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PROCEDURAL JUSTICE IN THE BOUNDARYLESS WORKPLACE: THE TENSION BETWEEN DUE PROCESS AND PUBLIC POLICY

*Katherine V.W. Stone**

INTRODUCTION

In the past decade, there has been an enormous increase in the use of alternative dispute resolution (ADR) in the workplace. Today, most large corporations have some system of ADR in place, be it a formal grievance procedure, an ombudsman, an open door policy, or a complaint hotline. One particularly controversial form of ADR is the use of arbitration in the nonunion setting.

Prior to 1991, the use of arbitration by nonunion firms to decide employment disputes was extremely rare. In 1991, the Supreme Court held in *Gilmer v. Interstate/Johnson Lane Corp.* that an individual could be compelled to submit his age discrimination complaint to arbitration.[1] In the wake *Gilmer*, the use of arbitration and other types of ADR in the workplace proliferated. In 1995, the Government Accounting Office found that almost ten percent of nonunion firms utilized arbitration for discrimination claims, and another 8.4% were considering doing so.[2] The evidence suggests that, by the late 1990s, even more firms had introduced arbitration systems for their nonunion workforces. In 2001, in *Circuit City Stores, Inc. v. Adams*, the Su-

* Professor of Law, University of California, Los Angeles, School of Law. This Article was a presentation at the joint program of the Section on Civil Procedure and the Section on Alternative Dispute Resolution at the 2004 Annual Meeting of the Association of American Law Schools. It draws on ideas presented in KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE (2004) (portions reprinted with permission).

1 500 U.S. 20 (1991) (holding that compulsory arbitration of claims under the Age Discrimination in Employment Act was consistent with the Act's statutory framework and purpose).

2 GEN. ACCOUNTING OFFICE, GAO/HEHS-95-150, EMPLOYMENT DISCRIMINATION: MOST PRIVATE SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION app. II at 28 (1995).

preme Court removed whatever doubts persisted about the application of the Federal Arbitration Act to such employment arbitration systems.[3] As a result, employers now have wide latitude to design alternative mechanisms to avoid costly and risky employment litigation.

At present, nearly as many workers are covered by nonunion arbitration systems as are covered by union contracts.[4] In addition to arbitration, the use of workplace mediation, peer review, open door policies, ombudsmen, and management appeal boards have been growing rapidly. Thus, it appears that ADR has surpassed unions as the enforcer of fairness in the workplace. This piece explores the reasons for the rapid growth of workplace ADR and asks whether ADR can effectively realize the promise of fairness at work.

One common explanation for the growth of ADR in the workplace is that it is a form of union-substitution used to keep unions out. There is indeed evidence that, in the 1970s and 1980s, some companies instituted grievance procedures, open door policies, and peer review in order to avoid unionization.[5] However, the precipitous decline of unions by the end of the 1980s made these kinds of elaborate union avoidance schemes unnecessary. Today workplace ADR plays two different roles in the workplace, both of which are a consequence of the changing nature of work. Below I describe the new workplace in order to show how it has given rise to a surge in interest in workplace-specific dispute resolution. I then describe two settings where ADR mechanisms are widely used and argue that each requires a different model of dispute resolution—a procedural justice model for fairness disputes and a public policy model for discrimination disputes. I suggest that the two models are in tension with each other, and conclude with speculation about whether the new interest in workplace dispute resolution can in fact satisfy the disparate goals it sets for itself.

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3 532 U.S. 105 (2001) (holding that the Federal Arbitration Act applies to all non-transportation employment contracts).

4 *See* Katherine V.W. Stone, *Employment Arbitration Under the Federal Arbitration Act*, *in* EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE 27, 27–28 (Adrienne E. Eaton & Jeffrey H. Keefe eds., 1999) [hereinafter EMPLOYMENT DISPUTE RESOLUTION].

5 *See* Alexander J.S. Colvin, *Institutional Pressures, Human Resource Strategies, and the Rise of Nonunion Dispute Resolution Procedures*, 56 INDUS. & LAB. REL. REV. 375 (2003).

I. THE NEW EMPLOYMENT RELATIONSHIP

The U.S. workplace has undergone a dramatic change in the past decade. The long-standing assumption of long-term attachment between an employee and a single firm has broken down and a new form of transitory employment relationship has taken its place. No longer is employment centered on a single, primary employer throughout one's career. Instead, employees now expect to change jobs frequently. No longer do employees derive their identity from a formal employment relationship with a single firm; rather, their employment identity comes from attachment to an occupation, a skills cluster, or an industry. At the same time, firms now expect a regular amount of churning in their workforces. They encourage employees to look upon their jobs differently, to manage their own careers, and not to expect long-term job security.[6]

This new employment relationship is a vast departure from employment relationships in the past. Roughly one hundred years ago, the employment relationship underwent a transformation that persisted throughout most of the twentieth century. On the basis of the scientific management theories of Frederick Winslow Taylor and those in the personnel management movement, most large corporations organized their workforces into job structures that are termed "internal labor markets." In internal labor markets, jobs are broken down into minute tasks and then are arranged into hierarchical ladders in which each job provides the training for the job on the next rung up. Employers who utilized internal labor markets hired only at the entry level, then utilized internal promotion to fill all of the higher rungs.[7]

Taylorism became the dominant type of human resource policy within large U.S. manufacturing firms throughout most of the twentieth century.[8] Throughout corporate America, management reduced

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6 I describe the nature of the changing workplace in KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE (2004).

7 *See* PETER B. DOERINGER & MICHAEL J. PIORE, INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS 1–90 (1971); Paul Osterman, *Introduction* to INTERNAL LABOR MARKETS 1, 2 (Paul Osterman ed., 1984); Katherine Stone, *The Origins of Job Structures in the Steel Industry*, *in* CONFERENCE ON LABOR MARKET SEGMENTATION, LABOR MARKET SEGMENTATION 29, 45–49 (Richard C. Edwards et al. eds., 1975); *see also* CLAUDIA GOLDIN, UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN 247 n.38 (1990) (reviewing the economic literature on internal labor market institutions).

