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Conflict Resolution and the Transformation of the Social Contract

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Abstract
[Excerpt] Here is my argument in a nutshell. Beginning more than thirty years ago, the social contract that had governed relations between workers and employers in the United States for the period following World War II began to unravel. Other scholars, most notably Tom Kochan, Harry Katz, and Bob McKersie, have charted the transformation of American industrial relations that began in the 1970s and to a great extent continues today (Kochan et al. 1986). Seeber and I have argued that the emerging social contract that had been produced by the transformation of U.S. industrial relations has had particularly profound consequences for the handling of workplace conflict. To a degree, the rise of alternative dispute resolution (ADR) has been the most obvious manifestation of how workplace conflict is handled under the new social contract. But our research has led us to believe that there is a much deeper, systemic shift that is occurring in the management of workplace conflict. We have focused on a development that moves conflict resolution significantly beyond ADR—we have emphasized the significance of the emergence of so-called integrated conflict management systems (Lipsky et al. 2003, Lipsky and Seeber 2003).

Keywords
workplace conflict, social contract, alternative dispute resolution, ADR, industrial relations

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Conflict Resolution and the Transformation of the Social Contract

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Before turning to the substance of my talk, I first want to express sincerest thanks to the members of the association for giving me the opportunity to serve as their president for the past year. It has certainly been a privilege and pleasure, and I am most grateful especially to the officers and members of the Executive Board for their support and cooperation. This evening at our general membership meeting Eileen will become our new president, and I am confident she will provide our association with superb leadership. Already as president-elect, Eileen has given all of us a preview of the vigorous leadership she will provide this organization, and I want to tell her how much I have enjoyed collaborating with her during the past year. Last, but certainly not least, I want to express my heartfelt gratitude to our executive director, Paula Wells, who provides LERA with exemplary service virtually every day of every year.

I also want to note, with sadness and regret, the passing of Neil Chamberlain, who died last November at the age of ninety-one. Neil served on the faculty at Yale and, for many years, at Columbia, and he was one of the greatest of all industrial relations scholars. He served as president of this association in 1967 and was one of our first members to receive LERA's Lifetime Achievement Award. For scholars of my generation, Neil was a giant—through the rigor and originality of his research he inspired us to believe that a career devoted to industrial relations research could be a noble undertaking. We shall miss him.

For the past ten years, since giving up the deanship at the School of Industrial and Labor Relations (Cornell University), I have focused most of my energies on studying workplace conflict and the emergence of new methods of managing and resolving it. I would like to use this opportunity to recapitulate some themes that my co-authors and I have framed in the research we have conducted on conflict resolution over the past decade. This research has been conducted under the auspices of the Institute on Conflict Resolution at Cornell. I have had the good fortune of being able to collaborate with several first-rate co-authors, most especially my friend and colleague Ron Seeber, and also Harry Katz, Rocco Scanza, Dick Fincher, Jon Brock, and Ariel Avgar (see, for example, Lipsky and Seeber 1998, 2003, 2006; Seeber and Lipsky

2006; Lipsky et al. 2003; Lipsky and Katz 2006; Lipsky, Scanza, and Avgar 2006; Brock and Lipsky 2003; Lipsky and Avgar 2004, 2006).

Here is my argument in a nutshell. Beginning more than thirty years ago, the social contract that had governed relations between workers and employers in the United States for the period following World War II began to unravel. Other scholars, most notably Tom Kochan, Harry Katz, and Bob McKersie, have charted the transformation of American industrial relations that began in the 1970s and to a great extent continues today (Kochan et al. 1986). Seeber and I have argued that the emerging social contract that had been produced by the transformation of U.S. industrial relations has had particularly profound consequences for the handling of workplace conflict. To a degree, the rise of alternative dispute resolution (ADR) has been the most obvious manifestation of how workplace conflict is handled under the new social contract. But our research has led us to believe that there is a much deeper, systemic shift that is occurring in the management of workplace conflict. We have focused on a development that moves conflict resolution significantly beyond ADR—we have emphasized the significance of the emergence of so-called integrated conflict management systems (Lipsky et al. 2003, Lipsky and Seeber 2003).

