeal. Two of the nine members are alternates, as seven associates actually hear the appeal.

The review board committee is to conduct hearings during the normal work day, thus, at the expense of the company. The proposed plan provides for employer-sponsored and paid-for training of the 14 committee members, to acquaint them with company policies and procedures, with legal and ethical issues, with dispute resolution techniques, and with considerations of fairness, confidentiality, and the identity and cross-examination of witnesses and the relevance of evidence. The actual training is to consist of a one-witness mock hearing after a discussion of the purpose and function of the associate review board. The proposed plan contains no mechanism to provide for training on the meaning and application of statutorily created employment rights.

The seven members of the board chosen to hear a particular dispute may request testimony from an appropriate company manager or executive regarding company policy or procedures. The plan is silent as to who will actually perform the training of the committee; it would be advisable to use independent legal counsel to conduct this task. In fact, the company proposing this peer review process suggested using a lawyer from a large law firm to conduct the training of the first committee members.

The proposed plan also provides for a neutral independent, volunteer moderator, approved by both parties, who schedules the hearing and coordinates the selection of the seven board members, including the exclusion and replacement of any member deemed ineligible or disqualified due to partiality or bias. However, if a dispute arises regarding the exclusion of members, the review board itself, by majority vote, will decide the question of the eligibility of a particular associate to participate in the hearing.

The moderator will have no voting right regarding the decision of the board. The voting will be by secret ballot with majority rule. Finally, the proposed policy provides that the discharged associate may request an associate of his/her choosing or an attorney to serve as a representative at the hearing and the employer can do the same. The goal is to have the moderator schedule the hearing at a mutually convenient date, allowing for sufficient time for preparation by both parties, but generally within 60 days of the appeal being made. The purpose of the hearing is to present the true facts of the case for impartial consideration by the

associate review board. The structure of the hearing is such that the burden of proof is on management to justify the discharge of the associate employee. In the proposed training materials, it is suggested that the board consider whether there was a legitimate business need for management's action and whether there were reasonable safeguards for the associate employee's rights. The associate employee's responsibility is to rebut the employer's evidence.

The proposed plan provides that the associate review board may uphold the discharge or set aside the discharge and award back pay. If the discharge is set aside, the employing company may determine that the event that triggered the process indicates that some discipline is still warranted and impose it according to the established policies of the company. Thus, the employer may still discipline the employee after the hearing for the very same incident that was the subject of the review.

There appears to be no question that the employer in this sample plan is proposing a predispute binding dispute resolution process using coemployees or associates as the panel of arbiters. This type of dispute resolution is a good example of a peer review process.

### **LEGAL ISSUES SURROUNDING THE SAMPLE PEER REVIEW PLAN**

The actual processes utilized by various predispute peer review methods to resolve employment disputes have been reviewed by the courts. A common concern is the denial of the elementary fairness of a given process. In traditional arbitration, arbiters follow rules of arbitration that comply with federal arbitration standards. Even if the contractual requisites with regard to issues such as consideration and genuine consent are satisfied, there remain significant legal concerns regarding predispute peer review processes. The concerns focus on whether the peer review committee or group can function as a neutral body, whether such an employee committee can function independently or is inevitably dominated by management, and whether such a committee can effectively vindicate disputes regarding statutory claims. These are matters of public policy regarding the validity and enforceability of any arbitration agreements.

In response to these legal concerns, the company proposing the sample peer review plan relies on case law to demonstrate the legality of the predispute peer review process under consideration. The company's position is that the proposed peer review process has been drafted in such a way as to avoid all of the legal pitfalls and to conform with the standards of fairness established by the legal system.

#### **Procedural Fairness and Neutrality**

The company has relied specifically on the case of *Renny v. Port Huron Hospital* (1986: 429), wherein the court acknowledged that "[B]y establishing an

internal grievance procedure an employer may avoid judicial review” and that “[A]dditionally, the employer can avoid the perils of jury assessment by providing for an alternative method of dispute resolution. A written agreement for a definite or indefinite term to discharge only for cause could, for example, provide for binding arbitration on the issues of cause and damages.” The employee handbook in *Renny* established an employment contract allowing the discharge of an employee only for just cause and utilizing an optional grievance procedure and a grievance board.

Upon a review of the grievance procedure at issue in the *Renny* case, the Michigan Supreme Court established standards and set forth the following guidelines:

The essential elements necessary to fair adjudication in administrative and arbitration proceedings are:

1. Adequate notice to persons who are bound by the adjudication;
2. The right to present evidence and arguments and the fair opportunity to rebut evidence and argument by the opposing argument;
3. A formulation of issues of law and fact in terms of the application of rules with respect to specified parties concerning a specific transaction, situation, or status;
4. A rule specifying the point in the proceeding when a final decision is rendered; and
5. Other procedural elements as may be necessary to assure a means to determine the matter in question. These will be determined by the complexity of the matter in question, the urgency with which the matter must be resolved and the opportunity of the parties to obtain evidence and formulate legal contentions.

The *Renny* court decided that the grievance procedures established by the hospital employer lacked these above-enumerated elements of fairness, because the procedures were not described in the employee handbook, and they failed to provide adequate notice to the employee as to the witnesses to be called, failed to allow the plaintiff to present her own evidence, denied the plaintiff the right to be present during her own hearing, and allowed for unilateral changes by the employer. For all of these reasons, the decision of the grievance panel was set aside and the plaintiff was allowed to adjudicate her employment dispute in court.

The standards set forth by the court in *Renny* were adopted and applied by the U.S. district court in the case of *Thornberry v. North Star Steel Co.* (1991). The court first noted that the plaintiff, Thornberry, had the option of using the binding peer review grievance procedure or an independent arbitration process. Thornberry voluntarily chose the peer review process. Thus, the court found that he had received adequate notice, thereby satisfying the first *Renny* standard. The plaintiff was also given the right to present evidence, call witnesses, cross-examine witnesses, and set forth his own story, thus meeting the second *Renny* standard. The district court found that the employer’s representative at the peer

review hearing, in his opening statement, adequately set forth the issues of law and fact, and identified the point at which the decision was to be made, so as to satisfy the third and fourth *Renny* standards. And finally, the court found that all other procedural elements necessary to resolve the dispute had been met.

However, the plaintiff made an argument that the peer review was completely employer dominated and thus did not meet the fifth requirement as set forth in *Renny v. Port Huron Hospital* (1986: 433). The U.S. district court was not persuaded, stating that

The court finds such argument unpersuasive. A review of the transcript of the peer review reveals that defendant's representative, Kollodge, presented defendant's side of the issue; plaintiff presented his side of the issue, and the members of the peer review board asked questions of both plaintiff and defendant. Further, the peer review board was made up of members equally chosen by plaintiff and defendant and it had the sole power to render the final decision on plaintiff's grievance. (*Thornberry v. North Star Steel Co.*, 1991: 16)

Thus, the plaintiff in *Thornberry* raised the question about employer domination and the court simply ignored the question. Employer domination is a crucial point in determining the fairness and neutrality of the peer review procedures, and that point goes to the fifth requirement set forth in the *Renny* case above. The failure of the court to address that crucial point makes the *Thornberry* decision flawed.

Since the pronouncement of the *Renny* and *Thornberry* decisions, more recent cases have elaborated on legal guidelines regarding the processes for arbitration. These recent cases must be taken into consideration in analyzing the proposed sample peer review plan and other such creative ADR methods. In the case of *Cole v. Burns International Security Services* (1997), the federal district court stated that before arbitration could be ordered, a court must scrutinize the agreed upon or contemplated arbitration system to ensure that minimal standards of procedural fairness are satisfied. The *Cole* court adopted the recommendations of the Department of Labor's Dunlop Commission (1994: 30–31) and noted that an arbitration arrangement would be enforced if it “(1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrator's fees or expenses as a condition of access to the arbitration forum” (*Cole v. Burns*, 1997: 1482–1483).

It appears that the most significant factor in the cases and enumerated guidelines is that the arbitration process be procedurally fair, that is, that arbiters should be neutral and that the employee should have the opportunity to participate in the selection of arbitrators. Manipulation of the process by an employer compromises neutrality. In *Walker v. Ryan's Family Steak House* (2005: 386), the Sixth Circuit



Court of Appeals affirmed the decision of the U.S. district court, stating that the arbitral forum was biased in favor of the employer because it “operates on a for profit basis” and has a “financial interest in maintaining its arbitration service contracts with employers.” In *McMullen v. Meijer* (2004: 487), the Sixth Circuit Court of Appeals held that an employee could not effectively vindicate her statutory rights because the employer maintained “exclusive control over the pool of potential arbitrators.”

In light of these recent decisions, a careful analysis of the proposed sample peer review plan seems to indicate that the makeup of the proposed dispute resolution panel may be subject to challenge on the grounds that such a peer review panel created by the employer and composed of coemployees lacks neutrality, lacks adequate training, and cannot therefore effectively maintain the employee’s rights. The proposed plan needs to be crafted in such a way as to allow for comprehensive training of the employees selected to be on the panel and to make sure that the decisions of the employees are not subject to employer recourse. The language of the proposed plan is not clear in these areas. It seems that it would be difficult, but not impossible, to achieve neutrality in a panel of arbiters made up of employees who work for the very employer involved in the employment dispute. Such a panel would operate under the exclusive control of the employer, would have a pecuniary interest in members’ own employment with the employer, would be subject to the arbitration training selected and provided by the employer, and, finally, would continue working for the employer during and after the peer review process. Such a group of employees, even if elected by fellow associates, could be intimidated by and beholden to the employer for personal economic reasons. One way to assist with this problem is to make the decisions of the peer review panel as anonymous as possible. The company in our sample peer review plan needs to be advised that a serious challenge could be raised concerning the neutrality of the arbitral panel created for this peer review process and that such a challenge would most likely be successful as the plan is currently drafted. If the plan is redrafted to allow for comprehensive training, then it could possibly meet these challenges.

### **Employer Domination**

In addition to the question of the neutrality of the peer review panel, another issue of major concern exists. If the operations of the peer review panel are determined to be “dealing with” the employer regarding grievances or labor disputes, then, pursuant to the National Labor Relations Act, the panel is considered to be a labor organization. If the panel is found to be a labor organization as defined by the NLRA, then any managerial domination of the panel constitutes an unfair labor practice in violation of the NLRA, section 8(a)(2) and (1).

Therefore, it is of paramount importance that a determination be made regarding the operations of the proposed review panel, the manner in which it is constituted,

and the authority given to the panel. Only then can a decision be reached as to the appropriate application of the NLRA. If the function of the proposed peer review panel is to make binding decisions on personnel matters such as promotions, demotions, and disciplinary actions including discharges and dismissals, then the question is whether the panel essentially “deals with” the employer within the statutory description of a labor organization. If the panel does “deal with” the employer on such matters as stated in the statute, then the employer may not dominate the panel.

In the case of *Electromation v. NLRB* (1994), the Seventh Circuit Court of Appeals held that a private nonunionized employer committed an unfair labor practice in violation of the NLRA, section 8(a)(2), when it created employee committees whose functions were to deal with work-related issues, committees whose continued existence depended on the employer, whose activities were determined by the employer, and that lacked the independence of action and free choice guaranteed by the NLRA.

The *Electromation* court noted that the administrative law judge (ALJ) decided that the company had committed an unfair labor practice in violation of the statute “because he found that the company had organized the committees, created their nature and structure, and determined their functions” (*Electromation v. NLRB*, 1994: 1153). The court acknowledged the conclusions, reached by both the administrative law judge and the National Labor Relations Board (NLRB), that the employee committees functioned in a representative capacity and were dominated by management in violation of section 8(a)(2) of the NLRA in light of the following facts: “(1) the employer initiated the idea to create the committees, (2) the employer unilaterally drafted the written purposes and goals statements of the committees, (3) the employer unilaterally determined how many members would compose each committee. . . . the employer permitted the employees to conduct committee activities on paid time within a structure wholly designed by the employer” (*Electromation v. NLRB*, 1994: 1154). In summary, the *Electromation* court held that the company had violated the NLRA.

The court’s holding in *Electromation* was adopted by the Sixth Circuit Court of Appeals in the case of *NLRB v. Webcor Packaging, Inc.* (1997). In *Webcor*, the employer established a plant council, composed of management and elected workers, that dealt with employment issues. The NLRB determined that the council was an employee representation committee under company domination that violated the NLRA. The *Webcor* court, in adopting the findings of the administrative law judge, determined that the elected worker-members on the council represented the workers. The court further determined that the council was established to deal with the employer and had an “active, ongoing course of dealings” (*NLRB v. Webcor Packaging, Inc.*, 1997: 1122) with the employer. As to dominance by management of the plant council, the court indicated that important factors determining management dominance were that the council was created by management, could be disbanded by management, was funded by

management, met during work hours, never met independently of management, and held elections supported by management.

However, it is important to point out that the NLRB, as an administrative agency with adjudicatory powers, has ruled specifically on the matter of peer review committees in nonunionized employment. In the case of *Keeler Brass Automotive Group* (1995), the NLRB held that an employee committee similar to that in *Webcor*, which did not make a final and binding decision and which was engaged in “dealing with” the employer over wages, hours, and terms and conditions of employment, was a “labor organization” under the law. The NLRB also found that in *Keeler* there was illegal dominance by the employer over the labor organization or committee, and in the subsequent reformation of the committee and its ongoing administration. Therefore, the NLRB decided that in *Keeler* the employer had committed an unfair labor act in violation of the NLRA.

In contrast to the *Keeler* ruling, in the case of *Sparks Nugget, Inc.* (1977), a case that preceded *Electromation*, the NLRB decided that an “employees council” that made final and binding decisions regarding grievances and reported those decisions to management functioned independently. Because there had been no “dealing with” management in a representative capacity, consequently there was no unfair labor act by management and, thus, no violation of the law.