8 *See* Katherine Van Wezel Stone, *Policing Employment Contracts Within the Nexus-of-Contracts Firm*, 43 U. TORONTO L.J. 353, 363–69 (1993).

the skill level of jobs—a process termed "deskilling"—while at the same time encouraging employee-firm attachment through promotion and retention policies, explicit or de facto seniority arrangements, elaborate welfare schemes, and longevity-linked benefit packages.[9] Because employers wanted employees to stay a long time, they gave them implicit promises of long-term employment and of orderly and predictable patterns of promotion. These were the dominant job structures of the industrial era. While these systems had their origins in the blue collar workplace of the smokestack industrial heartland, by the 1960s they were adapted to large white collar workplaces such as insurance companies and banks.[10]

Sometime in the 1970s, employment practices began to change. Since then, there have been widespread reports that large corporations no longer offer their employees implicit contracts for lifetime employment. Work has become contingent in the sense that the attachment between the firm and the worker has been weakened. The "recasualization of work" has reportedly become a fact of life both for blue collar workers and for high-end professionals and managers.[11]

As employers dismantle their internal labor market job structures, they are creating new types of employment relationships that give them flexibility to cross-utilize employees and to make quick adjustments in production methods as they confront increasingly competitive product markets. They want to be able to decrease or redeploy their work forces quickly as product market opportunities shift. The new employment relationship is what management theorists and industrial relations specialists call the "new psychological contract," or the "new deal at work."[12] In the new deal, firms disavow any long-term employment relationship. However, they also believe they cannot succeed if employees simply perform their tasks in a reliable but routine manner. Firms do not merely need predictable and excellent role performance, they need "spontaneous and innovative

9 *See* STONE, *supra* note 6, at 27–48.

10 HARRY BRAVERMAN, LABOR AND MONOPOLY CAPITAL 305–12 (1975).

11 *See, e.g., The Future of Work: Career Evolution*, ECONOMIST, Jan. 29, 2000, at 89; *see also* PETER F. DRUCKER, MANAGING IN A TIME OF GREAT CHANGE (1995); ROSABETH MOSS KANTER, ROSABETH MOSS KANTER ON THE FRONTIERS OF MANAGEMENT 190–91 (1997); RICHARD SENNETT, THE CORROSION OF CHARACTER 23 (1998).

12 *See* PETER CAPPELLI, THE NEW DEAL AT WORK: MANAGING THE MARKET-DRIVEN WORK FORCE 217 (1999); Sandra L. Robinson & Denise M. Rousseau, *Violating the Psychological Contract: Not the Exception but the Norm*, 15 J. ORGANIZATIONAL BEHAV. 245 (1994); Denise M. Rousseau, *The 'Problem' of the Psychological Contract Considered*, 19 J. ORGANIZATIONAL BEHAV. 665 (1998).

activity that goes beyond role requirements."[13] They need employees to commit their imagination, energies, and intelligence on behalf of their firms. They want employees to innovate, to pitch in, to have an entrepreneurial attitude toward their jobs, to behave like owners. Thus, they want to elicit behavior that goes beyond specific roles and job demands, and gives the firm something extra. Organizational theorists characterize this something extra as organizational citizenship behavior, or "OCB."[14] Organizational citizenship behavior is defined as behavior that goes beyond the requirements of specific role definitions.[15] Much of current human resource policy is designed to encourage that type of behavior.

Managers have been devising new organizational structures that embody flexibility, promote skill development, and foster OCB. However, they want to elicit OCB without giving promises of job security and creating the kind of career-long expectations they generated in the past. That is, the goal of today's management is, in the words of one management consultant, to foster "commitment without loyalty."[16]

A new employment relationship is emerging through numerous experimental programs by organizational theorists and management practitioners. Despite differences in emphasis, the approaches share several common features. One is that employers explicitly or implicitly promise to give employees employability rather than job security. They promise to provide learning opportunities that enable employees to develop their human capital but do not promise long-term employment. Thus, employers no longer promise to, nor are they are expected to, keep employees on the payroll when demand for the product fluctuates downward. Rather, in the new employment relationship, the risk of the firm's short-term and long-term success is placed squarely on the employee.

The new employment relationship also involves compensation systems that peg salaries and wages to market rates rather than internal institutional factors. The emphasis is on offering employees differential pay to reflect differential talents and contributions. Thus, for example, the leading management consulting firm, Towers Perrin, urges its clients to "recognize top performers to the greatest extent possible [by] providing the lion's share of available rewards to the

13 John R. Deckop et al., *Getting More Than You Pay For: Organizational Citizenship Behavior and Pay-for-Performance Plans*, 42 ACAD. MGMT. J. 420, 420 (1999).

14 *See* DENNIS W. ORGAN, ORGANIZATIONAL CITIZENSHIP BEHAVIOR: THE GOOD SOLDIER SYNDROME (1998).

15 *Id.* at 4–5.

16 CAPPELLI, *supra* note 12, at 217.

highest contributors."[17] The new employment relationship also involves providing networking opportunities so that employees can raise their social capital by interacting with a firm's customers, suppliers, and even competitors. It also is characterized by a flattening of hierarchy and the elimination of status-linked perks. And it is associated with the use of company-specific grievance mechanisms.

