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Samuel Estreicher
New York University School of Law, estreicher@juris.law.nyu.edu

Zev J. Eigen
Northwestern University School of Law, z-eigen@northwestern.edu

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THE FORUM FOR ADJUDICATION OF EMPLOYMENT DISPUTES

SAMUEL ESTREICHER AND ZEV J. EIGEN*

ABSTRACT

This paper asks what institutional arrangements for adjudicating workplace rights disputes would best resolve those disputes in a fair, efficient manner for workers, managers and the public generally. Concerning legislative attempts to prohibit employment arbitration, we argue in favor of predispute arbitration. If properly structured and regulated, arbitration is preferable to courts because it offers a lower-cost, less-formal forum, thereby improving the likelihood that employees, and most especially low-earning employees, will be able to obtain a hearing on the merits of their disputes—something almost always unachievable in the civil litigation realm. Employer-promulgated ADR should be the basis of an employment adjudication system that supplements the work of courts, administrative agencies and, in the union sector, the grievance and arbitration process. If starting from scratch and without regard to political realities, we would be inclined urge adoption of institutional arrangements similar to Great Britain's system. The UK model started as a wrongful dismissal statute, and over time also assumed adjudicatory authority over discrimination claims. The UK system mixes government-supplied mediation services with a tripartite government-funded, public adjudication. The system supersedes any common law cause of action for breach of the employment agreement and employment statutes; employment disputes that go to the regular civil courts are limited to libel and slander, certain torts and claims for injunctive relief for breach of restrictive covenants. Class actions are not authorized. We discuss the practical and political feasibility of importing elements of this system to the United States.

INTRODUCTION

This chapter focuses on the appropriate design of the forum for adjudication of employment disputes. By the term "adjudication," we refer to the resolution of "rights" disputes – disputes over the application of a contract or the application of a statutory or regulatory rule to a particular factual situation. We are not referring to "interests" disputes – disputes over the substantive content of an initial labor-management contract or renewal agreement, or the analogue in a non-union setting, such as the employer's promulgation of rules to regulate the workplace. In considering the design question, we

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* Respectively, Dwight D. Opperman Professor of Law, New York University School of Law and Assistant Professor of Law, Northwestern University School of Law. © 2010 by Samuel Estreicher and Zev J. Eigen. All rights reserved. Please do not photocopy or distribute without authors' permission.

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assume that all involved actors, (employees, employers, unions, etc.) retain whatever endowments they currently possess in terms of intelligence, energy, income, occupational status, access to resources, union representation, political influence, and statutory and contractual rights. Holding these endowments constant, we ask what institutional arrangements for adjudicating rights disputes would do the best job of resolving those disputes in a fair, efficient manner for workers, managers and the public generally.

The fundamental problem of the current system is that the overwhelming majority of U.S. workers lack access to a fair, efficient forum for adjudicating their disputes with their employers. They have, in a theoretical sense, a right of access to a court system that is, rightly, the envy of the world, but the costs of access to the system – not so much filing fees, but access to competent counsel – are prohibitive (Estreicher 2005). Workers with viable claims are often left with the unpalatable choice of either filing a complaint with an administrative agency poorly resourced to handle a large volume of claims, representing themselves in court, or simply giving up. Class actions, an ingenious, lawyer-driven device of the equity courts that has done much good, are also poorly designed for fact-intensive, day-to-day disputes of employees who complain of an improper termination of employment or other adverse personnel decision. No other country in the developed world relies on ordinary civil courts for employment disputes; rather, they use some form of employment tribunal with limited rights of appeal to the courts (Estreicher 2008).

PART I: THE CURRENT SYSTEM IN THE UNITED STATES

A. RELIANCE ON COURTS FOR EMPLOYMENT DISPUTES

The U.S. litigation system has been characterized as a system of "cadillacs for the few, rickshaws for the many" (Estreicher 2001). The features of the U.S. system that cause it to stand out among developed countries as a plaintiff-friendly system – allowance of a 30% (or greater) contingent attorney's fee, non-responsibility of losers for winner's attorney's fees, civil jury trials, recovery of "pain and suffering," and the possibility of a punitive damages award—spell an attractive source of leverage for well-paid litigants who can afford competent counsel; they receive the "cadillacs for the few". For the overwhelming number of U.S. workers, however, the U.S. court system is, for all practical purposes, *terra incognito*; they receive, at best, the "rickshaws for the many". This is because, at least in employment cases where jury awards tend not be astronomical, competent lawyers are not available for individuals who cannot afford to pay a nontrivial hourly fee (at least $200-300 per hour in major American cities) even if they are willing to be partially compensated by a contingent fee (payable only if they win) (Estreicher 2005; Hadfield 2000; Sherwyn, Tracy, and Eigen 1999). Lawyers paid exclusively on a contingent-fee basis are not likely to exclusively handle employment disputes, and so, either tend to be less proficient in employment matters, or are not likely

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to invest very much of their time and effort in cases they do handle hoping to be compensated out of a "nuisance" payment from the employer (Rosenberg and Shavell 2006; Sherwyn, Tracy, and Eigen 1999). Statutes providing for one-way fee shifting (for prevailing plaintiffs only) have improved access for particular claims but without fundamentally altering the picture.