These administrative agency decisions by the NLRB appear to hold that if the peer review process is not binding and the committee does not have full grievance handling authority but is merely advisory or representative of employees to management, then the group is a labor organization. If, then, management dominates the employee committee, there is likely a violation of the NLRA. On the other hand, if the decision of the peer review committee is binding on the employer, then it is likely to be determined not to be dominated by management and there is no violation of the NLRA.

### **CONCLUSION: BENEFITS AND RISKS OF PEER REVIEW ARBITRATION**

Peer review has many advantages for the employee. Peer review panels provide a mechanism for incorporating employee involvement into nonunion dispute resolution procedures in the workplace. Training improves communication and listening skills, ensures a better understanding of company policies, ensures privacy and confidentiality, and makes for fact-based decisions. This builds employee confidence in the process. Peer review arbitration panels have the freedom to craft resolutions that both sides to the dispute can actually live with, as opposed to court action.

The peer review process must be final and binding, resulting in a final decision. The peer review process must be one that is binding on management, not one that merely makes suggestions to management. If the peer review process does

not have full grievance handling authority without dealing with management, then management likely dominates the peer review process and, thus, the process is illegal. If, on the other hand, the decision of the peer review committee is binding on the grievant and management, the process only receives “input” from management, and the panel is neutral and is fully educated to vindicate statutory rights if such are involved, then it is likely to be determined not to be dominated by management and may survive challenges in court.

Arbitration itself has many advantages. Busy courts no longer set out to jealously protect their jurisdiction, but instead appear willing to embrace and actually encourage the practice of arbitration where it is created by a fair agreement, and where the arbitral body functions with a fair process, maintains neutrality and independence, and effectively vindicates rights. As has been indicated, a fair arbitration agreement that allows for a neutral, educated, independent arbitral panel acting vigilantly to protect rights established by the laws entrusted to its care may allow for an effective mechanism for justice. Employees should demand such a fair arbitration agreement, especially when utilizing peer review panels. Employees should demand from management that members of such a panel receive training to ensure that all claims when put before such a committee will be determined by an educated panel.

Employees should demand fair peer review procedures. To be considered fair, a mandatory arbitration agreement should not impose prohibitive costs on the grievant employee, should not limit the statutory remedies of the employee, should not deny the award of attorney fees to the plaintiff’s attorney, should be cautious of “loser pays” provisions, should be knowingly and voluntarily signed by employees, should not be arrived at through coercion or fraud, should allow for a meaningful choice and possibly an “opt-out” provision, should not contain threats of retaliation against members of the peer review panel, and should not allow for unilateral modification. These points must be taken into consideration when employees are considering whether to ask management to implement this form of ADR.

In most disputes, the use of peer review panels should be advantageous to employees. Peers are likely to view the testimony of an employee as credible. Peers do not like to dismiss peers from employment. According to recent statistics, employees who file grievances prevail in arbitration 63% of the time compared to only about 15% of the time in litigation (Green, 2000). In employment-at-will relationships, peer review panels will give employees stronger job security than the courts would provide, as they may create a just cause contract. Employees may retain their jobs after the resolution of the dispute; thus, a working relationship is an important concern when dealing with statutory employment discrimination.

The biggest disadvantage of the peer review method is that the statutory claims of the employee may not be properly protected. Peers usually do

not have any training, legal or otherwise, that will assist in resolving the statutory claims of employees. Peer review may best be utilized for disputes involving areas such as discipline, work assignments, and work schedules. Peer review should be used for fact-based decision making as to whether a company policy has been followed. It should not be used for disputes involving statutory and legal claims.

A second disadvantage of the peer review method is that it is questionable whether peer review panels can really be separated from management control. The peer members on the panel are still employees of management, and may not be able to separate themselves from the fear of later personal repercussions from management due to decisions they made while serving on a panel. Can these employees really be neutral, or are they still management dominated?

Employee intimidation by management is a concern. Intimidation and fear do not foster employee loyalty. One of the purposes of peer review is to enhance employee satisfaction in the workplace. Satisfied workers lead to greater productivity. It is therefore counterproductive for management to intimidate employee members of a peer review committee. A way to avoid employee intimidation aimed at influencing the outcome of peer review would be to allow for employee-only peer review and exclude managers from participation. After all, managers are not peers of the employees. The individual decisions of the panel members should be kept confidential. Voting by secret ballot after the hearing process would ensure the confidentiality of the decision. Perhaps different peer review groups should be trained for different peer classifications.

In the academic world, a peer review process is used to review scholarly work. A double-blind review process is used, in which authors do not know the identity of their reviewers and reviewers do not know the identity of the authors. This facilitates objectivity. "Without anonymity, junior reviewers may become hesitant to offer critical evaluations for fear of career reprisals" (Hillman & Rynes, 2007).

The key to the success of employment contracts that contain peer review clauses is that these processes must be carefully drafted to be fair to the employees and the members of the peer review panel must be properly trained to handle all the issues brought before the panel. Issues of legal and statutory rights should never be brought before an untrained peer review panel. Statutory rights issues are very complex, and employees cannot be properly trained to effectively vindicate the rights of the employee. Relatively noncomplex issues involving workplace conditions and employee behavior are appropriate for referral to peer review panels. The ability to resolve employment issues using an internal system benefits both the employer and the employee. Just, effective, and efficient internal decision making can be accepted by all.

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## **LEGALITY OF EMPLOYER CONTROL OF OBESITY**

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### **ABSTRACT**

Currently, obese employees have limited legal protections as a class. However, under certain managerial and legal situations, obese employees and former employees have begun to prevail in lawsuits against employers seeking to take adverse employment actions based on their obesity. An analysis of a random sample of 80 cases was carried out to identify factors that increase an obese plaintiff's likelihood of success. An employee in the private sector, especially a nonprofessional employee, has a statistically significantly greater likelihood of winning than do others. Similarly, an unemployed individual or an individual filing suit under legislation other than state discrimination laws or the Americans with Disabilities Act (ADA) has a statistically greater chance of prevailing.

### **INTRODUCTION**

Obese individuals face discrimination in employment and in other aspects of social life. A survey of attitudes among human resources (HR) professionals reveals the following: half of them believe that obesity negatively affects employee output, a quarter believe that obesity is becoming a problem in their industry, one-third believe that obesity is a valid medical reason for not hiring a

person, and 11% think that firms can fairly dismiss people just because they are obese (Thomas, 2005).

The way in which managers and coworkers perceive obesity can have profound effects on recruitment and hiring, discrimination, and employee morale (Grossman, 2004). Some of this is subtle. For example, applicants for employment may be judged on their appearance, not just on their qualifications. Rejected candidates may not be aware of weight-related factors (Laabs, 1995). Belizzi and Hasty (1998) have reported that obese salespeople are considered less fit for more challenging sales territories and may be discriminated against in job assignments.

Carr and Friedman (2005) investigated the psychological correlates of institutional and interpersonal discrimination reported by underweight, normal weight, overweight, and obese Americans. Not only did they investigate overt discrimination against overweight people but they also reported day-to-day discrimination, such as rude treatment. They found that very obese persons as compared to normal weight persons reported significantly lower self-acceptance, more frequent discrimination, and more major discrimination. In addition, they also reported more frequent discrimination and more major discrimination in the workplace; however, they did not report lower self-acceptance. A surprising finding was that for members of higher socioeconomic strata, the interpersonal consequences of severe obesity are even more acute than for others.

Other research has also shown stigmatization and discrimination due to obesity. Participants in Rogge's (2004) study were reminded in everyday encounters with family members, peers, health care providers, and strangers that they deviate from social norms and are inferior to those who are not obese. Puhl and Brownell (2001) found that stigmatization can be documented in employment, education, and health care. Puhl and Brownell (2006) also found that overweight research participants were subject to stigmatization, depression, and low self-esteem.

Friedman, Reichmann, Costanzo, Zelli, Ashmore, and Musante (2005), in a summary of the literature, state that obesity affects employment, employment potential, and socioeconomic status, as well as having negative psychological consequences. Their data, which were obtained through a self-report questionnaire, showed that participants had higher than average means for depression and general psychiatric symptoms. Tunceli, Kemeng, and Williams (2006) used data from the Panel Study of Income Dynamics; after adjusting for socio-demographic characteristics, smoking status, exercise, and self-reported health, they found that obesity was associated with reduced employment. However, while work limitation was statistically significant for women, the relationship was not statistically significant for men. Carpenter, Hasin, Allison, and Faith. (2000) also found that the relationship varies by sex. Furthermore, in two experiments, average-weight male job applicants were rated more negatively when seen with an overweight compared to a normal weight female. This shows that the stigmatization can spread simply due to proximity (Hebl & Mannix, 2003).

In an extensive review, Roehling (1999) notes that employee weight may bias employment decisions through its effect on assessments of physical attractiveness. Attractive people are perceived to have more socially desirable traits than unattractive people. They are perceived to be more intelligent, sociable, dominant, mentally healthy, and socially skilled than unattractive people. The obese are often blamed for their condition, leading to inferences about laziness and lack of self-control, being less tidy or having poor personal hygiene. Decision makers may react differently to overweight individuals, causing them to treat overweight employees differently on the job.

Currently, the legal protections available to remedy this discrimination are vague or not systematically enforced. Employers, while trying to cut costs, have instituted various measures impacting on obese employees. These can take both positive and negative forms, including health programs as well as disciplinary measures up to and including firing. Some of these measures may result in litigation, as employees try to protect their workplace rights.

### **CURRENT LEGALITIES**

Benforado, Hanson, and Yosifon (2004) present a call for the attainment of justice with regard to discrimination based on weight. They note that numerous laws protect individuals based on race, creed, color, sex, national origin, and age, but that discrimination based on weight seems to be legally different. Overweight individuals do not seem to have legal protection under Title VII or the Age Discrimination in Employment Act. Furthermore, people looking for protection under the Americans with Disabilities Act have not been very successful either, except when they were morbidly obese. When an individual claimed that he or she was discriminated against, not because of a disability but rather because of the employer's perception that the individual had disabilities when, in fact, he or she could really perform the job, the individual was more likely to prevail. Benforado and colleagues claim that the causes of obesity are still unclear, even after the genetic, behavioral, and environmental factors have been taken into consideration. The "real problem is that we have an extremely difficult time understanding the role of unseen features in our environment and within us and too readily attribute responsibility and causation to the more obvious 'personal choices' of the obese." (Benforado et al., 2004: 1653) The emerging consensus among public health experts is that obesity is largely a product of a "toxic environment." It is this notion of the toxic environment that moves the argument in the direction of governmental protection. This toxic environment includes high-calorie, low-nutrition foods and mega servings, a more sedentary life style, including greater reliance on a car, less time for exercise, and more time spent in front of TVs and computers (Battle & Brownell, 1996; Brownell & Horgen, 2004).

Two legal issues are coming to the forefront with respect to employer control of obesity. The first is the issue of protection for morbidly obese persons under the

Americans with Disabilities Act. Morbid obesity is defined as being 100 lbs. or more over the ideal body weight or having a body mass index (BMI) of 40 or higher, which is defined as 100% over the ideal body weight. The Sixth Circuit (covering Michigan, Ohio, Kentucky, and Tennessee), in *EEOC v. Watkins Motor Lines* (2006), recently ruled that “morbid” obesity is not automatically a disability under the ADA. The court rejected the argument of the Equal Employment Opportunity Commission (EEOC) that morbid obesity should always be a covered disability. In this case, the employee’s job consisted mainly of dock work including loading, unloading, and arranging freight. The employee was injured on the job and was eventually terminated, as he was deemed unable to return to work in 180 days. The court held that to be successful when pursuing a “regarded as disabled” claim, the employee had to allege that he was perceived to have an ADA-protected impairment. Under the ADA, the court held that employers are prohibited from discriminating against any qualified “individual with a disability” that substantially limits one or more of the major life activities of the individual. However, individuals who do not actually have a substantially limiting impairment are also covered under the statute if their employer regards them as being disabled. However, to constitute an ADA impairment, a person’s obesity has to result from a physiological condition, such as thyroid disease or a digestive disease. The employee in *Watkins* did not show that he suffered from any of these ADA impairments.

The second issue is the issue of whether an employer has to provide accommodation for obese employees who are perceived as disabled. The majority of circuits confronted with the question of the duty to accommodate individuals who are merely “regarded as” disabled have concluded that such a duty does not exist. Among the cases holding that employers do not have a duty to accommodate individuals who are regarded as disabled, the most comprehensive analysis to date is provided by the Eighth Circuit in *Weber v. Strippit, Inc.* (1999). In this case, the plaintiff, who had heart problems, was told to relocate. He refused and was terminated. He brought a claim under the ADA, alleging perceived disability discrimination. The court stated that there is considerable force to the argument that plaintiffs who are “regarded as” disabled are not entitled to accommodations. “Among the court’s concerns were that adopting plaintiff’s interpretation of the ADA would permit healthy employees to, through litigation (or the threat of litigation), demand changes in their work environments under the guise of ‘reasonable accommodations’ for disabilities based upon misperceptions.” (Perritt & Perritt, 2003: 70).

All states have statutes prohibiting discrimination against the disabled. However, limited but increasing numbers of municipalities and states, including San Francisco, Washington, DC, and Michigan, have enacted statutes prohibiting weight discrimination.

Courts have generally viewed obesity as a voluntary condition and therefore disqualified it as a disability under ADA. This is despite the fact that an individual

is more likely to be cured of cancer than to be cured of obesity if a cure is defined as a reduction to the desired weight and the maintenance of that weight for five years. In general, federal courts have begun to interpret state disability laws as requiring that a plaintiff have an actual disability, even if perceived disability theory is being used.

A few cases have held that obesity on its own constitutes a disability. Court rulings have demonstrated circumstances in which obese plaintiffs have been successful. *New York Division of Human Rights v. Xerox Corporation* (1985), *King v. Frank* (2005), *Cook v. Rhode Island, Department of Mental Health Retardation and Hospitals* (1992), and *Gimello v. Agency Rent-a-Car Systems* (1991) are examples of these cases.