II. THE SEARCH FOR PROCEDURAL JUSTICE IN THE WORKPLACE

A. *New Risks and Vulnerabilities of the New Employment Relationship*

The new employment relationship shifts onto employees many risks that were previously borne by the firm. Foremost, employees now face a constant risk of job loss due to the continual workforce churning that characterizes the new workplace. In addition, the new employment relationship generates a level of wage inequality and wage uncertainty that was not feasible under the old internal labor market arrangements. In internal labor markets, wages were set by institutional factors such as seniority and longevity.[18] Wages today, on the other hand, are increasingly pegged to other individualized factors and are sensitive to market fluctuations. One result is wage uncertainty for employees. Gone are the days of reliable and steadily progressing pay levels along some pre-arranged or pre-agreed-upon scale. Another result is increasing wage dispersion. Pay rates for similarly-situated employees in different firms and even with a single firm have become markedly dispersed.

In addition to job insecurity and wage uncertainty, the new employment practices place on employees the risk of losing the value of their labor market skills. When jobs are redesigned to provide greater flexibility, their skill requirements often increase.[19] Newly-trained employees thus have an advantage over older ones, and on-going training becomes not an opportunity for advancement but a necessity for survival. The new employment practices thus impose not only risks of job loss on employees, but also risks of depreciation of one's own skill base. Rather than being able to count on a rising wage level and a

17 Chris Hatch & Claudine Kapel, *Talent Management Remains Critical Even in the Face of Economic Turbulence*, PERSP. ON PEOPLE: PERFORMANCE & REWARDS (Towers Perrin), May 2002, *available at* www.towersperrin.com/hrservices/webcache/towers/Canada/publications/Periodicals/perspective_PerfRewards/2002_05/pprtalent.pdf.

18 *See* Stone, *supra* note 6, at 51–56.

19 For a series of case studies that support this conclusion, see Harry C. Katz, *Industry Studies of Wage Inequality: Symposium Introduction*, 54 INDUS. & LAB. REL. REV. 399 (2001).

comfortable retirement, many workers are anticipating a lifetime of retooling just to stay in place.

Another type of risk that is generated by the new employment relationship involves the dissolution of stable and reliable employee old age and social welfare benefits. In the United States, workers obtain health insurance, pensions, disability, long-term care, and most other forms of social insurance from their employers—when they can get it—rather than from the state. Because social insurance is tied to employment, even if there were no changes in employer benefit policies or practices, the new employment relationship would erode the social safety net. As job security wanes, and more and more people move from job to job, they usually lose whatever employer-sponsored benefits they once had. Furthermore, employers have been restructuring their plans so as to shift more risk of uncertainty onto employees. This is most evident in the area of pensions. In the past, almost all private pensions were "defined benefit" plans. In a defined benefit plan, employers contribute to a fund on behalf of its covered employees, and each employee is guaranteed a specified benefit level at the time of retirement. Since the 1980s, many employers have shifted from defined benefit plans to defined contribution plans, so that today, defined contribution plans have overtaken defined benefit plans as the dominant form of employer-provided pension in the United States.[20] In defined contribution plans, the employer contributes a fixed amount into an account for each worker based on the number of person-hours worked. In some cases, the worker makes a contribution as well. Upon retirement, the amount of the worker's pension is determined by the value of that account at that time. If the funds were invested well, or if the market did well overall, the worker's pension could be high. But if they were invested poorly, or if retirement occurred amidst a market downturn, the pension could be paltry. The risk, both of the market and of bad decisions, falls on the individual employee.

B. Procedural Justice to Cushion Risks of the New Employment Relationship

Because so many risks now fall upon employees, employees may be unwilling to assume these risks unless they have assurances that the system is fundamentally fair. While employees no longer expect long-term employment, they want to ensure that wage assessments are done fairly, that they are not terminated unfairly, and that they are

20 *See* STONE, *supra* note 6, at 252–55.

given the training opportunities, benefit packages, and other job incidents that they have been promised. They also want to obtain the networking opportunities that spell career advancement. Without a perception of fairness and implicit reciprocity, there is a danger that employees will not give the extra effort that constitutes citizenship behavior. Thus, employees' subjective appraisal of their employers' fairness is seen as an important factor in generating OCB. Researchers have found that employees who perceive their employer as unfair reduce their OCB, triggering a downward cycle in which the employee's diminished OCB leads the supervisor to withdraw informal types of affirmation, causing the employee to experience additional feelings of unfairness and to further decrease her OCB.[21] Hence organizational theorists advocate that employers establish a system for providing on-the-job fairness as a means of fostering OCB.[22]

Concern for generating OCB has led theorists to focus on the role of procedural justice and employee perceptions of fairness.[23] Organizational psychologist Dennis Organ explains that people in organizations perceive themselves as involved in a social exchange relationship, in which they contribute effort and citizenship in return for formal and informal rewards. When they encounter what they perceive to be unfair treatment, they revise their assessment of the nature of the overall exchange, retreat from an assumption of reciprocity, and reinterpret the relationship as an economic transaction.[24]

A number of organizational behavioral theorists have proposed definitions of procedural fairness. One widely-used measure of procedural fairness proposed by G.S. Leventhal utilizes six criteria. To be fair, according to Leventhal, a procedure must:

(a) be consistently applied;

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21 *See* Dennis W. Organ & Mary Konovsky, *Cognitive Versus Affective Determinants of Organizational Citizenship Behavior*, 74 J. APPLIED PSYCHOL. 157, 162 (1989); *see also* Sandra L. Robinson et al., *Changing Objectives and the Psychological Contract: A Longitudinal Study*, 37 ACAD. MGMT. J. 137, 149 (1994) (finding that citizenship may result from employees' perceptions of the company's performance of its obligations under the psychological contract).

22 *See* Jerald Greenberg, THE QUEST FOR JUSTICE ON THE JOB 32–39 (1996). *See generally* Jason A. Colquitt et al., *Justice at the Millenium: A Meta-Analytic Review of 25 Years of Organizational Justice Research*, 86 J. APPLIED PSYCHOL. 425, 435–37 (2001) (analyzing various empirical studies and different concepts of justice).