Social Contract Theory

The theory of the social contract has its origins in the work of seventeenth- and eighteenth-century philosophers, most notably Thomas Hobbes, John Locke, and Jean-Jacques Rousseau. The Protestant Reformation and the decline in the authority of the Catholic Church had served to weaken the divine authority of the monarchic form of government. Europe had been ravaged by the wars of the Reformation, and some philosophers recognized that the authority of the king, and more generally civil government, needed a new justification. "In their search, political theorists—and especially the Protestants among them—turned to the old biblical concept of a *covenant* or contract, such as the one between God and Abraham and the Israelites of the Old Testament" (Encyclopedia Britannica n.d.; see also Hobbes 1651, Locke 1690, Rousseau 1762). In sum, a social contract is a compact between rulers and their people that defines their respective rights and duties. It justifies political authority on the basis of reason and self-interest rather than divine authority. In classical theory, a social contract was in the first instance a means of preventing conflicts from arising. Under a social contract, individuals exchange their unlimited liberty for the safety and security provided by sovereign power. If conflicts arose, they would be resolved by the sovereign.

The trail that connects the classical concept of the social contract with the contemporary and popular use of the term is a long and winding one. Nowadays the term that was first meant to justify the sovereign authority of government is often used

to support the special interests of various stakeholder groups. Nevertheless, Seeber and I have argued that the concept of the social contract is useful in understanding the balance of rights and obligations between employers and employees.

The Social Contract at the Workplace

The social contract that governs the workplace was initially a compact fashioned out of the imperatives of industrialization. Industrialization strengthened the authority of management to make decisions regarding the products to be produced, the prices charged, the business location, the investments needed in new technologies, and the deployment and supervision of the workforce. Almost all organizations had a hierarchical authority structure featuring top-down management at the workplace. Managers and supervisors had the authority to direct employees. In the absence of trade unions, that authority could not be questioned unless management violated the law.

Under the hierarchical authority structure that prevailed in U.S. enterprise through the last half of the nineteenth century and the first part of the twentieth century, conflict was considered dysfunctional. Managers never thought of conflict strategically. If they considered it at all, it was usually a phenomenon they did their best to avoid, suppress, or ignore. If, despite their best efforts, they were forced to deal with conflicts with their employees, the remedy was to punish those responsible. There was little tolerance for dissent at the workplace. In sum, the nineteenth-century version of the workplace social contract served to justify the sovereign authority of owners and managers.

But the historic rise of unionism in the 1930s resulted in the transformation of the nineteenth-century workplace social contract. The dramatic surge of unionism in the 1930s was often accompanied by strikes and picketing and, occasionally, violence. The passage of the Wagner Act in 1935 not only encouraged workers to join unions and deterred violence; it also represented a symbolic ascendancy of the collective rights over the individual rights of workers in American jurisprudence.

The New Deal social contract that emerged in the 1940s endured until the 1970s. Under the New Deal social contract, managers gained a relatively free hand in controlling production and the workforce, and employees gained access to good jobs at good wages. By the end of World War II the United States was indisputably the leading economy in the world. Both labor and management were eager to rationalize and bring order to a chaotic workplace. Both sides were willing to develop processes and procedures that would serve to regulate employment relationships. Under the New Deal version of the social contract, at many work sites a broad, if fragile, consensus developed that would last more than thirty years. Managers recognized the legitimacy

of unions, unions restricted their concerns to well-defined workplace issues, and government served as the impartial arbiter, helping to ensure a level playing field.

Conceptually, the New Deal social contract promised significant, tangible benefits to most individuals and institutions in American society in exchange for their accepting certain responsibilities and obligations. The scope of the New Deal social contract was very broad—broader than the social contract had ever been in the past—but clearly it did not include everyone. Its most novel feature was probably its inclusion of trade unions. But many women, most minorities, and almost all of the disabled were excluded from the New Deal social contract.