We came to this state of affairs, in part, because our legal culture is very much enamored of the courts. Over a century ago, De Toqueville wrote about the American's penchant to turn all interesting political and policy questions into legal questions. American attitudes in this regard have not changed. Americans like the ideal of an assumedly impartial judicial system adjudicating disputes that they are unable to resolve on their own (Merry 1990; Merry and Silbey 1984). The jury trial is an important component of the American ideal of justice and procedural fairness. Courts also play an extremely important role in providing a bastion against the power of the state, and for this reason have found favor on both the left and the right.

B. DECLINING UNION REPRESENTATION

A second important factor is that American regulation of the employment relationship started first with "labor law," i.e., workers' collective rights to representation and collective bargaining, before it turned to "employment law," i.e., workers' individual rights under contract, various statutes or regulations. This occurred in part because early efforts at legislated improvements were overturned by courts, and organized labor developed a philosophy of "voluntarism," of looking for lasting improvements in the welfare of their members through collective action and contract (Estreicher 2010b; Tucker and Mucalov 2010).

At a time when U.S. labor unions represented one-third of all workers in private companies, and many non-union companies seeking to avoid union campaigns felt compelled to replicate the compensation, benefits and working conditions (including grievance procedures) obtained in the unionized sector (Ewing 1989), it made sense to think of the U.S. employment adjudication system as grounded principally in the grievance and arbitration process provided jointly by the employer and union or, in non-union shops, by the employer alone.

This model of union-based workplace representation has some attraction. The costs of the system were shared by employers and unions. The familiarity of the union with collective bargaining agreements it negotiated – not only the text but also the bargaining history and the practices of the parties under the agreement – made it an efficient, low-cost provider of representational services. Unions often used their business agents, rather than lawyers, to represent them before arbitrators when workplace disputes arose. Arbitrators also understood that the labor union, even more than the employer, was an institutional repeat player likely to represent employees and be involved in choosing arbitrators for future disputes and other parties as well. A high premium was placed on informal resolution; often grievances were resolved in the less formal early steps of

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grievance procedures and never escalated to arbitration. Particularly difficult cases might be subject to a non-legal resolution via continuation of the bargaining process between the parties.

Yet not all was perfect with the union-based model. The union's integrative role in representing employees in rights disputes was invariably accompanied by a redistributive role in seeking wages and benefits not paid by competitors (Estreicher 2009). Historically, unions affiliated with the railroad crafts and building trades barred African-Americans from membership and the better jobs – leading to a judicially created duty of fair representation (Malamud 2005). Even when unions actively support non-discriminatory policies, they have difficulty mediating claims of groups of workers where those claims cannot be easily resolved by a rule favoring length of service in the particular department or the particular employer (Kleiman and Frankel 1975). This may be part of the reason unions generally are reluctant to overtly assert claims of racial or other discrimination even where the labor agreement authorizes such claims. Indeed, even if there are no issues of discrimination or other concerns of dividing workers into factions, the fact that a given grievance or arbitration could have significance for other workers and other possible disputes might in some cases work to the benefit of all unit workers but in other cases could lead to "horsetrading" resulting in the sacrifice of valid claims ostensibly for the greater good (Summers 1977).

C. THE RISE OF EMPLOYMENT LAW

Perhaps through much of the first six decades of the twentieth century, many laws enacted to regulate the workplace assumed an ongoing role for union representation and collective bargaining (Kochan, Katz, and McKersie 1986). But unions and collective bargaining have faded instead of flourishing. As unions have declined as a force within the private sector (a slide that began in earnest in the mid-1970s), the civil rights movement of the 1960s prompted the enactment of important state and federal legislation giving individual worker rights to sue employers (and unions) for discriminatory employment decisions. State courts followed suit with new causes of action challenging certain employer actions. In short, Employment Law has come to displace Labor Law as the dominant feature of legal regulation of the workplace (Piore and Safford 2006).