23 *See* GREENBERG, *supra* note 22, at 32–39 (1996). *See generally* Colquitt et. al., *supra* note 22, at 435–36 (analyzing various empirical studies and different concepts of justice).

24 Dennis W. Organ, *The Motivational Basis of Organizational Citizenship Behavior*, *in* 12 RESEARCH IN ORGANIZATIONAL BEHAVIOR 43, 63–66 (Barry M. Staw & L.L. Cummings eds., 1990).

(b) be free from bias;
(c) ensure that accurate information is collected and used in the decision-making process;
(d) have a mechanism to correct flawed decisions;
(e) conform to personal or prevailing standards of ethics;
(f) ensure that the opinions of various affected groups have been taken into account.[25]

All of these criteria are about the *process* by which rules are applied and disputes are resolved; they are not about substantive outcomes.

There is evidence that as firms disavow promises of job security, procedural fairness becomes more important than ever. For example, a study of 3000 employees by the Towers Perrin consulting firm in 1997 found that the changes in the employment relationship had made employees more sensitive to whether they were treated with fairness and respect.[26] It is understandable that employees would focus on procedural fairness when they lack promises of long-term employment because in this new employment relationship, employees are required to bear many of the risks that were previously borne by the firm. Because employees increasingly have to bear the consequences of firm failure or market fluctuations, they at least want to be confident that the incidence of the risks are fairly applied.

Because organizational performance is linked to procedural justice, employers have attempted to devise procedures for hearing complaints and resolving disputes that foster a perception of fair treatment. These procedures are a far cry from the management methods of the nineteenth century, when Andrew Carnegie famously said: "When a workman raises his head, hit it." Today employers have instituted a wide range of dispute resolution procedures designed to address employee complaints.[27]

For example, some corporations maintain open door policies that encourage an employee to bring a problem or grievance to a

25 *See* Colquitt et al., *supra* note 22, at 426 (citing Gerald S. Leventhal, *What Should Be Done With Equity Theory? New Approaches to the Study of Fairness in Social Relationships, in* SOCIAL EXCHANGE: ADVANCES IN THEORY AND RESEARCH 27 (Kenneth J. Gergen et al. eds., 1980); Gerald S. Leventhal et al., *Beyond Fairness: A Theory of Allocation Preferences, in* JUSTICE AND SOCIAL INTERACTION 167 (Gerold Mikula ed., 1980)).

26 Mark V. Roehling et al., *The Nature of the New Employment Relationship: A Content Analysis of the Practitioner and Academic Literatures*, 39 HUM. RESOURCES MGMT. 305, 315 (2000).

27 *See* Lisa B. Bingham & Denise R. Chachere, *Dispute Resolution in Employment: The Need for Research, in* EMPLOYMENT DISPUTE RESOLUTION, *supra* note 4, at 95, 103–13 (discussing the growth of ombudsmen, mediation, and arbitration programs amongst nonunion firms); Colvin, *supra* note 5.

high-level manager outside the chain of command. Some have hired specialized corporate officers, called ombudsmen, whose job it is to hear complaints, conflicts, and disputes, and to reach across status and departmental lines to seek resolution. Some have established management appeals boards to permit an employee to appeal an objectionable decision of an immediate supervisor to managers in other departments or divisions. Peer review procedures, in which disputes are resolved by panels comprised of fellow employees who hear and decide specific employee grievances, are also becoming a common practice.[28] A recent survey of over 300 firms in the telecommunications industry found peer review procedures in place in 15.9% of the firms in the sample, a surprisingly high incidence.[29]

A common characteristic of these employer-initiated dispute resolution techniques is that they all utilize decisionmakers who are from the firm but outside the employees' normal chain of command. The peer review plan at aerospace and automobile parts manufacturer TRW illustrates how these new systems are designed to promote procedural justice without reinforcing hierarchy. At TRW, peer review can be invoked by any employee who wants to challenge a supervisory disciplinary measure, including termination. The review panel consists of five regular peer employees, three selected by the employee and two by management.[30] The panel holds a hearing, accepts evidence, and then issues a decision. It has no authority to change company policy, merely to ensure that it was applied correctly. If it was not, the disciplinary measure is revoked.[31]

The purpose of these new nonunion employee dispute resolution procedures is to create a perception of procedural fairness that will enable the employee to assume the risk of the employment relationship while augmenting rather than diminishing citizenship behavior. The goal is not to approximate justice. Thus, for example, Professor Alex Colvin found that in one TRW plant between 1992 and 1997, 160 employees took cases to peer review, but only ten were successful in overturning a supervisory decision. The low employee win rate none-

28 *See* KATHERINE V.W. STONE, PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION (2000).

29 *See* Colvin, *supra* note 5, at 382, 386.

30 *See* Alexander J.S. Colvin, *The Relationship Between Arbitration and Workplace Dispute Resolution Procedures*, 16 OHIO ST. J. ON DISP. RESOL. 643, 652 (2001).

31 *See id.* at 658.

theless was sufficient to promote a sense of procedural fairness by the firm.[32]

C. *Assessing the Due Process Model of Dispute Resolution*

Because workplace-centered due process forms of dispute resolution do not ensure substantively "fair" outcomes, one might ask: Are they just a sham or do they contribute important values to the workplace? This is a highly controversial question, the answer to which, in large part, depends upon what one is comparing them to. Compared to Andrew Carnegie's personnel practices, the newly minted forms of due process at work seem like a vast improvement because they give employees some voice about working conditions and enable them to get redress for the most egregious forms of mistreatment. But compared to the grievance systems in U.S. unions or German-style works councils, they look minimal at best. And because they neither foster nor reflect collective empowerment, they are not a substitute for unions. They are creatures of the new employment relationship that must be understood as part of a larger vision of a non-hierarchical workplace with committed yet non-attached employees.