### Cases of Interest

Several cases illustrate a tendency for employees to prevail. Employees have prevailed when employers have made hiring decisions based on negative stereotypes. In *Cook v. Rhode Island* (1992), Cook applied for a job as an institutional attendant at a residential facility for the mentally disabled. She was accepted contingent upon satisfactorily completing a physical examination. The examining physician refused to approve her application unless she reduced her weight to less than 300 pounds, and she was refused employment. There was no evidence that the plaintiff lacked the agility, the strength, or any other physical ability to do the job. Thus the employer seemed to base its judgment on stereotypical assumptions. The court ruled that the employer viewed the applicant's overweight condition as a handicap. Thus the court agreed with the jury that not only should she be hired for the next available opening in the position for which she had originally applied, but she should also be paid compensatory damages with interest and be awarded retroactive seniority.

A similar, more recent case was *Connor v. McDonald's Restaurant* (2003). Connor had applied for a cook's position and was denied employment. He alleged that the employer discriminated against him because the employer believed that he was substantially limited in the major life activity of working due to his morbid obesity (420 lbs.); that this was due to a negative stereotype. This case clarifies that an obese applicant does not have to plead that his obesity is a physiological disorder, but only that he is able to perform the essential functions of the job for which he wants to be hired.

An employer is not at liberty to selectively choose which medical conditions apply in litigation. In *McLaughlin v. Unum Life Insurance of America and Group Long Term Disability Plan for Employees of Independence Blue Cross* (2004), an accounting supervisor applied for long-term disability status because of diabetic neuropathy, fibromyalgia, complicated migraines, and an eye condition. The employer's physician indicated that some of her conditions were related to obesity. The court ruled against the employer, stating that the company used highly selective parts of her medical report, which showed arbitrary and capricious

action by the plan administrator. The court also stated that a heightened standard of review applies when a plan is “unfunded” and when a plan is administered by an outside administrator “that does not have strong incentives to keep employees satisfied by granting meritorious claims.”

Sometimes when an employee decides to take medically based actions to control his obesity, the employer declines to support that action. This can result in litigation outcomes in favor of the employee. For example, *Lowell v. Drummond, Woodsum and MacMahon* (2005) was another interesting case in which the employee prevailed. It involved a decision to deny gastric bypass surgery under the health care plan, which was administered by a third party. Lowell suffered from morbid obesity, a significant medical condition that increases the likelihood of developing diseases such as heart disease, diabetes, hypertension, pulmonary complications, and certain obesity-related cancers. The defendants claimed that the plan did not expressly provide coverage for surgical weight reduction procedures or for gastric bypass surgery. The plan denied coverage for any expense for weight reduction, nutritional or dietary counseling, smoking clinics, and sensitivity training whose primary purposes were recreational and/or social. While the defendants claimed that the exclusion was based on the lack of medical necessity, Lowell’s doctor’s rationale for prescribing gastric bypass surgery was not weight reduction but rather the reduction or elimination of the associated morbidities, which he believed would occur in Lowell’s case. The court ruled in favor of Lowell.

### METHODOLOGY

The purpose of the research on which we are reporting here was to identify case characteristics that are associated with successful lawsuits by obese plaintiffs against their current or former employers. The case characteristics identified fell into several categories: the demographic characteristics of the individual, employer or context characteristics, and laws and physical/psychological factors that confound the legal protections. The current study is based on an analysis of a random sample of cases that have been litigated on the basis of adverse employment decisions with regard to obese individuals. LexisNexis’s database of federally litigated cases was queried using the search strategy “obesity AND employment OR work OR employee” for the years 1994 to 2003. This yielded 276 cases, from which the cases in this study were randomly drawn. The rationale was to draw a sufficiently large sample size for a chi-square analysis that would ensure an adequate number of observations in each cell to assure an acceptable rate of Type II errors. While there is no clear determinant sample size, we as the researchers wanted to be conservative in pulling the random sample (Garson, 2008). Ten cases had split decisions and were removed from the analysis. Seventy cases are included in the empirical analysis. This analysis considered demographic characteristics, organizational and case characteristics, legal bases, and confounding physical factors (see Table 1).

Table 1. Predictors of Success in  
Obesity Discrimination Lawsuits

Category of variable
Demographic characteristics
1. Sex—female
2. Professional position
3. Unemployed status
4. Obesity within own control
5. Disabled
Organizational and case characteristics
6. Manufacturer as employer
7. Need to make accommodation
8. Third party involvement
9. Union involvement
10. Arbitration involvement
11. Public sector
12. Service sector
13. Proposed action other than firing
14. Proposed firing
15. Job action
16. Physical action
Laws
17. District court
18. Discrimination laws
19. Health laws
20. Disability laws
21. Constitutional laws
22. Americans with Disabilities Act
23. State law
Confounding physical issues
24. Muscular
25. Digestive
26. Cardiovascular
27. Psychological



## FINDINGS

Table 2 shows the frequencies for the relevant variables. Overall, the employer prevailed in 58.8% of cases and split an additional 12.5%. This means that employees had protection almost 54% of the time (findings for employees 41%, split findings 12.5%). The table contains frequencies for the cases in which the employer prevailed, and the frequencies for the cases in which the individual prevailed.

The plaintiffs had a greater than 50% chance of prevailing in the case of seven characteristics. These included being female or being employed in the service sector. When the employer proposed a job-context action, such as a job reassignment, denial of promotion, denial of benefits, or schedule modification (in contrast to a personal action, such as requiring dieting), the individual prevailed. When the employer proposed an action other than firing, such as a suspension or demotion, the individual prevailed in more than 50% of the cases. The individual also prevailed at the district court level and when the lawsuit was filed under health laws such as those relating to the Employee Retirement Income Security Act (ERISA), the Occupational Safety and Health Administration (OSHA), Workers' Compensation, or Social Security Disability. A full 95% of the cases in which the individual prevailed involved unemployed plaintiffs. Apparently, the rulings were more likely to be in favor of the individual plaintiff if she or he were unemployed. The unemployment might be due to the individual's being fired or due to a disability.

Some of the case characteristics that were identified were surprising to us, in that they were other than what the literature would have predicted. We expected that when obesity was judged to be within the control of the individual employee, the individual would prevail even less frequently than in the actual finding of 18%. We also expected that individuals who were found to be disabled would win more than 17% of their cases. There was no union involvement at all in the cases in which the individual won; nor were any cases in the public sector won by individuals.

The success rate relating to a proposed action other than firing was considerably higher than expected, at 74%. Apparently, when employers do not want to terminate an obese individual, the individual wins. However, when the employer proposes to fire the individual, the individual is most likely going to lose.

Table 3 provides the best guidance to plaintiffs because it shows the factors that distinguished winning cases from losing ones. These factors included being in the private sector and being a nonprofessional employee. An unemployed individual was more likely to prevail, but this was a statistically weaker finding. Lawsuits filed on grounds other than those related to alleged violations of state discrimination laws or the Americans with Disabilities Act were more likely to result in the individual plaintiff prevailing. However, in no case in which the employee prevailed was a union involved.

Table 2. Frequencies of Case Characteristics and Case Outcomes

Category of variable	Percentage of all cases <i>N</i> = 80	Percentage of cases with finding for employer <i>N</i> = 47	Percentage of cases with finding for individual <i>N</i> = 23
Demographic characteristics			
1. Sex—female	50.0	46.8	60.9
2. Professional position	30.6	40.9	15.8
3. Unemployed status	82.9	80.0	95.5
4. Obesity within own control	18.1	12.8	18.2
5. Disabled	31.3	36.2	17.4
Organizational and case characteristics			
6. Manufacturer as employer	31.0	27.5	40.9
7. Need to make accommodation	25.3	28.9	14.3
8. Third party involvement	51.3	47.7	47.8
9. Union involvement	13.9	19.6	0
10. Arbitration involvement	2.5	2.2	0
11. Public sector	19.7	29.5	0
12. Service sector	56.3	52.2	59.1
13. Proposed action other than firing	68.8	63.8	73.9
14. Proposed firing	23.8	29.8	13.0
15. Job action	63.8	63.8	60.9
16. Physical action	26.3	23.4	30.4
Laws			
17. District court	78.0	72.3	87.0
18. Discrimination laws	40.0	52.3	17.4
19. Health laws	48.0	57.4	65.2
20. Disability laws	25.0	36.2	4.3
21. Constitutional laws	5.0	2.1	8.3
22. Americans with Disabilities Act	27.5	34.0	13.0
23. State law	18.8	23.4	8.7
Confounding physical issues			
24. Muscular	56.3	70.2	56.5
25. Digestive	31.3	38.3	21.7
26. Cardiovascular	35.0	42.2	22.7
27. Psychological	42.5	44.7	43.5
Finding for employer	58.8	100	0
Split finding	12.5	100	100

Table 3. Chi-Square Analysis—Finding for Employee—Split Cases Excluded  
(*N* = 70)

Findings for employee by variable	Chi-square value	Degrees of freedom	Probability
Finding for employee: private sector	8.431	1	.004
Finding for employee: nonprofessional employee	3.768	1	.052
Finding for employee: union not involved	5.175	1	.023
Finding for employee: unemployed	2.779	1	.095
Finding for employee: not filed under state discrimination law	8.157	1	.004
Finding for employee: not filed under ADA	3.444	1	.064

## DISCUSSION

It is simplistic to think that morbid obesity is not a disability and that overweight individuals are not protected (*EEOC v. Watkins Motor Lines*, 2006). In fact, the statistics show that a high proportion of overweight individuals are more likely to have additional disabilities that would be protected under the Americans with Disabilities Act. Alternatively, they have other confounding factors, such as muscular, digestive, cardiovascular, or psychological factors (Obesity Society, 2008). In our sample, 62 of the 80 cases involved muscular, digestive, cardiovascular, or mental/psychological disabilities in addition to obesity.

A high proportion of the cases studied involved individuals who were unemployed. This suggests that there may be costs to society in terms of Unemployment Compensation or Social Security Disability Insurance. However, this is not the focus of the study. Additionally, many employers were involved in lawsuits relating not to their current but to their former employees. This is especially relevant when one considers that nearly all of the individuals who prevailed were unemployed former employees.

The findings of this study suggest that individuals who are suing for adverse employment actions based on obesity are more likely to prevail under certain circumstances. If these conditions are not met, the case outcomes of this study indicate a limited likelihood of winning in court. For instance, professionals are

unlikely to win in court. It seems likely that appearance, especially weight, counts more if one is a professional than if one is a nonprofessional employee. It may be that in nonprofessional jobs, employers do not find weight as significant an issue. There are many stereotypes about what professionals are supposed to look like, and one of those is the idea that they should be lean and trim. Thus the courts may feel that a professional should look the part.

Another surprising finding was that there were very few cases with union involvement (14%). In addition, none of the employees who prevailed were represented by a union. There are several possible reasons for this finding. First, the low number of cases with union involvement probably indicates that most union-involved cases are settled under union procedures as detailed in contracts. For instance, the issue may be resolved within a company by a grievance hearing, which is outside the purview of this study. Furthermore, in many contractual cases, when the plaintiff is not satisfied, the union will refer the case to arbitration, not litigation. In addition, if such a case does reach the court system, it is likely that the court will rule that the judgment under the contract should stand. Thus the court is not likely to rule against the employer.

Cases within the public sector were never won by the individual employee. Like union jobs, many public sector jobs have a strong grievance process. Most of these cases are probably settled internally without going to litigation. Furthermore, as in the union example, public sector lawsuits that do appear before a court are unlikely to be won by the employee, because the belief is that the employee has already had her or his day in court within the organizational structure.

Finally, cases brought under the ADA or discrimination laws are very unlikely to be won by an individual. The definitions are very specific in each of these sets of laws. Therefore it is difficult for the employee to win a judgment. In other laws, such as health and disability laws, a more general statement is included, which allows more flexibility in determining the outcome of the cases. While there still is no strongly significant difference under these other laws, employees have a greater chance of winning than under the ADA or discrimination laws.

### **Promising Legal Approaches**

There are ever-increasing numbers of bills in state legislatures prohibiting obesity discrimination, and there are many who think that this is the most promising approach. Other suggestions include the following (Adamitis, 2000; Klaff, 2005; Kristen, 2002; Reisman, 2005):

1. Changing the definition of disability under the ADA;
2. Allowing exceptions in court rulings;
3. Removing consideration of voluntarism and mutability as irrelevant under the EEOC guidelines; and
4. Recognizing metabolic syndrome as a disability.

Bradbury (2007) notes that although employers have fared well in obesity-related discrimination claims, a review of federal case law suggests that public human resources managers will be well advised to adopt a strategy that reduces the likelihood of obesity-related discrimination, as it is more desirable to avoid potentially litigious behavior than to emerge victorious in court. If employers adopt this approach, individuals will be protected against discrimination, rather than having to litigate to obtain this protection.

Overall, our findings and discussion demonstrate that obesity by itself may not be protected under the major public policy protections. However, when it is taken in conjunction with other medical or psychological conditions, employees have some protection under the legal system and they can prevail.

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## **ACQUIRED DISABILITY AND RETURNING TO WORK: TOWARDS A STAKEHOLDER APPROACH**

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### **ABSTRACT**

This article examines the potential application of stakeholder theory to the case of a disabled worker returning to work. A gated notion combining both the instrumental and ethical views of stakeholder theory is explored as a way to understand how to determine who may be classified as a stakeholder. This nuanced application of stakeholding to the process of returning to work lends itself to the consideration of mediation techniques as mechanisms of conflict avoidance rather than exclusively as dispute resolution techniques. Implications in terms of the study of the return to work process, disability, and the further potential for practical application are discussed.