For most workers, union and nonunion alike, the New Deal social contract promised a comfortable middle-class standard of living—provided the worker was a law-abiding, heterosexual, white male. After World War II middle-class Americans were able to enjoy a level of material well being that was unparalleled in world history. The quid-pro-quo for the middle-class lifestyle was a set of fairly rigid obligations and responsibilities, not only on the job but off as well. Under the New Deal social contract, unions enjoyed protections and privileges that had never previously existed and, possibly, may never again be duplicated. Indeed, with hindsight, the status of unions under the New Deal social contract could very well be an aberration in U.S. history; whether that status can ever be restored remains problematic.

The Unraveling of the New Deal Social Contract

By the 1970s the glue that had held the New Deal social contract together had come unstuck. The forces bringing about the transformation of the social contract included the increasing globalization of business, the growth of multinational corporations, and the rapid pace of technological change. These factors, in turn, required corporations operating in international markets to accelerate the pace of their decision making. No longer did most managers have the luxury of tolerating any aspect of their business that dampened their ability to respond to market pressures.

In the 1960s U.S. economic strength was still based on its ability to produce and distribute manufactured products, but by the 1980s its strength was based on its ability to produce and distribute information. The United States had become a knowledge-based economy. Also by the 1980s the "deindustrialization" of the United States was in full swing. In most manufacturing industries, dozens of plants were closed, jobs were permanently lost, and communities were abandoned. The industrial centers of the northeast and the midwest were left in shambles (Bluestone and Harrison 1982). As the twentieth century wound to a close, the combination of globalization,

heightened competition, technological change, and deregulation had served to undermine the terms and conditions of the New Deal social contract.

The Emergence of a New Social Contract

As the new millennium approached, there were increasing calls for a new workplace social contract (Penner et al. 2000). At a White House summit on jobs and the economy in 1998, for example, the participants focused on creating new employer-employee relationships. The conferees agreed that it had become "necessary to craft a new social contract between employer and employee" incorporating the concept of employability fostered through skills training and life-long learning. Representatives of seemingly every political hue came to believe that the demise of the New Deal social contract required a rebalancing of the rights and obligations of employers and employees. On the left end of the political spectrum, for example, Jeremy Rifkin, in his book *The End of Work*,predicted that technological change and "hyper capitalism"—that is, the spread of capitalism to all parts of the globe, including Russia and China—would necessitate a new social contract that incorporates a radical reordering of workplace relationships (Rifkin 1995). On the right end of the political spectrum,*BusinessWeek* described how certain elements of the business community were attempting to define a new position regarding the social responsibility of corporations:

In isolated pockets of Corporate America, a middle path is slowly emerging, one that reflects a new paradigm for business and society in a global market. It recognizes that job security died with the 1980s—but concedes, too, that employers bear an obligation to help workers through transitions, and it attempts to align the interests of investors, managers, and employees, aiming to share both the risks and rewards of doing business. ("Writing a New Social Contract" 1996)

A number of commentators have pointed out that the demise of the New Deal social contract did not lead to the emergence of a dominant system of employment relations. The American labor market has always been characterized by segmentation and balkanization, and globalization seems to have strengthened those centrifugal tendencies. Harry Katz and Owen Darbishire, for example, documented the existence of four patterns of work practices in the United States and other industrialized countries: a low-wage employment sector, featuring a high level of managerial discretion and informal procedures; a human resource management model, characterized by above-average contingent pay, teams, and a low level of unionism; a joint team-based sector, featuring high pay, a high level of unionism, and a high level of employee involvement and joint employer-union decision making; and in the United States a small but significant sector that had adopted a Japanese-oriented system featuring standardized procedures, employment stabilization, and problem-solving teams (Katz and Darbishire 2000).

In the United States, outside of the large and significant low-wage sector, the transformation of the social contract is associated with a significant reorganization of the way work is performed in many U.S. companies. A hallmark of the reorganization of the workplace is the decline in the importance of hierarchy and the rise of team-based work. Many U.S. employers have discovered that employee performance and productivity can be enhanced if employees are empowered to assume more responsibility for the manner in which they perform their work. In many workplaces, management has removed layers of supervision and delegated substantial authority to teams of employees to control the direction of their activities. In our research on conflict management systems, we studied sixty major corporations in the United States, and all of them purported to use a team-based system of production (Lipsky et al. 2003).