One important aspect of these procedural justice types of workplace ADR is that they draw their substantive norms from the workplace itself. When an open door policy or a management appeal board is utilized, the decisionmaker is expected to apply the workplace's own internal code of conduct, both the formal and informal rules. Even peer review panels are generally restricted in their powers and forbidden to disregard the rules of the workplace.[33] Thus, while the decisionmaker may not always uphold a managerial decision, a procedural justice style of workplace ADR will reinforce the prevailing workplace culture. Its function is to instantiate and effectuate the workplace's internal norms.

III. THIRD PARTY FORMS OF DISPUTE RESOLUTION IN THE WORKPLACE

In addition to the proliferation of forms of ADR that rely on workplace participants, there has also been an increase in forms of ADR that utilize outside neutrals, i.e., mediation and arbitration. Mediation is a method by which an outside neutral helps parties achieve a consensual resolution of a dispute. Arbitration is a system by which

32 *See* Alexander J.S. Colvin, Citizens and Citadels: Dispute Resolution and the Governance of Employment Relations 189, 213 (1999) (unpublished Ph.D dissertation, Cornell University) (on file with author).

33 *See supra* note 31 and accompanying text.

an outside neutral hears evidence and imposes a resolution on the parties. Both mediation and arbitration involve the injection of outsiders into the workplace culture. Despite its use of outsiders, however, mediation shares one goal with peer review and open door policies—to resolve conflict using the internal perspectives of the participants as its normative guiding light. Indeed, the current view of best mediator practice is that mediators should not impose their own views of the best resolution of a dispute, but rather facilitate the parties' resolution according to their own normative sense of fairness. Arbitration, in contrast, brings an external perspective to bear on a dispute. Such an outside perspective is necessary to address some types of workplace disputes, particularly those that involve employment discrimination. For reasons that will be explained below, ADR that simply instantiates the workplace's own internal norms cannot adequately address discrimination in the new workplace.

A. New Types of Discrimination Claims

In the past, much employment discrimination was rooted in the hierarchical job structures of internal labor markets. Today's workplace does not have as much formal hierarchy, so there are less formal impediments to advancement. At the same time, because there are not defined job ladders and the criteria for advancement are not clearly specified, it is difficult for someone to claim that she has been bypassed for advancement because of her gender or race. That is, the diffuse authority structure of the new psychological contract makes discrimination hard to identify and difficult to challenge.

In addition to the hidden nature of the decisionmaking process, the decentralization of authority and the flattening of hierarchy mean that decisions are delegated to a wide range of people who are permitted to use their individual, often idiosyncratic, discretion. Also, when jobs are defined in terms of competencies and employees are valued for their varied skills and flexibility, it is difficult for firms to articulate clear criteria for advancement. Often "social credentials" are used in lieu of objective performance measures.[34] These social credentials include such assets as prestigious education, membership in social clubs, participation in certain sports—all activities that have traditionally excluded women and minorities. Thus, under a system that rewards "social credentials," women and minorities are disadvantaged.[35]

34 *See* Edward S. Adams, *Using Evaluations to Break Down the Male Corporate Hierarchy: A Full Circle Approach*, 73 U. COLO. L. REV. 117, 167–68 (2002).

35 *See id.*

A growing number of employment discrimination class action lawsuits allege that informal and decentralized promotion practices foster covert discrimination against women and minorities. For example, in a suit filed in 2001 against Johnson & Johnson, the plaintiffs alleged that the giant conglomerate knowingly engaged in racial discrimination by maintaining promotion policies that allowed supervisors to "'handpick white candidates, resulting in fewer promotions for African-Americans and Hispanic-Americans and perpetuating a "glass ceiling" and "glass walls," thereby blocking advancement of these employees into "visible and influential roles" within the organization.'"[36] Similar complaints against informal promotion policies are becoming widespread.

In addition, the new nonhierarchical workplace makes power and lines of authority less visible. It is often difficult to know to whom to make appeals, with whom to lodge complaints, or how to bring about change. There are numerous cases in which an employee experiences sexual harassment and wants to complain, yet loses because she did not know to whom to report the offensive conduct or because she reported to the wrong person.[37]

These cases illustrate the more general proposition that when there is no visible power structure, the invisible structures rule. In the new workplace, these invisible power structures may well turn out to be more remote and impenetrable for women and minorities than the old power structures. Responsibility for discriminatory decisions has become difficult to assign and even more difficult to remedy.

Furthermore, it is difficult to meet the legal test to establish liability for discrimination in today's workplace. If a plaintiff alleges discriminatory treatment, she must show that the employer treated her in a disadvantageous way with a discriminatory intent.[38] Proving the employer's discriminatory intent is the most important, and most difficult, task of the plaintiff. However, the available techniques for demonstrating an unlawful motive only make sense in a world in which employers make employment decisions on the basis of uniform policies and practices that can be articulated. In such a world, if an employer departs from its uniform policy or pre-existing practices, then

36 Beth M. Mantz, Dow Jones News Wires, *Johnson & Johnson Discrimination Suit May Be One of Largest Ever*, Nov. 16, 2001 (quoting the plaintiffs' complaint), *available at* http://www.diversityatwork.com/news/dec01/Johnson.htm.

37 *See, e.g.*, Watkins v. Prof'l Sec. Bureau, Ltd., No. 98-2555, 1999 WL 1032614 (4th Cir. Nov. 15, 1999); Montero v. Agco Corp., 192 F.3d 856 (9th Cir. 1999); Schrean v. Chicago Transit Auth., No. 97 CV 3455, 1999 WL 977068 (N.D. Ill. Oct. 22, 1999).