### **INTRODUCTION**

Disability among Canadian adults who are considered part of the labor force (defined as being between the ages of 15 and 65) is a situation that affects just under 2 million individuals or approximately 9.9% of the working-age population (Cossette & Duclos, 2002). While there appears to be an increasing interest in ill and injured employees returning to work as early as possible (James, Cunningham, & Dribben, 2006), nevertheless the impact of an acquired disability upon an individual's future employment prospects seems bleak at best (Clauretie, 2003). The impact that involuntary job loss has upon those with disabilities (Bradley, Boath, Chambers, Monkman, Luck, & Bould, 2004) is by no means limited to the person with a disability; indeed, the individual's family members are also



substantially affected (Strunin & Boden, 2004). When a person acquires a disability and loses employment, the impact is felt by the broader community.

Are there current perspectives in the human resources or management literature that could benefit both our understanding and the situation of the disabled worker attempting to return to the workplace? In this article I explore the potential applicability of one particular alternative; a stakeholder approach. I go on to suggest the broad contours of a proactive application of the stakeholder approach, which would avoid some of the negative aspects of the current, litigation-based process. My concluding comments highlight some implications and areas for future research.

### **DISABILITY AND RETURNING TO WORK**

Why is the loss of work so profound an issue, and why are some disabled individuals motivated to return to work, despite the variety of challenges they may face along the way back to employment? The empirical literature has largely focused upon modeling the determinants of an individual's successful return to the workplace and has incorporated factors such as socioeconomic status, type of disability, age, sex, and duration of unemployment. In one sense this seems to replicate the ways in which insurance company-based actuarial processes analyze data to allow for effective risk assessment. A problem with this approach is that it fundamentally ignores the choices and the nuanced context of the disabled worker, and instead deterministically attempts to predict the person's behaviors based upon presupposed intrinsic characteristics or an index of the individual's situation. This approach is even more problematic if we take into account the broader context of the disabled individual, in which we find many different and often competing agendas that affect the return to work effort. If we instead recognize that a worker's desire to return to work is likely based upon a multitude of economic, psychological, and social factors, we find ourselves asking very different questions about the return to work process, with implications for the worker's rights.

#### **Beyond Economic Rationales**

The meaning of work to an individual clearly varies from person to person. Individuals likely do work for economic benefits, but this presupposition may trivialize the other types of motivations or rewards that characterize their decision to work. In their research designed to develop a measure of motivation to change for musculoskeletal pain patients, Gard, Rivano, and Grahn (2005) found that in motivation for change in the work situation there were a number of factors beyond economic gain; namely, co-worker support, supervisory support, challenges in work, job control, interaction, and job satisfaction. These findings mirror Siegert and Taylor's (2004) review of social psychology perspectives on rehabilitation

and goal setting, particularly the concepts of autonomy, competence, and interpersonal relatedness. The social contact that work affords, as well as the satisfaction and sense of accomplishment that accompanies some tasks, seems as important as, yet not exclusionary to, economic well-being. Nevertheless, it is interesting that so little empirical work has been done on the reasons why a worker with an acquired disability would wish to return to work. This situation would seem to offer an opportunity for real insight into motivation and work, yet there seem to be assumptions that the rationale for employment is largely an economic requirement and that the motivation is the same as that of the worker without a disability.

Regardless of the individual's motivations that are at play in the desire to return to work, and instead of simply labeling the individual as likely or unlikely to return to work, we must regard the question of the process by which an individual with an acquired disability returns to work as far more nuanced, pertinent, and interesting, with implications for the fundamental human rights of such a worker.

### **Legal Factors**

In addition to the multitude of trying physical and psychological issues that potentially accompany a disabled person's desire to return to work (see, e.g., Vowles, Gross, & Sorrell, 2004; Weiner, Rudy, Kim, & Golla, 2004), there are also structural aspects of the legal and social welfare systems that the disabled worker must contend with. In fact, when considering evidence from the United States (Kruse & Hale, 2003; Kruse & Schur, 2003; Lee, 2003; Schwochau & Blanck, 2003) it is clear that the legal protections afforded via the Americans with Disabilities Act (ADA) and its accompanying mandatory accommodation policies are uneven. In the case of litigation based upon the ADA, Lee (2003) reports a substantial inequality in lawsuit success rates, with employers showing an 80%–96% success rate over disabled employees who seek legal recourse in navigating their return to the workplace. This situation highlights the likely power imbalance present in such litigation (including access to resources to pay for legal advice) and the fact that legal protection for the rights of the disabled employee is required.

While it is difficult to broadly characterize the return to work process for an employee with an acquired disability, it is useful to briefly describe how the process could unfold in such a way that litigation actually becomes necessary. Typically, when an individual acquires a disability, the question of whether or not it has been caused by an accident related to the workplace is crucial. The implications of this relate to insurance coverage for the employee as well as accident investigations. While it is beyond the scope of this article, it is possible to see that the relative pressures upon an organization to accommodate a disabled worker who returns to the workplace where he or she was initially injured are probably great. Nevertheless, the rehabilitation process, which requires detailed

documentation along the way, is the source of much expert opinion from medical professionals' reports (e.g., reports from doctors, physiotherapists) as they, often under the watchful gaze of an insurance company disability case manager, chart how the individual will eventually return to work. This return to work may or may not be to the same organization, to the same profession, or in the same capacity (i.e., regarding part-time versus full-time employment). There are many opportunities for medical complications and relapses. In short, there is motivation to get the worker back to work to remove financial liabilities (especially on the part of insurers), while there is a simultaneous perception of real productivity risks and potential associated costs for an organization employing a person with a disability. This in part explains why legal protection for working individuals with disabilities is crucial.

### **Definitional Challenges**

A further challenge both for those with disabilities and within the legal system itself relates to definitional issues. Categorization of a diverse population using a simple term such as "disabled" is problematic, and part of the agenda of the disability rights movement has been to reframe disability as an environmental mismatch, rather than as an attribute of an individual (Kruse & Hale, 2003). The definition of disability and thus impairment is pivotal in most ADA cases, and in the United States the courts are often left to determine the extent of rights and responsibilities relating to accommodation at work for the disabled employee. In Canada, the accommodation of individuals with a disability is mandated under the Canadian Human Rights Act (Catano, Cronshaw, Wiesner, Hackett, & Methot, 2005) and has been refined as a result of subsequent court cases (Kelloway, Francis, Catano, Cameron, & Day, 2004). Despite legislative differences between Canada and the United States, Canadians with disabilities requiring accommodation and forced to seek it through litigation face similar hurdles in reaching a tenable resolution.

The assumptions regarding what constitutes work, its potentially contingent nature, and the ways in which those with disabilities actively construct their working lives in adaptation to their specific needs are complex (Schur, 2003). The economic benefits acquired as a person with a disability (e.g., disability insurance or social welfare system benefits) may implicitly preclude the undertaking of volunteer work, as insurance and social assistance economic benefits are, for the most part, contingent upon the disabled worker being essentially unemployed if not unemployable. Thus, the economic viability of the return to work effort may be an important factor affecting labor market participation by those with acquired disabilities, particularly if the return to work may entail modified work hours or part-time versus full-time status. It appears that the control and flexibility that would permit individually determined and appropriate participation in the workplace are lacking. This common "all or nothing" approach

effectively polarizes the individual workers' choices and threatens their right to resume participation as employed members of their society.

### **Towards a Nuanced Approach**

Beyond medical factors and interventions such as ergonomic assessments, pain management, mobility aids, and time management, there are a number of psychosocial factors identified in the literature that could compound the efforts of disabled workers in their return to work. Typical intervention processes to prevent long-term loss of employment due to disability have been categorized as medical models, physical rehabilitation models, job-match models, and managed care models (Pransky, Shaw, Franche, & Clarke, 2004). A critical success factor for the return to work effort is effective communication between the multitudes of parties who are involved in these simultaneous models of intervention (Pransky et al., 2004). Sadly, Pransky et al. (2004) also find little evidence of effective communication in the return to employment situation. This lack of effective communication may show up as a variety of "roadblocks" to a successful return to work. For instance, the literature reports that a "backlash" might result from other employees' perceptions of unfair accommodation practices (Colella, 2001) or that stigmatization of those returning to work may provide additional psychological burdens to the disabled employee (Kelloway et al., 2004). Goal setting and motivation have been linked to a successful return to work for the disabled individual (Siegert & Taylor, 2004), as has respectful and open communication (Roberts-Yates, 2003), yet despite these suggestions for ways to improve the likelihood of an individual successfully returning to work, disability models that incorporate physical, psychological, and workplace factors have been able to explain less than 25% of variance in disability and work outcomes (Pransky et al., 2004). Pransky et al. believe this suggests that other important factors may remain unmeasured. This opens up the possibility that the current models employed in rehabilitation and return to work issues may simply be myopic in identifying the key individuals and groups involved in the process. Perhaps a sort of range restriction resulting from a model specification that excludes key elements of the concerned population is at work in this case. In short, maybe the present focus upon a deterministic viewpoint regarding an individual's likelihood of returning to work has reached its limit and a more contextualized and process-based understanding of the situation would be useful.

It is clear that despite many hurdles, some workers with acquired disabilities desire and subsequently attempt to return to work. The problems with the current approaches relate to how such a situation is managed and/or resolved. There is an inherent power imbalance between the worker and the workplace and the insurance and medical complexes that she relies upon for advice and intervention. This power imbalance reflects the underlying assumption that economic gain is the primary reason for a return to work. As a result of the focus upon economic

gain or loss to the exclusion of other factors, the voices of the disabled worker and other stakeholders stand to become silenced. This potentially gives rise to a situation in which costly legal action is invoked. The comparative simplicity of assuming only economic rationality in terms of return to work motivation is therefore likely to be costly, exclusionary, confrontational, and personally as well as socially damaging. The situation needs some context beyond the economic motivation assumption.

A contextualized approach to the disabled worker returning to work is likely to involve many different persons and organizations and a variety of intersecting or competing interests. It is this myriad of involved people and entities that makes stakeholder theory seem potentially useful and appropriate for discussion. Insofar as stakeholders are seen as having legitimate rights of involvement in decision-making processes, stakeholder theory may offer a framework whereby many of the difficulties in the present situation of a disabled worker returning to work can be mitigated. I next survey stakeholder theory in an effort to illustrate the intersections of this theory and the disabled worker's situation.

## **STAKEHOLDER THEORY**

Many people are affected when an individual with a disability makes efforts to return to work. Disagreements are likely as firms, insurance companies, government, nongovernmental organizations, and medical professionals engage in responding to the disabled worker's needs. At the same time, each group that is involved on behalf of the worker is also engaged in fulfilling its own unique mandates. The sometimes overlapping and competing agendas of these groups further complicate the situation, as both the overall number and the interconnectedness of the various organizations evolve over what may well be a multi-year rehabilitative process for the disabled worker. The interconnectedness of stakeholders issue has much more in common with the perspective offered by Reynolds, Wagner, and Harder (2006), and yet these authors' examination of more physician-centered models of disability management seems to largely replicate the placement of the disabled worker on the periphery of the process. It seems clear that the requirement to balance the needs of the disabled individual with those of others has elements in common with the literature exploring stakeholder theory. To explore the potential application of stakeholder theory to return to work issues, I first examine the theory itself and then examine its potential applicability to the situation of the disabled worker. Based upon these discussions, I can then identify some aspects of a potential intervention that makes use of the theory.

### **What Is Stakeholder Theory?**

R. Edward Freeman (1984) identifies the origin of the term "stakeholder" as being a product of the work of the Stanford Research Institute (SRI) in 1963.

Stakeholders were originally conceived by the SRI as “those groups without whose support the organization would cease to exist” (Freeman, 1984: 31). Freeman further illustrates the dispersion of the term, highlighting the definitional and application changes wrought upon it through influences from the corporate planning, systems theory, corporate social responsibility, and organizational theory literatures. He then reconsolidates the various aspects of stakeholder theory contained in these literatures under the guise of strategic management processes in *Strategic management: A stakeholder approach* (Freeman, 1984).

Contemporary stakeholder theory is fragmented at best (Jones & Wicks, 1999), is difficult to define, and as a label does little justice to the multitude of perspectives and controversies surrounding the field (Donaldson, 1999; Freeman, 1999; Gioia, 1999; Jones & Wicks, 1999). Some authors have even argued that there is no such thing as a stakeholder theory, only a stakeholder research tradition (Trevino & Weaver, 1999). Freeman (1984), widely regarded as having revived the notion of the strategic use of stakeholder management, refers to the concept as a “stakeholder approach” as opposed to a theory. Underlying all stakeholder theories, traditions, or perspectives is the conception that an organization is affected by (and in turn affects) a variety of individuals or groups (i.e., the “stakeholders”). A key concept of stakeholder theory maintains that these stakeholders have an interest in how the organization operates and thus must be respected, considered, and consulted in pertinent matters. This integration of stakeholders does not require pure altruism; it is undertaken for strategic purposes as well. Because of this intersection of both ethics and instrumental ends, disagreement within the broad family of stakeholder perspectives relates to the identification, legitimacy, and equality of consideration of an organization’s constituent stakeholders. Opinions have largely been divided along the lines either of a presupposition of the moral imperative to identify all affected stakeholders (e.g., Zsolnai, 2006, regarding discussions of the earth and future generations as stakeholders) or along the lines of managerial-based evaluations of stakeholder salience based on factors such as power, legitimacy, and urgency (e.g., Page, 2002). Thus, for my purposes, the underlying typology of stakeholder theories carries important considerations for potential applicability to the disabled worker.