Most large American corporations, many of them working cooperatively with their unions, experimented with a variety of workplace innovations designed to foster employee involvement in decision making. Teams, delayering, multiskilling, multitasking, contingent pay, empowerment, and participation are all elements of a full-fledged high-performance work system. By no means have all U.S. employers embraced all of these elements, but Paul Osterman's research shows that a majority of large companies adopted one or more of them (Osterman 1994, 2000). The reorganization of the workplace was a consequence of management's drive for increased flexibility in employment relations. Flexibility would allow them to shed outdated work rules and practices, motivate employees, and enhance employee productivity.

The Implications for Workplace Dispute Resolution

Many people—even professionals in our field—are unaware of how widespread the use of ADR is in the United States. Here is one definition of ADR: it involves the use of arbitration, mediation, fact finding, facilitation, and other third-party processes to resolve disputes that might otherwise be handled through litigation (Lipsky et al. 2003). The dramatic growth in the use of ADR in recent years clearly seems associated with the unraveling of the New Deal social contract and the emergence of a new workplace compact.

Under the New Deal social contract, arbitration, mediation, and other third-party techniques were seldom used to resolve non-union employment disputes. But under the new social contract at the workplace, the use of these techniques in employment disputes has become commonplace. A variety of forces have resulted in a shift in favor of private rather than governmental or collective methods of resolving workplace disputes. Research suggests that there are two proximate causes: one might

be labeled "litigation avoidance" and the other "union substitution" (Seeber and Lipsky 2006, Colvin 2003).

Litigation Avoidance

Beginning in the 1970s there was a widespread perception among managers and corporate attorneys that employment litigation was becoming increasingly costly and time consuming. The dockets of federal, state, and local courts became crowded with a backlog of unresolved disputes after the passage of new workplace legislation in the 1960s and 1970s. Between 1970 and 1989, for example, employment discrimination case filings increased by 2,166 percent (Ford 2000). The business community's dissatisfaction with the legal system caused it to search for measures that would alleviate the growing burden of employment litigation. For example, it began to lobby for tort reforms that would place limitations on civil lawsuits. The movement for tort reform, however, had only piecemeal success, which probably strengthened the business community's resolve to use ADR (Lipsky et al 2003).

Facilitating the growth of ADR has been a series of seminal decisions by the federal courts. Two Supreme Court decisions (*Gilmer* in 1991 and *Circuit City Stores* in 2001) supported an employer's right to require arbitration even if it meant that an employee was denied access to the public justice system. It is now clear that an American employer may, with near total impunity, require an employee, *as a condition of hiring and continued employment,* to use private arbitration as the means of resolving public claims against the employer that involve a statutorily protected right. Mandatory arbitration agreements have many critics, and one, Kathy Stone, has called them the "yellow dog contract" of our era (Stone 1996). Of course, such agreements have many defenders, particularly in the business community (see, for example, Estreicher 2001).

Union Substitution

The ascendancy of ADR is to a large extent linked to the decline of the labor movement in the United States. No informed observer can possibly claim that the secular decline in the American labor movement has been accompanied by a corresponding decline in workplace conflict. All the evidence suggests that quite the contrary is the case. Thus, the decline in collective representation has left a vacuum in the available means of resolving workplace disputes, which has been filled, at least in part, by the use of ADR. Many employers we interviewed were astonished to discover that a union-free workplace was seldom free of conflict (Lipsky et al. 2003).

In the interviews we conducted with employers, we found that a handful acknowledged that they use ADR as a means of avoiding unionization.

Understandably, many unions view ADR with skepticism, especially mandatory non-union arbitration. The union movement has joined with civil rights organizations, the plaintiffs' bar, and other liberal interest groups (such as the American Civil Liberties Union) in opposing mandatory non-union arbitration. On the other hand, some unions have embraced ADR, including voluntary arbitration, because they believe ADR systems can extend the authority and influence of a union into areas normally considered management prerogatives (Lipsky et al. 2003, Robinson et al. 2005).