38 *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805–06 (1973).

the plaintiff can use that fact to show that the employer's proffered reason is a pretext. When employers have uniform policies and practices, these policies establish a baseline against which an employer's actions can be measured and a pretext can be identified. Indeed, without evidence that an employer's practice is a departure from a uniform baseline, it is practically impossible for a plaintiff to prove that an employer's asserted motive is a pretext.

It is difficult for a plaintiff to prove that the employer acted with a discriminatory intent in today's workplace. In the boundaryless workplace, employment decisions are decentralized. Rather than promoting uniform policies and centralized decisionmaking, many firms today delegate job assignment decisions to disparate, decentralized decisionmakers. Sometimes these decisionmakers are peers. In the boundaryless workplace, decisionmakers are expected to exercise subjective, often ad hoc judgments. In this setting, it is difficult to establish whether a particular decision is pretextual because there is no uniform baseline from which the employer's deviation can be identified. The baseline is constantly changing.

In addition to the difficulties of identifying discrimination and locating the responsible party in the face of decentralized and dispersed decisionmaking structures, the new workplace exacerbates the problem of coworker discrimination. Today, discrimination often takes the form of cliques, patronage networks, and buddy systems that utilize tools such as ostracism and subtle forms of non-sexual harassment (as well as sexual harassment) to exclude and disempower newcomers. The harms caused can be devastating to the victim, yet not cognizable under existing theories of discrimination. Existing theories of liability assume that the discriminator is in a hierarchical relationship to the complainant. Woman and minority plaintiffs who complain of coworker harassment must prove that the employer knew or should have known about the harassment and failed to take remedial measures. The plaintiff has the burden of proof on both issues, and the burden is formidable. If a worker fails to report coworker harassment for fear of subtle and not-so-subtle retaliation, her failure to report makes it easy for a firm to deny knowledge of the harassment and thus escape liability. Some courts find that the employer is on notice of harassment if other employees have reported similar incidents,[39] but not all courts do so. Similarly, some courts will find that

39 *See* Hurley v. Atlantic City Police Dep't, 174 F.3d 95, 118 (3d Cir. 1999) (finding that reporting policies cannot increase a plaintiff's burden under the law); *see also* B. Glenn George, *If You're Not Part of the Solution, You're Part of the Problem: Employer Liability for Sexual Harassment*, 13 YALE J.L. & FEMINISM 133, 153–54 (2001).

an employer is not on notice of harassment if the employee complains to the wrong supervisor.[40]

Finally, remedies become problematic in a world of flattened hierarchies. Many types of discrimination involve failure to promote women and minorities along stable job ladders, and the remedies include decrees to move them up to their "rightful" places. When there are no such job ladders, it is difficult not only to identify discrimination, but also to remedy it.

B. Framing New Procedures for New Types of Discrimination

In order to make further strides toward equality in the workplace, it is necessary to devise new antidiscrimination theories and procedures. At present, employment discrimination claims are brought to a court or an administrative agency such as the Equal Employment Opportunity Commission or a state human rights agency. These tribunals have the virtue of placing decisionmaking authority in the hands of someone who is not part of the workplace that gave rise to the alleged discrimination and who can apply neutral, nondiscriminatory norms. However, both courts and agencies are also remote from the workplace, circumscribed in the evidence they can hear, and limited in the remedies they can issue. Furthermore, as Judith Resnik has pointed out, courts and agencies have constricted approaches to legal standing that prevent them from treating discrimination as the collective harm that it is. Rather, by requiring the individual targets of discrimination to bring an action, courts cannot address the ways in which a culture of harassment can arise that shapes power relationships among all individuals in a workplace.[41]

Furthermore, much of today's discrimination takes the form of coworker conduct that marginalizes a member of an outsider group. It is difficult to imagine a court imposing civil liability on a group of workers for ganging up on a coworker or for spreading nefarious gos-

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40 *Compare* Madray v. Publix Supermarkets, Inc., 208 F.3d 1290, 1300 (11th Cir. 2000) (affirming summary judgment for the employer when the employee did not report to the proper representative), *with* Jackson v. Quanex Corp., 191 F.3d 647, 663 (6th Cir. 1999) (holding that harassing conduct need not be reported by the plaintiff).

41 *See* Judith Resnik, *The Rights of Remedies: Collective Accountings for and Insuring Against the Harms of Sexual Harassment, in* DIRECTIONS IN SEXUAL HARASSMENT LAW 247 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004). Susan Sturm has also pointed out that the activities that produce exclusion of women and blacks is highly contextualized and not amenable to crisp, clear rules of right and wrong. *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 475–78 (2001).

sip unless the conduct constitutes a cognizable crime or tort, such as assault or rape.

In addition, it is not always feasible for individuals to obtain redress from a court or administrative agency. Courts and agencies are inundated with complaints and have large backlogs. Litigation is expensive and many victims of employment discrimination lack the resources to enforce their rights.

Even if the courts were not backlogged and litigation were inexpensive, there is an additional reason why new forms of discrimination are not best handled in an adversary procedure. The adversary process gives each side a stake in proving the truthfulness of its claims and the falsity of the opposing party's claims, even when doing so inflicts damage on a continuing relationship. Where complaints involve allegations of exclusion, marginalization, or subtle forms of harassment, the complaining party must either demonize her coworkers or risk demonization herself. For example, if a plaintiff complains she has been shunned and denied access to informal know-how, her coworkers might defend by claiming that they refused to socialize with her because they disliked her and found her to be obnoxious or even paranoid. The complaining party then must counter by impugning the motives and good faith of the dominant group, accusing them of racism, sexism, or worse. That is, the courtroom setting tends to make each side exaggerate its accusations and harden its position rather than seek conciliatory solutions. In a harassment case, this kind of name-calling occurs not as lunchroom gossip, but in the open of a public trial. Even if the accusations are true—and they frequently contain considerable truth—the public nature of the setting makes it unlikely that such a dynamic will help a workplace to function better.