There are three commonly identified typologies of stakeholder theorizing: normative, descriptive, and instrumental. I agree with the argument that for a “Kantian capitalism” to exist (i.e., a values-based economic system), the normative nature of stakeholder theory (typically identified as an underlying assumption of ethical responsibilities to stakeholders) is an intrinsic aspect of stakeholder theory, not simply one alternative typology (Donaldson & Preston, 1995; Kaler, 2003). Simply put, we cannot ignore the potential ethical legitimacy of stakeholders who might not be directly impacted by the organization in question. On the other hand, an exclusively normative stakeholder approach is problematic. Normative stakeholder theories categorize firms in terms of stakeholding (and

therefore compliance with an ethical imperative) but embody little or no attempt to hypothesize, measure, or predict outcomes regarding this stakeholder orientation. While normative ideas concerning stakeholders seem pivotal to the very concept of stakeholding, at the same time it seems that there are practical issues in terms of situations where there is also a requirement for a measurable outcome. For the purposes of examining the return to work context, it seems important to respect the underlying ethical premises of stakeholder theorizing, emphasizing equal consideration of legitimate stakeholding parties, and at the same time to deal with measurable and salient outcomes.

This leaves us to examine the remaining two typologies of stakeholder theory available for the purposes of this article: descriptive theories that explain the firm and its embedded stakeholder network, and instrumental theories that “explore the relationship between causes (the management of stakeholders) and effects (organizational performance)” (Pesqueux & Damak-Ayadi, 2005: 10). It seems that to move forward with a practical application of stakeholding theory within the context of the disabled worker returning to work, an instrumental approach, which maintains a presupposition of the normative (or ethical) stakeholder rights, is imperative. A fused instrumental/normative approach to stakeholder theory holds most promise with respect to any application to the case of the disabled worker who returns to work.

Of course, a definition of a generalized typology of the perspective I choose to employ is not in and of itself a description of a theory. In essence, this parallels the weaknesses of stakeholder theory as reviewed in the literature. Despite discussion of the appropriateness of the theory and the qualities it might have, there is remarkably little in terms of specific theories and propositions that could evolve into *testable* hypotheses, let alone practical application for the practitioner. Indeed, one of the few recent works that contains potentially testable propositions actually relates to the idea of stakeholder multiplicity and interactions between stakeholders (Neville & Menguc, 2006). Having broadly surveyed stakeholder theorizing, I now turn to the potential application of a stakeholder approach to the situation of work and acquired disability.

### **Is Stakeholder Theory Applicable to Return to Work Issues?**

In many respects, the situation faced by the disabled worker returning to work mirrors that of the corporation at the center of a stakeholder analysis. Presupposing the ethical aspects of stakeholding, there is an opportunity to make use of a simple input/output-based perspective for identifying stakeholders. This resource-based perspective also offers considerable opportunity (beyond the scope of this article) in terms of situation analysis using other common operations or marketing-based theoretical models. For example, Michael Porter's Five Forces analysis (see Porter, 1980) could be used as a diagnostic of the relative bargaining power of the various stakeholders.



Just as the theoretical “rational firm” seeks to maximize benefits and manage externalities that affect it, I propose that the rational disabled worker would seek similar outcomes. To this extent, the perspective of the corporation as an entity seeking to maximize the utility of relationships might be applied to a disabled worker at the center of a group of instrumental stakeholders. Most important is that with the underlying acceptance of the ethical foundation of stakeholder theory, an instrumental resource-based view with which to qualify prospective stakeholders becomes pertinent. After this initial finding of legitimacy, I suggest that stakeholders be treated as equals. This nuance is what separates a simple resource-based view of the situation from the viewpoint expressed in this article.

There are aspects of stakeholder theory that promise to be useful to the disabled worker returning to work. The stakeholders other than the disabled worker also accrue benefits from this application of a stakeholding approach. In particular, the avoidance of legal costs, the time saved through an amicable resolution of the situation, and the mutual retention of control over the process (quite unlike the relinquishing of control associated with court actions) are all appealing features of a conflict avoidance application of stakeholding. In this respect, an application of stakeholder theory to the situation faced by the person with an acquired disability returning to work addresses many of the factors I earlier identified as problems with the present processes. The loss of voice, the power imbalances found during the management of the return to work process and in any subsequent requirement for litigation, and the need for effective, contextualized communication are all potentially dealt with through a stakeholder approach. Most importantly, the individuals who are making substantial efforts to contribute to an organization and community, as well as to themselves and their families, are placed in a reasonably central position in the discussions, action plans, and interventions. Finally, all of these potential changes in the process can be carried out with economic rationality as part of the mixture in a stakeholder perspective scenario.

The palatable quality of accepting an underlying ethical stance and at the same time having tangible outcomes that are rationally driven seems quite suitable for application to the return to work situation. Furthermore, the ability to demonstrate outcomes that satisfy both the ethical and the social imperatives while also being informed by the economic stake of the stakeholders means that an empirical assessment of the outcomes can be made. In short, we might be able to rationally discuss the cost and benefits (economic and otherwise) of the resolution of the situation without having to resort to a discussion that involves legal action, threats, and little or no place for the individual who has acquired the disability.

The requirements of this argument now lead to a discussion of the mechanisms for identifying the stakeholders, followed by some ideas about what a practical application of this approach might entail.

### **Who Are the Stakeholders?**

#### **A Rationale for a Particular Instrumentality**

A successful application of elements of stakeholder theory to the return to work issue will have to address or avoid any underlying theoretical paradigmatic contradictions (Gioia, 1999) that are identified in the literature. So while discussions regarding the most appropriate definition and the way to unify the disparate elements of the theory are not especially critical to our application, theory and pragmatism are. It seems clear that in the case of a disabled worker and a return to work, the legal and economic ramifications alone will indicate that an initial instrumental approach is required. This somewhat narrower application of stakeholder theory is important; it not only avoids the mire of the ongoing arguments regarding the consolidation of multiple aspects of stakeholder theory but also allows for empirical testing of any ensuing application of stakeholder theory to the unique situation of the disabled worker. Furthermore, an instrumental approach is consistent with the findings of the limited available literature (Berman, Wicks, Kotha, & Jones, 1999) that explicitly identifies whether an instrumental or more of a normative categorization approach has been taken. In this way, our application of stakeholder theory can be quantified, offering the potential of adding to the literature on the financial effects of the theory in the practitioner milieu.

Taking an instrumental approach offers a decision criterion for identifying pertinent stakeholders (this being the evidence of an economic relationship). Only those stakeholders who have an observable economic stake would be considered. Furthermore, this concept of “relationship” is important, for it allows the conception of a situation of mutual economic gain among stakeholders. This provides the possibility of an outcome that need not represent a zero-sum game in which one stakeholder must win at the expense of another (Donaldson & Preston, 1995), not unlike the basic tenets of principle-centered negotiation (see, e.g., Fisher, Ury, & Patton, 1994).

What might a network of instrumental stakeholders for the disabled worker consist of? The list of possible parties with some vested economic interest is long and varied. Some possibilities include insurance companies, the workplace firm, co-workers, governmental and social welfare organizations, nongovernmental organizations, and the family of the person with a disability. In situations where litigation is possible or likely, various legal stakeholders (such as lawyers working on a contingency basis) may be part of the mix of stakeholders with an economic interest in how a person returns to work. In many cases, the mandate and/or the contractual obligation of the disabled worker and the various other stakeholders could be the decision criteria for initially identifying stakeholder legitimacy.

By way of an example, consider the situation of a worker with an immediate family. If we imagine a situation in which the disabled worker is a spouse and also has an elder parent for whom she is a primary caregiver, a clear ethical imperative

to consider the family stakeholders is present. There is an economic rationality in these dependents having an interest in the outcome. The disabled worker's spouse in particular is subject to both the impact of any loss of family income and the added need to provide care for the elder parent at home. As the (now) primary economic provider, this spouse is unlikely to be able to provide the elder care required and thus will likely have to contract out this important responsibility, further affecting the family. In this example, the worker's spouse and the elder parent are stakeholders from both an economic and an ethical standpoint, and I am arguing that their interests must also be represented in the process of setting up a return to work strategy that places the disabled worker at the center of the network.

### **MEDIATION AND A STAKEHOLDER APPROACH**

In trying to take an instrumental view of the disabled worker and at the same time remain firm in the accepted underlying ethical foundation of stakeholder theory, it seems useful to consider some of the feminist literature, which examines similarities and differences between the disabled community and feminist causes. In particular, one stream of feminist disability studies demonstrates how notions of care and dependence combined with patriarchal societal aspects are disempowering and exclusionary (Garland-Thomas, 2005). The notions of care, dependence, and exploitation that are part of much current feminist thought share with disability studies the idea of moving towards interdependence rather than towards a care/dependence model (Watson, McKie, Hughes, Hopkins, & Gregory, 2004). The present process for setting up a return to work strategy largely focuses upon experts assessing an individual, conducting a type of "gap analysis," building plans of action and then requiring the individual to comply to the point of either attainment or failure of the objectives. When this process is embedded in a focus upon financial liability (e.g., involving insurance providers), I question the actual opportunity for participation by the disabled worker in her own return to work journey. Can the current adversarial legal and contractual system of rights and responsibilities concerning disabled workers be augmented to combine respect, empowerment of the individual, and acceptable outcomes? One branch of feminist thought on stakeholder theory may offer hints of a solution.

It has been suggested that mediation as a conflict resolution strategy naturally espouses many of the tenets of both feminism and stakeholder theory (Lampe, 2001). Lampe defines mediation as "a non-adversarial method for resolving disputes whereby parties in conflict, with the aid of a neutral, third party mediator, cooperate to resolve differences" (2001: 166). As a dispute resolution mechanism, the use of a fair and mutually agreed upon mediator has much to offer when compared with legal proceedings, including reduced costs, improved communication, a sense of procedural justice, and a reduction of severe power/negotiation imbalances. While some feminist critiques of mediation have stemmed from the embedding of mediation in an adversarial and patriarchal system, I believe that it

may be possible to mitigate some of these problems and offer an alternative. It is plausible that something quite different from the use of mediation as just a dispute resolution process is both possible and useful in regard to the present topic. A proactive use of mediation techniques as a method of coordinating a disabled worker's return to work (as opposed to being used strictly as a dispute resolution method) might form a successful bridge between an instrumentally informed stakeholder approach and the successful return to the workplace of a disabled worker.

The employment of mediation prior to actual conflict (that is, as a component of a broader strategy to aid in a return to work strategy) offers an important variation on the commonplace use of mediation. Conventional mediation is typically used to avoid costly court battles when prior negotiation has failed. In this situation, experts and legal counsel are largely driving the process, with a subsequent silencing, to some extent, of the individual client's voice. An additional complication of such mediation is the potential barrier to resolution when not all parties are present or have sufficient authority to agree on a solution (Picker, 2006). In contrast, a preemptive use of mediation techniques offers the disabled worker some comparative empowerment in the process; this being an often touted but seldom realized benefit of conventional mediation processes. The linkage of such proactive mediation with stakeholding concepts helps make the "unseen" parties visible and may perhaps remove some of the "invisible barriers" (Picker, 2006) to successful resolution. This process would also help address some of the communications shortcomings described by Pransky et al. (2004) in terms of workers, physicians, employers, and insurers, in a way that does not structurally impede hearing the voice and allowing the empowerment of the worker herself.

In being sensitive to the potentially disempowering aspects of a conventional mediation process, which feminist critique has highlighted, it seems that a very different conception emerges of how mediation and stakeholding theory might usefully be utilized in the case of the disabled worker who attempts to return to work. The cooperation and the reduction of power imbalances, the justice perceptions afforded in such a situation, and the much improved fostering of open communication between parties address some of the needs that the broader return to work literature identifies. The use of mediation prior to actual conflict is an empowering prospect when compared with the exploitation that is possible when the process is seen as an "11th hour" response to the threat of litigation. The biggest issue, that of who should be involved in this version of mediation, is where the application of stakeholder theory as earlier described offers some utility.

## DISCUSSION

What might this fused mediation/stakeholder approach look like in practice? While it is difficult to identify a particular systematic approach, perhaps a broad-stroke description of an example would be helpful. Imagine that an individual who

worked in a physically demanding occupation has been injured in a motor vehicle accident. This individual has been through an initial round of physical intervention for her damaged back, yet it seems that her now identified disability will preclude her from doing her previous work. Typically at this point, the discussions center on the fact that the organization may or may not have alternative work for the employee or the requirement for the employee to find new work elsewhere. Disability case managers normally offer resumé writing advice; in extreme cases, they may negotiate retraining. The disabled individual is faced with the decision as to how far to push the requirement of the workplace in accommodating her disability, with the understanding that lawyers will likely be involved. The expense and the difficulty involved in proving that the individual should be accommodated in returning to her workplace are daunting. During this time, the individual will be subject to scrutiny and continual reassessment as to her eligibility for disability insurance, contributing to stress on both the individual who is trying to manage the disability and her dependents, if any.

With the suggestions offered in this article, the order of operations might be very different. At the first hint of a possibility that the individual might not be able to return to his earlier workplace duties, the modified mediation process would be embarked upon. I suggest that if the worker is kept central to the process from the beginning, she in fact should be aware of her right to modified mediation and thus subsequently be in a position to trigger such mediation. The meetings with an impartial mediator would include members of the individual's medical team, her family, insurance providers, and representatives of the workplace, just to name a few. The impact of the acquired disability would be made apparent as all those affected describe the challenges they face in light of a return to work (or not) by the disabled worker. The costs to the organization, but also the potential benefits of a successful return to work, would be discussed. Maybe a trial return to the workplace in a different capacity would be explored, but this would be without the fear of loss of insurance eligibility should the attempt not be successful. The medical team would be aware of the interventions required to support the returning worker prior to the particular effort made.

None of these initiatives would be set in place without direction and an ongoing assessment of their utility by the person with the disability. The organization involved would be aware of the support that the family requires in order to offer familial support to the person making the effort to return to work. The members of the medical community would see more than an injured person to be repaired or maintained; they would be able to see that the ongoing support of the health and well-being of the disabled individual requires a community approach and has implications for the person's family and co-workers.