As a consequence of the use of ADR, there has been a significant shift in the resolution of many types of disputes—not only employment disputes—from the court system to private forums. Some observers have claimed that this shift represents the *de facto* privatization of the American system of justice. One index of the privatization of our system of justice is the declining trend in the use of trials in the United States. For example, Samborn reports a significant drop in federal trials over the last thirty years. In 1970, of the 1',280 civil and criminal cases filed in the federal courts, 10 percent were resolved after either a jury or a bench trial; by contrast, in 2001, of the 313,615 cases filed, only 2.2 percent were resolved by either a jury or a bench trial (Samborn 2002). Evidence suggests similar trends in state courts. Although several factors account for the phenomenon of "the vanishing trial," most experts point to ADR as a major reason for the decline (Stipanowich 2004).

The research we have conducted over the last decade strongly suggests that ADR is firmly institutionalized in a majority of American corporations, especially for employment disputes. We have asserted that the use of ADR in the United States passed the so-called tipping point in the 1990s. ADR is now so firmly embedded in our laws, in both federal and state court systems, and in the practices of our principal employers that there is simply no going back to a bygone era. In our own research we did not find a single corporation that had adopted the use of ADR and then abandoned it. Quite the contrary: we discovered that ADR was a way station between reliance on conventional methods of dispute resolution and the development of integrated conflict management systems (Lipsky et al. 2003).

The companies we studied began their journey by attempting to manage litigation; they then expanded their concern to the management of disputes, and ultimately they reached the point of systematically managing conflict. We discovered that virtually every major corporation in the United States now uses ADR to resolve employment disputes, but I need to acknowledge that not more than 20 or 25 percent of the Fortune 1000 have adopted an authentic integrated conflict management system. Those companies that have adopted an integrated conflict management system have moved from a reactive to a proactive, strategic approach to the management of conflict. Top management in these companies regards the management of conflict as akin to the management of any other corporate function, such as sales, marketing, and finance. In

contemporary U.S. organizations the movement toward integrated conflict management systems is definitely the cutting edge in workplace conflict resolution (Lipsky et al. 2003).

Conclusions

An intriguing question, in my view, is whether the emerging social contract in the United States will constitute a new and stable equilibrium, matching in endurance the traditional and the New Deal versions of the social contract, or whether it represents merely a transitional phase to other societal arrangements we can scarcely imagine. We might consider the question in its broadest terms. Francis Fukuyama, in his book *The End of History and the Last Man,*argued that Western-style democratic capitalism was achieving global hegemony and would be the dominant politico-economic system indefinitely (Fukuyama 1992). Is the new social contract at the workplace, as Fukuyama might argue, the end of history? If the past is any guide to the future, it seems to me that the new social contract is not the end of history, although it may be a significant stage in our evolution. John Dunlop famously declared that a so-called industrial relations system consisted of three sets of actors: a hierarchy of managers and their representatives, a hierarchy of workers and their agents, and specialized government agencies dedicated to employment relations. Dunlop believed that in an industrial relations system there would be a tendency for the three principal actors to achieve an equilibrium. He doubted that an industrial relations system dominated by one or two of the actors could be sustained over an extended period of time. He endorsed the so-called convergence hypothesis, which holds that over time all industrial relations systems dominated by one or two actors tend to become three-party systems (Dunlop 1958). Under the new social contract in the United States, managers have been in the ascendancy, and they have generally been supported by government agencies. Personally, I share Dunlop's view that a two-actor system is unlikely to be a stable one. A long-term view of our industrial relations system suggests that ultimately there will emerge a separate and independent voice for worker advocacy, albeit not necessarily in the form of traditional unionism. If that occurs, it is likely to diminish the role of ADR and conflict management systems in employment relations.

But a realistic view of the short term—the next ten or twenty years—suggests that the forces and factors that have brought about the new social contract at the workplace are unlikely to abate and, accordingly, there will continue to be a need for new approaches to conflict resolution and conflict management.

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