For all these reasons, conventional litigation is not always an effective option for remedying employment discrimination and it is necessary to devise a dispute resolution procedure that can supplement existing judicial mechanisms. Some employers have attempted to use the dispute resolution mechanisms discussed earlier to address discrimination claims. However, it is difficult to devise internal dispute resolution systems that can help counteract the development of workplace fiefdoms and cliques, redress abuses of hidden authority, and bring external norms to the workplace.

Most ADR mechanisms are designed to apply norms internal to the workplace to a situation of conflict and thus they cannot address these second-generation forms of discrimination in a reliable and con-

sistent fashion.[42] Any procedure used to redress employment discrimination must not delegate responsibility for recognizing and remedying discriminatory conduct to the work group, because the work group is often the source of the problem. Similarly, it cannot delegate those tasks to top management, because top managers have an interest in smooth operations, which often means condoning the discriminatory conduct. Instead, it is necessary to devise a system of workplace-specific alternative dispute resolution that utilizes neutral outsiders to scrutinize workplace conduct, identify subtle as well as overt discriminatory practices, bring external norms of equal opportunity to bear, and fashion effective remedies. By bringing in outside neutrals to adjudicate workplace disputes, such a system could offer the possibility of injecting an external standard of fairness that can transcend the rule of the clique.

Two types of alternative dispute resolution involve the use of outside neutrals—mediation and arbitration. While mediation has the virtue of resulting in a consensual resolution to a dispute, it is not always possible to resolve discrimination claims in such a forum. Mediators aspire to a stance of neutrality, yet neutrality compels them to refrain from intervening to correct power disparities that might exist between the parties—disparities in resources, sophistication, knowledge, or experience—that might compromise one side's ability to negotiate a fair settlement of the dispute. In discrimination cases, the complainant is by definition a member of a subordinate group, so that disparities in power are almost always present. Thus, mediation usually is not appropriate for the types of discrimination cases described here. Rather, there must be an outsider who is empowered to hear claims and make an independent decision to resolve a dispute. That means there has to be a system of arbitration.

C. The Uses and Abuses of Workplace Arbitration

The use of arbitration in the nonunion workplace has been growing at a fast pace. After the *Gilmer* decision in 1991, employers instituted arbitration systems in almost ten percent of nonunion

42 Susan Sturm gives examples of internal dispute resolution systems established by Deloitte & Touche, Intel, and Home Depot to deal with complaints of subtle forms of gender bias and exclusion that decreased women's advancement prospects. However, the success in each case depends upon a single individual in a position of authority who is committed to advancing women's causes within the firm. Furthermore, the case studies do not illustrate how a firm can use an internal dispute resolution mechanism to bring about sustainable change. *See* Sturm, *supra* note 40.

workplaces.[43] In part, the increase in workplace dispute resolution is due to certain legal developments. Since the 1980s, there has been a growth in employment litigation and employers have been found liable for unjust dismissal in some jurisdictions, employment discrimination in a variety of guises, and intentional infliction of emotional distress, invasion of privacy, slander, and other types of workplace torts. In order to reduce their exposure, employers have tried to identify and resolve issues before they reach litigation proportions. The Supreme Court decisions in *Gilmer* and *Circuit City* applying the Federal Arbitration Act (FAA) to employer-crafted arbitration procedures in the nonunion setting enables employers to use arbitration as a shield against liability or a method to mitigate awards. Under the FAA, when there is a written arbitration clause in effect, courts must stay litigation and compel arbitration instead.[44]

Because most employment arbitration procedures are crafted by employers, they are often drafted in ways that make it likely that an employer will prevail in the arbitration proceeding. For example, some place severe limits on discovery, limit the number of witnesses or types of evidence an employee can present, shorten limitations periods, heighten burdens of proof, and restrict remedies that could be recovered.[45] In addition, some are drafted in a way that imposes asymmetrical obligations—requiring a worker but not the employer to submit all disputes to arbitration. Some permit the employer to pick the pool from which the arbitrator will be selected. Some require workers to bear a substantial cost for bringing a case to arbitration. Courts are divided as to whether such procedures can be enforced.[46]

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43 *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); *supra* text accompanying note 1.

44 9 U.S.C. §§ 2–4 (2000).

45 *See, e.g.*, Lang v. Burlington N. R.R. Co., 835 F. Supp. 1104 (D. Minn. 1993) (enforcing an arbitration agreement that had been sent by the employer to the employee by mail and to which the employee never consented); Pony Express Courier Corp. v. Morris, 921 S.W.2d 817 (Tex. App. 1996) (rejecting an unconscionability challenge to an arbitration system in which the employee had no discovery rights and severely restricted remedies). *See generally* Katherine Van Wezel Stone, *Mandatory Arbitration of Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1036–41 (1996).

46 *Compare* Cole v. Burns Int'l Sec. Servs., Inc., 105 F.3d 1465 (D.C. Cir. 1997) (holding asymmetrical arbitration clauses not unconscionable, but stating, in dicta, that if an employee were required to pay arbitral fees to have her claim heard in arbitration, a clause would be unconscionable), *with* Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000) (holding an arbitration clause that imposed steep costs on a party seeking to vindicate statutory rights is not per se unconscionable), *and* Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138 (Ct. App. 1997) (holding that an asymmetrical arbitration clause requiring the employee to arbitrate but not the employer and re-

Initially courts upheld employer-crafted arbitration procedures that contained serious due process deficiencies in their pro-arbitration zeal.[47] As a result, in the 1990s, many employers adopted policies that compelled employees to bring their employment discrimination complaints to arbitrators who were biased in favor of the employer or who simply lacked knowledge of anti-discrimination law. Further, under current interpretations of the FAA, arbitration awards receive virtually no judicial review.[48] Decisions rendered by biased decisionmakers or in unfair proceedings could not be appealed.[49]