While the brief and necessarily incomplete description above seems almost utopian in nature, it actually sounds very similar to the current purported role of a disability case manager. Key differences include early intervention, and the

comparatively unbiased role of a mediator (normally a disability case manager is hired by an insurance provider) prior to conflict. Also, note that the family and medical service providers are part of the discussion, as key stakeholders of the return to work effort. While medical advice is conventionally sought in such situations as they are currently managed, it is normally in order to quantify time, treatment, and the economic costs of interventions. In effect, the medical practitioners are acting as experts regarding the disabled individual but without that individual's involvement except as a subject of analysis.

It seems that there are some promising aspects of this effort to link a stakeholder approach with a disabled worker's efforts to return to work. However, the successful application of the theory to this process will require a specific operational use of stakeholder theory. Any subsequent use of the theory will have to incorporate both a measurable economic rationale and the ethical perspective foundation embedded in stakeholding as a legitimate analytical tool. When these tasks are accomplished, the likelihood of the various stakeholders agreeing to use mediation prior to disputes is improved.

Of course, the current adversarial mechanisms used to deal with the disagreements that arise when the disabled return to work do eventually create some sort of resolution of the issues. The negative aspects of the current system lie in both the power-laden outcomes and the process itself. This sort of conflict is expensive and time consuming. It renders the individual with a disability relatively powerless in the dispute resolution mechanism, perhaps causing harm to person attempting to become more independent. A "sense of control over one's life" has been found to be the top psychosocial factor identified by both patients and health care staff for recovery from a workplace accident (Antoniazzi, Celinski, & Alcock, 2002). A process that allows all relevant parties to be involved while allowing the worker herself to feel empowered may be beneficial.

In searching for cases of a similar application of mediation to conflict avoidance, I have found few examples. Perhaps the closest analogue to what I am proposing is the use of mediation prior to arbitration in other types of workplace conflict situations (both in unionized and in nonunionized situations). There is a growing literature that explores the role of alternative dispute resolution techniques in union and nonunion settings (e.g., Colvin, 2003) and examines both the human resources (HR) and the industrial relations (IR) perspectives (Lewin, 2001) regarding such practices. A fundamental difference between the proposed application of mediation techniques and that offered in the workplace conflict literature is the suggested use of mediation techniques prior to any conflict. To an extent, this concept of conflict avoidance is consistent with the way Lewin (2001) portrays an HR perspective regarding workplace conflict. In contrast, he describes an IR perspective as viewing conflict as normal, inevitable, and potentially healthy. Importantly, this dichotomy illustrates the possibility that the proposed use of preventative mediation might be viewed as encroaching upon the traditional role of the union in a unionized work environment. In such a

case, any application of nonunion dispute resolution techniques in the unionized setting would have to view the union as an important stakeholder.<sup>1</sup>

The use of mediation techniques to prevent conflict in the return to work context is novel, and represents a process akin to that purportedly carried out by disability case managers. However, the substantial difference between the proposed mediation model and the use of a disability case manager is the notion of impartiality; most disability case managers are individuals appointed by insurance companies and so they are open to criticism as being exclusionary with regard to other legitimate stakeholders. My proposed preventative mediation process, grounded in the stakeholder approach, is more inclusive and comparatively unbiased, except towards the individual with a disability, who is seen as being central to the entire process. This I regard as both a fundamental right and an appropriate tactic for the process described.

## CONCLUSIONS

The rights to meaningful employment and to nondiscriminatory workplace practices are embedded in the United Nations' Universal Declaration of Human Rights. Article 22 of the declaration states that "Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality." Furthermore, Article 23, sections 1 and 3 respectively, state that "Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment" and that "Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection" (United Nations, 1948). There is no discussion of the relative merits of the business case for such human rights; these rights are seen as fundamental, if not inalienable.

<sup>1</sup> The application of the proposed preventative mediation occurring prior to an actual dispute highlights a fundamental difference between its use and the increasing use of nonunion dispute resolution techniques. Colvin (2003) discusses the use of nonunion dispute resolution as a potential "counter defensive" response to unionization. The link between dispute resolution methods and their use as a response to unionization extends beyond the scope of this article. Critical, however, is the difference between the use of mediation principles prior to an actual dispute and mediation as an alternative dispute resolution tool, whether in unionized or nonunionized workplaces. This distinction, while originating in the nonunion dispute resolution literature, is also critical in the case of the disabled worker returning to work. Mediation as a last-ditch effort to avoid the risks of litigation is not what I am proposing; this practice is already well established.



Despite the extreme difficulty in clearly defining stakeholder theory, this article has argued that there is a role for a stakeholder approach in helping a disabled worker successfully return to work. With so many different individuals and organizations involved in the process, it is paramount that a method to determine stakeholder legitimacy be employed. Through a particular use of an instrumental model of stakeholding, an objective and empirical assessment of this legitimacy can be made while still largely maintaining the ethical foundations of the normative typologies of stakeholder theory. This article has described the idea of a gated notion of stakeholder salience, with inclusion being initially based upon economic instrumental stakeholding, but subsequent mediation involving the equal legitimacy of all economically salient groups. This makes possible objective decisions about the inclusion of stakeholders and potentially offers the means to conduct empirical assessments of the effects of such an application of a stakeholder approach.

A particular branch of feminist thought on the nature of disability, care, and stakeholder mediation offers a perspective that can inform the application of these theories to the disabled worker. In particular, I have proposed the use of mediation techniques to aid in the coordination of a return to work strategy, rather than as an alternative dispute resolution method. This suggestion directly addresses the lack of effective communication between the parties involved with the variety of initiatives related to return to work interventions (Pransky et al., 2004), yet I have found no evidence in the literature regarding the use of these mediation techniques for coordination of efforts rather than as dispute resolution techniques.

Would a group of stakeholders agree to such a process? Clearly, the willingness of the concerned parties to embark on a modified mediation process before being compelled to do so is critical. Presumably, each stakeholder would have to evaluate the utility of such an arrangement against the opportunity cost of delaying/precluding any adversarial legal action in a sort of rational utility versus opportunity cost analysis. While much literature exists concerning dispute resolution in general, little is available regarding this particular use of planned and managed dispute avoidance through mediation embedded in a stakeholder approach. The complex nature of the return to work process and the multitude of concerned individuals and organizations involved suggest that a stakeholder approach has a role to play in managing this complexity. The integration of a preventative mediation process amounts to the application of prevention, rather than to the eventual requirement for an adversarial cure.

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## **SPIRITUALITY IN THE WORKPLACE: A WAKE UP CALL FROM THE AMERICAN DREAM**

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### **ABSTRACT**

The American Dream, born out of a desire to emancipate people through the principle of the individual right to freedom, has metamorphosed. What we now have is a materialistic, self-serving American Nightmare that has inspired a wealth-creating society that is spinning out of control. A parallel world view, the European Dream, offers a more humane alternative for a world in crisis. We propose that the American Dream and the European Dream are so diametrically opposed that any movement from the short-run materialistic mindset toward a more humanist long-run perspective will require an intermediary. The spirituality in the workplace movement, which may be both a cause and an effect of the decay of the American Dream, is proposed as a conduit to facilitate this evolution. Canada and Canadian companies in particular are identified as potentially fertile ground for carrying the message of spirituality to the workplace and inspiring an evolution to a more globally conscious and sustainable society.

### **THE AMERICAN DREAM**

Nearly three hundred years ago, as Europeans landed on Plymouth Rock, disheartened and driven from their homelands by famine, political strife, and generally poor living conditions, they needed a dream to give them hope. Faced with the daunting task of conquering the new world, and out of necessity for

survival, the American Dream began to crystallize, promising pioneers of the new frontier not only freedom from oppression but hope for wealth and meritocracy for anyone who was willing to believe. Settlers in the new world came to believe that they were the chosen people, entitled to convert any and all resources they encountered into their own material wealth. Social status became synonymous with material wealth and power. Over time, other nations came to marvel at the pace of material progress in the Americas and would regard the American Dream as a beacon of hope (Rifkin, 2004: 33).

Although not officially adopted as a phrase until the mid-1930s by author James Thurlow Adams (1931/2001), the American Dream originally motivated society to uphold the principle of freedom. Within 200 years, that dream had transmuted from the right to freedom to the right to have material things and wealth. This emphasis on materiality over spirituality or humanity may well be a warning sign of the moral decay of society (Nester, 1973).

This materialistic version of the American Dream provided the foundation for what organization and management theorists conceptualize as economic rationalization. In the 18th century, Adam Smith would conclude that it “is not from the benevolence of the butcher the brewer or baker that we expect our dinner, but from their regard for their own interest” (Smith, 1776/1976: 119). Two centuries later, Frederick Taylor’s scientific principles of management would provide organizations with the means to amass material wealth by reducing human input to mechanistic, measurable resources (Taylor, 1911/1947). However, three centuries later, the American Dream is in danger of imploding on itself, destroying everything it purports to hold dear. It appears that “over the last three hundred years [we have] constructed a remarkably efficient wealth-creating machine, but it is now out of control” (Bakan, 2004: 159).

### THE AMERICAN DREAM TURNED NIGHTMARE

At this period of our history, as we experience global crises such as wars, decaying social structures, and depleting ecosystems, the American Dream appears to be of no assistance to us. Nearly half of our world’s population (2.8 billion out of 6 billion) lives below the poverty line on less than \$2 a day and is too undernourished to learn how to read or sustain a living, even if education were available (World Bank, 2001: 41). It appears that the American Dream is contributing to the global crises we are now facing. In the name of economic progress and entitlement, inherent in the American Dream, oceans are polluted, natural resources are depleted, and life-giving forests are destroyed (Salleh, 1997).

Corporations that don’t even exist except by social and legal construction are now capable of owning other living beings. This has been most clearly demonstrated by a 1980 U.S. Supreme Court decision in the case of *Diamond v. Chakrabarty*, where it was ruled that a genetically modified organism could be patentable. The monopolistic control that American corporations now have over

living forms of nature that have coexisted with humankind for thousands of years has created tension between those who value the earth as a shared heritage to be cherished and those who seek to exploit nature for economic gain. This exploitation, predominantly undertaken by capitalist corporations, also widens the chasm between the privileged Western world and the underprivileged developing nations (McLean, 2004; Shiva, 2001).

Perhaps the time has come to recognize that the needs of the new millennium are vastly different than they were in the 1600s. Since “epoch-making systems have as their real content the needs of the time in which they arose” (Rigby, 1998: 277), it is time to radically revamp the American Dream. Just as Marx foretold in *Das Kapital*, “a sustainable, steady state of economy is truly the end of history defined by unlimited material progress” (Rifkin, 2004: 8). Perhaps the emotional and spiritual fallout following the tragic events of September 11, 2001, in the United States was a painful indication of the inability of the American Dream to provide solace for a society in despair. Although a slim majority of Americans still embrace the American Dream, many appear to have given up on it. According to a report commissioned by the Ford Foundation in 2001 on American public opinion about poverty and upward mobility, more than one-third of Americans believe that it is harder to get rich than it used to be and that it is no longer possible for most Americans to live the American Dream (Bostrom, 2001). These results are especially pertinent because they emerged prior to the wake-up call of the terrorist attacks in the United States on September 11, 2001. Since 9/11, many former American Dreamers have been reevaluating their lives and their work as they search for a deeper meaning in life, beyond material success (Cannon, 2002; Garcia-Zamor, 2003; Howard, 2002; Wrzesniewski, 2002). Perhaps ethical fiascos such as Enron and WorldCom are additional alarms, waking us up to revise our view of ourselves and of how we should be leading our organizations (Cacloppe, 2000; Fairholm, 1996).

### **VIOLATION OF WORKERS' RIGHTS TO MEANINGFUL EMPLOYMENT**

Beyond the pursuit of wealth and leisure, the promise of liberty that underpins the American Dream/Nightmare can be intoxicating and inspire isomorphism by other nations. Thus, “anti-Americanism is not always directed against the United States. At times, it can also be an attack against fellow [foreign] citizens who have embraced the U.S. ways” (Gobat, 2005: 7).

Even though the American Dream purports to be the ideal vehicle for liberty and freedom, we argue that it actually infringes on the individual rights of people and workers. Ironically, the drive for American liberty, ensconced as it is in meritocracy and emphasis on material wealth, actually alienates individuals from themselves and undermines individual freedom of expression. If we agree with the existentialist notion that “man’s search for meaning is the primary motivation in



his life" (Frankl, 1959: 121), then the American Dream/Nightmare with its predetermined map for material success does a great disservice to individuals. By removing the individual's right and ability to choose his or her own vision of success or meaning, it robs the individual of his or her freedom of expression. The American Dream thus becomes more like Weber's iron cage than a ticket to freedom.

In her best-selling novel, *Feminism and the Master of Nature*, Plumwood (1993) explains how the American Dream/Nightmare has metamorphosed in three phases: justification and preparation; invasion and annexation; and instrumentalization and appropriation. Over the past centuries, the powerful corporations have rationalized their own existence (as employers), divided and conquered society by demoralizing workers, and ensured their own survival as a cornerstone of the economy and politics. In the final stage of Plumwood's evolution, "the colonized are offered the alternatives of elimination or incorporation. Only those who can be incorporated into the empire of self, who offer no resistance, are permitted to exist" (Plumwood, 1993: 192). Although this may read like a science fiction novel to some, the concept is not far-fetched in light of the antiterrorist movement in the United States that is force-feeding assimilation under the guise of peace. This form of terrorizing is somewhat reminiscent of the anticommunist panic of the McCarthy era in the United States after World War II. It is not difficult to imagine how the alleged plots against the U.S. government, both then and now, could be diversions used to preserve the fragile American Dream.

The American Dream/Nightmare is a reification of what Marx described as the capitalist class structure, where workers are mere cogs in the wheel of corporate progress or rungs on preordained career ladders. The ruling class or bourgeoisie (shareholders and corporate agents) exerts hegemonic power over the working class or proletariat (employees) who, completely alienated from the true meaning of work, merely provide surplus for the ruling class's profits. Organizations that embrace the American Dream place an overwhelming emphasis on shareholder and material wealth maximization. Historically there have been a number of calls for changes to the current business model, especially with respect to the workplace environment and the treatment of employees. Unfortunately, despite advances in the standard of living and increased choices of careers, work for many people is still a "daily humiliation" (Ciulla, 2000: xiv). In his award-winning documentary and book, *The Corporation*, Bakan (2004) posits that the American corporation has evolved into a destructive psychopath, justified in exploiting people and the environment in the name of profit. But the psychopathic personality, we argue, is not only embedded in the corporate mentality; it is endemic in the American Dream/Nightmare.

Even organizational and management theorists have unwittingly bought into the American Dream by commodifying workers and defining work in terms of economic outcomes (Brief & Nord, 1990). While claims of exploitation or

alienation are decried by many eloquent critical theorists, much of mainstream management theory upholds the need to measure and improve production efficiencies and profits. However, “Profit, quality, cycle time, and market share are not the core points of work. They are [simply] measures of how well an organization is doing at creating greater value than it is consuming” (Henning, 1997: 35). So, while researchers and business leaders are focusing on such functional measures, the true value of work, the “creating, sustaining, and enlarging [of] the possibilities of life” (Henning, 1997: 35), is largely overlooked.

### **SPIRITUALITY IN THE WORKPLACE: WHY IT IS IMPORTANT**

In this time of twilight for bureaucracy and the American Dream, the topic of spirituality in the workplace is flourishing (Bell & Taylor, 2004; Elmes & Smith, 2001; Harrington, Preziosi, & Gooden, 2001). We propose that the spirituality in the workplace movement not only signals the decline of the American Dream but will actually help to diminish the dream. Special academic journal issues have been published on the topic of spirituality in the *Journal of Organizational Change Management* (Biberman & Whitty, 1999), the *Journal of Management Education* (Dehler & Neal, 2000), and the *Journal of Management Inquiry* (Bowl & Hirsch, 2000). Additionally, the Academy of Management publishes a regular Management, Spirituality, and Religion (MSR) newsletter and recently introduced the *Journal of Management, Spirituality & Religion* (JMSR). Ironically, some research indicates that engaging the spirit of employees enhances the meaning of work, increases commitment and productivity, and deepens relationships in the workplace (Neal, 2000). To intensify the situation, over the past few decades, traditional support systems like places of worship, community neighborhoods, and extended families have declined in importance in the United States (Conger, 1994). Whether as a cause or a result, many people are spending more time at the workplace (Conlin, 1999), where they are feeling emotionally and metaphysically disconnected, and less time with family, neighborhood, church, and social groups (Fairholm, 1996). As previously discussed, due to the aging demographic, a majority of the North American population has reached middle age, resulting in a reevaluation of work. Some workers are redefining their career aspirations to encompass the satisfaction of their inner spiritual identity needs and personal fulfillment through their labor (Block, 1993; Fairholm, 1996). In short, work values, particularly for many in the middle class, are shifting from “earning a living” to “creative expression and making a difference” (Neal, 2000: 1320).

The increased level of questioning the individual meaning of work is a strong driving force behind the popularity of the spirituality in the workplace movement:

It is hard for many of us to separate our work from the rest of our being. We spend too much of our time at work or in work-related social and leisure

activities for us to expect to continue trying to compartmentalize our lives into separate work, family, religious and social domains. As one result, the pressure many of us feel to recognize and respond to the sacred in us must find an outlet in the secular workplace. If personal or social transformation is to take place, it will most likely take place at work. For, after all, life is about spirit and we humans carry only one spirit that must manifest itself in both life and livelihood. (Fairholm, 1996: 12)

The construct of spirituality, by its nature, can be viewed from a variety of perspectives and defined in many ways. Therefore, it is not surprising that there has not yet been an agreement on what spirituality really means, in the workplace or anywhere else. For some, "spirituality is highly individual and intensely personal, as well as inclusive and universal" (Howard, 2002: 231). It can be viewed abstractly as the "feeling of being connected with one's complete self, others, and the entire universe" (Mitroff & Denton, 1999: 83) or simply as that which "distinguishes us from rooted plants" (Savickas, 1994: 43). Regardless of the worldview or definition of spirituality, organizational theorists observe that "whatever one's underlying belief system, everyone has a spiritual life, just as they have an unconscious, whether they like it or not" (Howard, 2002: 234).

Organizations that are respected as functional and rational are openly considering replacing systems composed of rules and order with more spiritually centred practices involving meaning, purpose, and a sense of community (Fairholm, 1996). For example, corporations such as Tom's of Maine, Ben and Jerry's, the World Bank, Medtronics, and The Body Shop succeed because (or despite the fact that) they incorporate spiritual values into their corporate culture. Research on 18 "visionary" companies whose core values were based on non-economic beliefs and an empowering culture outperformed their more traditional counterparts, in economic terms, by as much as 61 to 1 (Collins & Porras, 1997). Tom Peters found similar evidence in the search for "excellent" companies. The implication is that spiritual culture can create a synergy in which both the organization and the individual are better off. By encouraging the spiritual education and growth of the individual, the organization will reap the benefit of the individual's increased motivation (Peters & Waterman, 1982).

In Canada, Holding OCB Inc. of Montreal, a large frozen foods manufacturer, has proposed a unique philosophy of business that incorporates both economic and humane aspects. Several values-based management activities are incorporated into the plant's operations, to ensure that people are not a means to an end. Rather, the dignity of the individual and the well-being of employees are the goal, and profit is merely the means to that end. Profits serve people; people do not serve profits. For example, hiring practices include tests of authenticity and humility along with technical expertise; groups of employees volunteer at soup kitchens twice a year on company time; a quiet room is available on site; and managers who have laid off employees are required to meet with those employees twice within nine months following the terminations. By treating employees with dignity, the

organization has managed to ease the tension between economic and human goals. Organizations such as Holding OCB Inc., that adopt a humanistic culture that respects the body, mind, and soul of employees are more likely to inspire employees to feel a sense of connection with their work, which then becomes more meaningful to them. This meaning can then be translated into shared organizational meanings, which, in turn, will align employees' intrinsic motivation with the achievement of organizational goals (Neal & Bennett, 2000). Harrington, Preziosi, and Gooden (2001: 162) argue that having a spiritual component in the workplace "will help to sustain organizational goals and energize people toward greater output."

### **THE AMERICAN WORKER BEGINS TO WAKE UP**

Nearly 30 years ago, as we moved into the information age, researchers identified the problems associated with prioritizing organizational motives of profit over human development:

The aims of productivity and profit making have had top priority in the industrial age that is now passing. As we move into an age in which production and power might be less overriding concerns, we have a chance to reorder our priorities. It remains to be seen whether we shall give higher priority to enhancing the meaning of work and to creating work organizations that foster development as well as productive efficiency. (Levinson, 1978: 338)

The evolution from the industrial age to the information age has instigated many changes in society, the economy, and business. The assumption of unemployment and an "industrial reserve army" that is integral to Marx's (1863/1969) capitalist theory is being threatened by an impending skilled labour shortage due to demographic shifts. Baby boomers who represent a large segment of the North American population, are due to retire within the decade and the proposition is that there are insufficient skilled tradespeople in North America to replace them. Some researchers assert that the resulting skilled labour shortage coupled with a generalized decrease in job satisfaction will dramatically change the way that work is performed and jobs are designed (Jamrog, 2004).

The decline of the psychological contract between employers and employees, downsizing and massive company layoffs, and increased use of technology are considered to be instigators of a new movement to bring the meaning of work and spirituality into the workplace (Harrington et al., 2001). We suggest that this backlash is also a call to wake up from the American Dream/Nightmare. According to some, "business owners, managers, policymakers, and academic researchers all need to remember, as many surveys indicate, that tens of millions of world citizens are hungering for transmaterial, mind-expanding, soul-enriching,

and heart-centred (spiritual) values” (Butts, 1999: 329). Faced with the increased stress of social, economic, and ecological crises, people are “looking for avenues to cope,” such as increased “spiritual awareness and practice.” As a result, “Workers now desire a stronger integration of their spiritual values with their work and leaders will be forced to respond by accommodating the transformation of a more humanistic workplace where spiritual principles and values become integral parts of the organization’s culture” (Harrington et al., 2001: 162).

Another factor impacting on the examination of the meaning of work is a heightened awareness of the questionable fate of humanity and the world. Perhaps “this renaissance, this dawning and awakening of humanity, is the emerging era of evolution . . . it is a time of our conscious creation of human evolution shaping all life on earth” (Jaccaci & Gault, 1999: 2). Some researchers propose that society is close to an explosive point due to cognitive dissonance and the need for more fulfilling work. “The burning fuse [of the impending explosive point is] unstable work environments too concerned with advancement and survival to lend support to two basic human needs of employees: to build meaning in an employee’s own life through their work and to cultivate an environment that encourages the growth of the human spirit” (White, 2001: 47). Beyond the American Dream’s vision of work as fulfilling economic, social, and prestige needs, work can also provide intrinsic meaning (Sverko & Vizek-Vidovic, 1995).

In a vein similar to that of Maslow’s Hierarchy of Needs theory, people must first take care of their survival needs then move on to higher-level esteem and actualization needs. However, the American Dream has convinced us that our self-worth and sense of well-being are inextricably linked to our income (Lane, 1993). Sadly, for the workers who are under the illusion of the American Dream, the effect is only temporary, since an increased salary provides short-term pleasure without the lasting intrinsic benefit of meaning in their lives. Just as addicts become dependent on drugs, workers become addicted to high-paying but low-satisfaction work in their insatiable desire for the social esteem that money supposedly buys. Then the trap door closes as people adapt to their circumstances, so that each incremental increase in wages soon creates a new standard against which they measure themselves. Not surprisingly, research suggests that money cannot buy self-esteem. Although some people vehemently claim that they work for money, research suggests that many others work for meaning in their lives (Dalton, 2001).

In the classic work *Habits of the Heart*, work is categorized as being either a job, or a career, or a calling. A job is defined as “a way of making money and making a living,” where one’s identity is “defined by economic success, security and all that money can buy” (Bellah, Madsen, Sullivan, Swidler, & Tipton, 1985: 66). Since work as a job is primarily conceived as a means of economic survival or success, career choices will be based on the highest-paying salary. In a career, “work traces one’s progress through life by achievement and advancement in an occupation [and] yields a self defined by a broader sense of success, which

takes in social standing and prestige, and is itself a source of self-esteem.” In addition to economic factors, work choices would now be made based on opportunities for development and advancement over a number of years. Finally, in a calling, “work constitutes a practical ideal of activity and character that makes a person’s work morally inseparable from his or her life [and] links a person to the larger community . . . a crucial link between the individual and the public good” (Bellah et al., 1985:66). For those that regard work as a calling, work becomes life’s mission.

Some workers are slowly waking up from the American Dream, looking for a career calling or more meaning in their lives, and are no longer amenable to being treated as “replaceable drones in the hive.” Along with balance, they want “meaning in their work” and “opportunities to contribute and to know how their work contributes to the organization” (Herman & Gioia, 1998: 24). After all, “the practical business of working . . . [has] not remained constant over time . . . and it is likely that the conceptual and perceptual understandings which we have of work—the intellectual assumptions and expectations we make about the work we do and why we do it—will also change over time” (Ransome, 1996: 1).

Demographic shifts are also instigating change in workers’ opinions about their work or careers:

Organizational and occupational ladders provide a common understanding of social mobility and an identifiable pattern of progression through the life course. But this common understanding represents a set of practices and policies that no longer fit with the realities of a changing economy, changing gender roles, blurred lines between work and retirement, and a cohort of educated, introspective baby boomers newly valuing family life and uncertain about middle age. (Moen, 1998: 44)

The increased presence of women, various ethnic groups, and older workers in the labour force has resulted in increased questioning of the status quo of the American Dream job and perhaps further evidence of a shift toward more feminine values on Hofstede’s (1984) masculinity/femininity continuum. Sixty hours a week at the office while your toddler takes his first steps to his or her paid nanny is no longer the standard vision of career success. Balance between home and family life is becoming much more prevalent than material wealth or individual success at work.

This is an ideal time in our history for corporations to change their paradigm from strict profit maximization to balancing profit with the long-term needs of society. In the post-Enron era, people are looking at corporations with increasing cynicism and distrust. To reinstate trust, “what is called for . . . involves nothing less than a rethinking of the basic purpose and responsibilities of the corporation. Restating corporate purpose in terms of social needs rather than solely of maximizing profit is the surest way” (Wilson, 2004: 21). But therein lies the root

of the problem with the American Dream: Within this mindset, the objectives of maximizing short-term profit and serving the long-run needs of society are diametrically opposed. As long as the American Dream drives the goal-setting process and supports the objective of maximizing material profit above all else, the best we can hope for is slight incremental improvements to the work environment.

### **THE EUROPEAN DREAM: AN ALTERNATIVE TO THE AMERICAN DREAM**

It is time for society to embrace a new dream, one that reflects the humane needs of the planet at this time in our history and provides guidance for a world in crisis. Perhaps what we need is a new vision, one that recognizes that people, workers and owners alike, possess minds, bodies, and souls that are worthy of respect and need meaning for nourishment. We propose that the basis for such a vision does exist and is alive and well in parts of Europe. While the American Dream emphasizes accumulation of financial wealth, assimilation, and autonomy, what Rifkin (2004) refers to as the European Dream emphasizes quality of life, interdependence, community embeddedness, and diversity. The European Dream, “focused not on amassing wealth but, rather, on elevating the human spirit,” “seeks to expand human empathy not territory” and “takes humanity out of the materialist prison” (Rifkin, 2004: 7–8). Thus, what we are referring to as the European Dream is not so much defined by geographic boundaries as it is a mindset that values success in humanitarian rather than economic terms.