Gradually throughout the 1990s, courts began to disallow many of these unfair procedures by ruling them unconscionable or unenforceable on due process grounds. For example, courts have held that it is unconscionable to require an employee to pay excessive fees to have her claims heard,[50] or that it is improper to require an employee to arbitrate claims when the employer is not similarly bound.[51] One court held that an arbitral panel that was hand-picked by an employer was not a proper "arbitration" under the FAA.[52]

Despite the potential abuses of employer-crafted arbitration systems in the past, it is possible to design a dispute resolution system that could address the subtle but powerful forms of discrimination in today's workplaces. This use of ADR would not merely provide procedural justice but also be a method of implementing substantive public policies. Such a system would seek to vindicate equality norms without the limitations imposed by current Title VII doctrine. For exam-

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stricting potential remedies an employee could recover is unconscionable and unenforceable). See also *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999), where an arbitration system where the employer selected the panel from which the arbitrators were chosen was held not to be unenforceable.

47 *See* Stone, *supra* note 44, at 1036–41.

48 Under the FAA, an arbitral award may not be vacated for an error of law or erroneous fact-finding, but only if the arbitral award displayed a "manifest disregard" of the law. Wilko v. Swan, 346 U.S. 427, 436 (1953), *overruled on other grounds by* Rodriguez de Quijas v. Shearson/Am. Express Inc., 490 U.S. 477 (1989). *See generally* Katherine V. W. Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 954–55 (1999) (citing cases that establish the narrow standard of review under the FAA).

49 For criticisms of employer-designed arbitration systems in the nonunion setting, see Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of* Gilmer, 14 HOFSTRA LAB. & EMP. L.J. 1 (1996); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33; Stone, *supra* note 48.

50 *See Cole*, 105 F.3d at 1488; *see also Green Tree*, 531 U.S. at 95 (holding that the plaintiff failed to show sufficient likelihood of excessive costs).

51 *Stirlen*, 60 Cal. Rptr. at 152.

52 Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 940 (4th Cir. 1999).

ple, decisionmakers could take into account many kinds of evidence, including shop history and lore, to identify departures from past practices and consider whether or not an employer's stated reasons for an action were pretextual. Furthermore, claimants could impugn the plausibility of an employer's asserted reason for taking an action that disadvantaged a woman or minority employee by showing that the action was irrational or inconsistent with sound business judgment—arguments that, while comporting with common sense, are not persuasive to a court in a Title VII case. In addition, workplace arbitration could embrace disputes between coworkers as well as disputes between employees and employers. While a court may not find a particular type of conduct sufficiently serious to be actionable under Title VII, an arbitrator may be better attuned to the contextualized nature of the harm done.

To ensure that arbitration can adequately identify and redress subtle forms of employment discrimination that arise in the new workplace, courts would have to impose minimal standards of due process on the arbitration process.[53] Thus, for example, a court would have to ensure that the complainant had a right to counsel, to take discovery, subpoena witnesses, obtain documents, and cross-examine adverse witnesses. The arbitration procedure could not unduly shorten limitations periods, shift burdens of proof, or impose high costs on the party seeking to vindicate her discrimination claim. Furthermore, an outside arbitrator would not merely have to apply norms internal to the workplace, but also serve as a check on the possibility of tyranny and capture by insider cliques. That is, the arbitrator would have to apply the external norms embodied in anti-discrimination law. Under this proposal, there would have to be de novo judicial review for issues of law to ensure that arbitrators did not merely defer to the rule of the clique, but rather applied Title VII and other employment laws to the workplace. In order to preserve the right of appeal, a record would have to be made, and a written opinion rendered.

Workplace arbitration, as proposed herein, would cost more than most current forms of nonunion arbitration because it requires a transcript, a reasonably full hearing, and a written opinion. However, such a procedure offers employers a relatively expeditious factfinding procedure that could stave off many lawsuits. Employment discrimination suits are often factually dense matters, so that when documentary evidence and credibility assessments can be determined in an

53 *See* Stone, *supra* note 48, at 1024–28 (suggesting a mechanism to provide increased scrutiny and to inject external norms into private arbitration tribunals).

arbitral review setting, employers and employees can often be spared lengthy and expensive litigation.

CONCLUSION

I have described two models of ADR in the changing workplace—a procedural justice model and a public policy model. The first involves using ADR to reinforce and apply existing workplace values. The second involves using ADR to change the normative life of the community and inject external notions of racial and gender justice. Each model applies to different types of disputes, although it would be easy to imagine a dispute that could be characterized as both. In such a case it would be necessary to consider what to do with the overlap. For present purposes, however, the larger question is can the models co-exist? Does building up one type of ADR system undermine the possibilities for the second? Obviously there is no barrier to a company having more than one dispute resolution program, and indeed many companies do just that. A recent book by David Lipsky, Ron Seeber, and Richard Fincher shows that some companies have dispute resolution systems that are so complex and multi-optioned that their organizational diagrams look like maps of the Paris subway system.[54] But there is nonetheless an important respect in which an internal norm-applying due process system might be incompatible with an external norm-based public policy system. That is, there is a danger that bolstering the internal self-regulatory aspects of the workplace by means of dispute resolution aimed at enhancing procedural justice could, in fact, intensify the cliquishness that makes the external dispute resolution system necessary. Conversely, an ADR system with external decisionmakers to impose external standards of conduct could undermine the ability of dispute resolution to provide procedural justice and generate organizational citizenship behavior. The tension between the two uses of workplace ADR is an issue that will require further research and discussion into the roles and functions of dispute resolution in the new and changing workplace.

54 *See* DAVID B. LIPSKY ET AL., EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS 151 fig.4.3 (2003).