Since we recognize the danger in making sweeping generalizations about a positivist, unified European culture, the term “European Dream” is used in this context to denote a general attitude shared by many people throughout the world rather than a geographic phenomenon. According to Hofstede (1984), culture is a system of shared values and beliefs where most people within that group share reactions to or attitudes about four constructs: uncertainty avoidance; masculinity/femininity; individualism; and power distance. For the purposes of this article, we focus our attention on issues of masculinity/femininity and individualism. We would expect a culture that embodies the American Dream to share more masculine traits, for example, emphasizing heroism, achievement, and material success, than its European Dreamer counterpart, which values more feminine characteristics, for example, emphasizing relationships and quality of life. With respect to the individualism dimension, we would expect European Dreamers to have a more collectivist attitude than their American Dream counterparts. Concern for others’ welfare would take precedence over the self-serving, save-yourself attitudes that are evidenced by the increased incidence of unethical corporate behavior in the Western world (Arnold, Bernardi, Neidermeyer, & Schmee, 2005).

In summary, we do not propose that any one nation or group is superior to another. Rather, in viewing the situation from a position of cultural relativism, we



propose that the appropriateness of a custom, such as valuing human life over materiality, should be evaluated with regard to how this custom might help society and the planet evolve. Some of the most contented people are those who are living intrinsically rewarding lives; by simply living compassionately they are giving their lives meaning. They are not necessarily considered the most successful by American standards but they are happy:

These people work very hard, they often don't get recognition, they often have to skimp and do without the comforts that everybody else takes for granted. But they are doing what they want to do. And essentially what they want to do is follow their curiosity and their interests. For one person it is understanding why the galaxies move one way or the other. For another it is expressing their feelings through words and poetry. For others it's helping humanity by working for social policies or the social good. The important thing is that it's something you feel particularly in sync with, something that attracts you, something that moves you, something that resonates with your interests. (Whalen, 1999: 164)

Perhaps it is time for those who hold the torch of the American Dream to evolve from the old materialistic "me" worldview to one where "we" embrace change and each other willingly. Whereas the American Dream is tired and adding to intensified strife in the new millennium, the European Dream is flourishing as a conduit for evolution to a truly global society. "The new European Dream is powerful because it dares to suggest a new history, with an attention to quality of life, sustainability, and peace and harmony." In the United States and Canada, such a "steady state global economy is a radical proposition, not only because it challenges the conventional way we have come to use nature's resources but also because it does away with the very idea of history as an ever-rising curve of material advances" (Rifkin, 2004: 8).

Some researchers are questioning whether, in light of intense economic pressure and global diversity, the European Dream is sustainable and able to withstand the pressure to conform to an American civil liberty mindset in order to survive globalization (Estes, 2004). Although we embrace the tenets of social solidarity and cohesion inherent in the European social state, we recognize that differences among European nations and cultures coupled with increased diversity may yield different interpretations of the European Dream. We also appreciate that Europe is a collection of distinct and diverse groups, such as the Anglo-Saxon, Continental, Central, and Eastern Europeans.

However, we also recognize that cultures across the various groups are not necessarily similar or consistent over time (Kolman, Noorderhaven, Hofstede, & Dienes, 2003). During the last decade of the 20th century, economic problems, increases in the number of conservative national governments, the shifting of political authority and fiscal responsibility to the private sector (Ascoli & Ranci, 2002), environmental issues, and social conflict due to increased diversity led to an overall decrease in the social welfare system worldwide. However, at the same

time, the decline in the North American social index was reported to be more than double that of Europe (Estes, 2004). And, even though evidence suggests that some European nations are emulating the American model by shifting the welfare mix and placing more onus on private citizens and enterprises (Estes, 2004), there is no empirical research to substantiate the claim that the “New Europe” is incompatible with the European Dream’s philosophy of social cohesion (Taylor-Gooby, 2005).

Despite the differences among the various nations, there does appear to be a prevailing attitude of placing human rights and social solidarity above economic rights:

European codes of private law have traditionally commenced with a concept of the person. In the development of private law in the European Union, we require a modern concept of the person, one which goes beyond the idea of the bearer of economic rights, to one which embraces ideas of human rights and social solidarity, as found in the Universal Declaration of Human Rights and the Nice Charter of Fundamental Rights of the European Union. (Alpa, 2004: 734)

It is this defining identity of social solidarity, this emphasis on people and society over profit that supports the notion that the European Dream can survive regardless of geographic boundaries (Weiler, 2002). In much the same way that the American Dream crosses geographic boundaries and infiltrates Asian, African, or even European cultures, the European Dream is not constrained by geography or nationality.

The crux of the problem, however, is how to communicate the nonmaterial conceptualization of success to American Dreamers. And how do we stop the spread of the American Dream across the globe? Although some researchers and politicians claim that “if an enlarged EU is to function, it may have to become a little more like the US in its social attitudes” (Prowse, 2003), we propose that this shift away from social and human values is not inevitable. However, it will take a concerted effort and perhaps an intermediary of sorts to retain the European Dream of social cohesion and emphasis on human over economic success.

### **SPIRITUALITY IN THE WORKPLACE: INCOMPATIBLE WITH THE AMERICAN DREAM?**

The spirituality in the workplace movement has attracted much attention from individuals and organizations with strong personal beliefs. However, if personal agendas dominate, as they do by design in the American Dream, the inevitable alienation of many people who could and should have been involved will impair the movement’s growth. Because of the nature of spirituality, it is better understood from a humanistic worldview than from an economic, materialistic one. While profits and productivity can be and are quantified, spirituality defies

objective rationalizations. Although we respect the fact that for some people spirituality entails religion (Hicks, 2003), we caution against the inclusion of specific religious beliefs, because of the inherent exclusivity. The problem created by placing priority on one belief or religion over another will likely lead to the alienation and marginalization of the spirituality in the workplace movement.

Perhaps out of a “deep-seated antagonism toward centralized power,” and to guard against a “single official state religion” such as existed in Europe, the American Dream was founded on the separation of state and religion and the relegation of the government’s role to one of “guarantor of individual property rights” rather than redistributor of wealth (Rifkin, 2004: 33). As a result, the American Dream inherently promotes the individual’s right to express one’s religious beliefs and allocate one’s time to help society as one sees fit. Consequently, religion has played a much more prominent and vociferous role in American society than it has in Europe. Research conducted in the 1990’s indicated that religious organizations represented 11% of nonprofit employment in the United States, more than three times that of Europe (Wojciech & Salamon, 1999). According to the same study, Europeans tended to volunteer their time out of personal choice, whereas nearly one-third of American volunteers were more likely to volunteer through religious affiliations in order to perpetuate and legitimize certain religious institutions. It is as if the expression of religious beliefs is an extension of the American Dream’s fundamental right to freedom of individual expression.

However, the view of spirituality as religiosity may be problematic if, through the hegemony of the American Dream, subjective voices are silenced by dichotomous beliefs in terms of right or wrong, good or bad, and the assumption that one religious belief is superior to another. As a remedial step, the spirituality in the workplace movement could be viewed from the perspective of the individual’s quest for meaning in life, work, or simply a meaningful existence. Actors involved in the movement would need to acknowledge their personal beliefs and opinions on the role work plays in their lives. We suggest that this examination would be difficult for a society that wholeheartedly embraces the American Dream and its inherent prioritization of profits over people. Adopting or even understanding spirituality in the workplace requires a paradigm shift from a materialistic to a humanistic perspective and a shift from an American to a European Dream.

We suggest that an open, respectful forum is needed, one that is consistent with a humanistic European Dream mindset, if the spirituality in the workplace movement is to grow and be a force for positive change. Rather than embracing dichotomous doctrines or a preference for economic gain, we must embrace all belief systems equally. Rather than focusing on making workplaces more efficient, we must focus on making workplaces more humane, so that workers are free to be more productive. Rather than focusing on careers and material wealth, we must focus on helping people understand the meaning of work and how it

aligns with the organization's purpose. And, rather than focusing on amassing individual shareholder wealth, we must focus on the long-term sustainability of all stakeholders, including the earth.

We posit that it is the responsibility of corporations such as Tom's of Maine and Holdings OCB Inc., which possess economic power in society, to institute an ideological shift from the American Dream to the more humanistic European Dream. Since "The ideas of the ruling class are in every epoch the ruling ideas" (Marx & Engels, 1845/1974: 64), we need more organizations to experiment with economic gain as a means to serve human well-being rather than as the end itself. As more organizations report economic success as a result of feeding human dignity and the human spirit, the more likely the paradigm is to be adopted by other rationalizing and isomorphizing firms.

### **SPIRITUALITY IN THE WORKPLACE IN CANADA: A CONDUIT FOR EVOLUTION FROM THE AMERICAN TO THE EUROPEAN DREAM**

When viewed from an American Dream perspective, business leaders and politicians might ask, "What does spirituality have to do with profits?" or "How can we harness this new tool called spirituality in the workplace to increase productivity?" When viewed from a European Dream perspective, however, there is space to conceive of workers as much more than tools or means to the end of profit. The spirituality in the workplace movement offers emancipation for workers from the iron cage of the American Dream through enhanced meaning of work and respect for each individual's mind, body, and soul. From such a humanist perspective, spirituality and the meaning of work are subjective and defy objectification or commodification.

Canada occupies a particularly unique role amid the polarization of materialist and humanist worldviews. Neither purely American nor purely European, Canada possesses both materialistic and humanistic aspects. Although Canadians may appreciate material comforts much as their American counterparts do, share similar consumption patterns, and tend to overuse exhaustible resources, in contrast to the United States, Canada is widely respected as a peacekeeping nation and a cultural mosaic rather than a melting pot. The Canadian national anthem encapsulates both national languages, regions of the country are granted special status due to uniqueness of culture, and even the Royal Canadian Mounted Police uniform, regarded as a national icon, is modified to embrace members' diverse cultures or religions.

With less (materially) to lose than their American neighbors, and with a need to increase population through immigration, Canadian organizations are increasingly more tolerant of diversity and different worldviews. Because of this unique position, midway between the American Dream and the European Dream, we propose Canadian organizations as prime candidates for experimentation with

spirituality and the workplace and for building a bridge between the two dreams. For example the first Canadian university to establish a centre for spirituality in the workplace is situated in Halifax, Nova Scotia (Saint Mary's University, 2007). The centre provides a hub for similarly minded business people and researchers and offers contemplative practices, lectures and presentations from ethical and spiritual businesses and organizations, research opportunities, and courses in spirituality in the workplace. It is through this centre that Canadian business leaders such as Robert Ouimet of Holdings OCB Inc. in Montreal are able to reach out to other business leaders and future business leaders (university students) with an appeal to integrate humanistic ideals with economic gain. Ouimet believes that an emphasis on employee well-being is compatible with organization success and in fact is the key cornerstone of it. In an incremental rather than a radical way, as is so typical of the Canadian culture, Canadians are questioning the dominant ideology (the American Dream) and examining how people just might be more important than profits.

## CONCLUSION

In conclusion, we argue that the American Dream must be replaced with a vision that is more consistent with the humanistic approach of the European Dream, one that values humanity over profit. While some may argue that the American Dream has helped create a better world from an economic standard of living perspective, it is difficult to ignore the fact that corporations are adept at making the wealthy wealthier as they destroy the environment in the process. Our evolution is at stake. Some research indicates that "income mobility appears to be lower in the United States than in other OECD countries" (Reuters, 2004) and that there is a higher proportion of the American population living in poverty than in many European nations (McCartney, 2003).

Some organizational theorists propose that we have a disconnect between our inner world and the external world (Durkheim, 1915). While we focus on amassing our own wealth and engage in individual therapy to cope with our daily problems, we have neglected our accountability to the evolution of humanity:

In 1930, anticipating future economic growth, Keynes wrote a letter to his "grandchildren" advising them to try "encouraging, and experimenting in, the arts of life as well as the activities of purpose [earning a livelihood]." "But chiefly," he said, "do not let us overestimate the importance of the economic problem, or sacrifice to its supposed necessities other matters of greater and more permanent significance." Keynes thought that "the permanent problem of mankind" is learning not just to live, but to live well. (Lane, 1993: 65)

Although the world has made great strides technologically, the evolution of humanity is in question as we are still focused predominantly on financial and material gain (Hillman & Ventura, 1992).

The evolutionary myth based on material progress allows us to formulate goals that are congruent with only the first two stages of individual development: physical well-being and conformity to group values. This limitation makes us very vulnerable to exploitation by any idea, product, or technology that is advertised as making life more comfortable materially and as helping us live up to societal expectations. To go beyond these to the stages of individual autonomy and then to harmony with our social and nonsocial environment, we must find a way to recast the current idea of evolution so as to include a model of psychological progress based on what we know about personal growth. (Csikszentmihalyi, 2000: 34)

In short, the American Dream, with its focus on individual short-term material progress, fails to serve the evolutionary needs of the individual or society. We agree with futurist writers and researchers who are exposing the need for the conscious evolution of society (Cornish & McQuinn, 1993; Hubbard, 2002).

The human species is facing a great transition from one stage of evolution to the next. In our generation, *Homo sapiens* have gained unprecedented technological and social power to either destroy this world as we know it, or to co-create an immeasurable future. We stand at a threshold, and it has become clear that if we continue to use our new powers in the same state of consciousness in which we created them, we can wreak havoc upon ourselves and the other species of earth. But if we use our new powers wisely, we will transcend the current human condition, not only solving our problems but participating in the co-creation of futures that are chosen, open-ended and ever-evolving. (Hubbard, 2002: 359)

We propose that the time has come to evolve from the American Dream to a more humane paradigm and approach to work that is consistent with the substance of the European Dream. To assist with the transition, we propose that the spirituality in the workplace movement is an ideal conduit and that Canada, with its tolerance for diversity, is an ideal breeding ground. We put forward a challenge to ourselves and to other management and organizational researchers to work with Canadian businesses and organizations to advance the theory on the evolution of healthy individuals, workplaces, and society.

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