Unions remain important forces in government offices and continue as collective bargaining agents in several important private industries, such as hospitals, big-city construction, film and television, and trucking. But the system of collective bargaining agreements with progressive discipline, "just cause" provisions, and grievance systems culminating in final, binding arbitration is not the common experience of most American workers. And even where unions are present, they remain reluctant to assert discrimination and other statutory claims, preferring to rely on purely contractual grounds that pose less of a danger of dividing workers. (This may change with the Supreme

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Court's 2009 *Pyett* decision, which authorizes the parties to a collective bargaining agreement to negotiate a binding arbitration process in lieu of lawsuits even for statutory discrimination claims (Cummins and Seiler 2010)). With the emergence of individual rights as the primary building block of workplace regulation, not surprisingly, employment rights enforcement has almost entirely shifted away from the tripartite model of collective representation to reliance on legal advocacy on an individual basis (Piore and Safford 2006).

One question about this shift is whether an effective rights-based adjudicatory system requires (at least from the employees' perspective) some measure of institutional power – the employees' ability to impose significant costs of disagreement on the employer to secure their objective without expending resources on case-by-case adjudication. When union representation was the dominant model of dispute resolution, employees derived institutional power from the unions. The union presence enhanced the leverage of workers with low-dollar value claims, and introduced, or brought to the surface, the risk of extra-legal disputes that might create serious industrial unrest if left unaddressed. Even where the courts sought to channel rights disputes into the contractual grievance and arbitration process, the threat of a work stoppage or of recurring difficulties on the shop floor created a powerful disincentive for employers to persist on a course of conduct opposed by the union.

By contrast, in a workplace without union representation, employees have much less institutional power. Where the employee does not have significant individual bargaining power, his or her sole legitimate means (as distinguished from illegitimate means such as sabotage or neglect of duties) of imposing costs of disagreement on the employer is the threatened claim to sue the employer. That claim is not likely to be asserted by incumbent employees who fear employer retaliation (Eigen 2008). Rather, it is asserted, if at all, only by former employees (Donohue and Siegelman 1991). Even if we assume that the actions of former employees are likely to have important feedback effects to influence the relationship between current employees and the employer (Estreicher 2010a), the individual-rights model has some obvious deficiencies. First, employees are not likely to obtain competent counsel for their retail claims. Second, the damages the employee might be able to levy against the employer are, for all practical purposes, tied directly to how much money the employee earns, suggesting that the prospect of a damages recovery, standing alone, is not likely significant to influence employer behavior. Finally, for all employees, regardless of earnings, there is no institutionalized means of bringing lawful non-legal pressure to bear on the employer.[1]

There are long-standing debates in the industrial relations literature implicated by these results and this chapter more broadly. For instance, is workplace conflict inevitable or is it something that may be reduced so that it becomes functionally nonexistent? John

[1] Although certainly not an institutional means, one could argue that the increasingly available and low-cost option of publicizing information about employers via electronic outlets in real time presents a growing lawful, non-legal way of bringing pressure to bear on an employer. However, there are numerous limitations to this mechanism. For instance, many employers are not in the public eye and are not worried about their public reputation.

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R. Commons and Karl Marx disagreed on this point. Commons believed that conflict is naturally occurring in the workplace, as it is a function of the division of labor. It therefore requires accommodation, but no ultimate solution that resolves to some utopian result; conflict is an ongoing part of work (Commons, Saposs, Sumner, Mittelman, Hoagland, Andrews, and Perlman 1946). Marx believed that there is no way of regulating conflict in an equitable or effective way via the law. He posited that conflict is a precursor of revolution stemming from the discord between labor and those who control the means of production and distribution. This chapter, we note, takes the view held by Commons that conflict is naturally occurring in the structure of work, and the law has a role to play in helping manage it effectively.

A related debate provoked by the rise and current dominance of the individual-rights model for adjudicating workplace disputes is the question of whether employee "voice" is important. Voice is the decision to complain about a condition or engage in individual or group activity to bring actual and desired conditions closer together, rather than to exit from the firm (Hirschman 1970). Both voice and exit are alternative mechanisms for mediating conflicts between workers and their employer. Unions are conduits for employee voice for employees with a diminished exit option; the focus of their efforts are the "inframarginal" workers, i.e., those with little ability to exit the firm because their compensation, job security or other benefits are tied to length of service or because they have put down roots in the local community (Freeman and Medoff 1984). Other theorists define voice as the ability to have meaningful input into decisions, and argue that voice is an "intrinsic standard of participation," meaning that it is an important end in itself for "rational human beings in a democratic society" (Budd 2004: 13). For Budd, Clegg (1975), and other Institutionalists like Commons, voice is an essential part of a vibrant, pluralist democracy. By contrast, for writers from the Human Resource Management (HRM) perspective, voice is seen more in instrumental, functional terms, perhaps closer to Hirschman's. For these scholars, voice is nice, but not a necessary and important component of a viable workplace relations system, and therefore should not factor heavily into a normative discussion of how workplace rights disputes ought to be adjudicated. This view would suggest less of a focus on procedural fairness and perceived fairness. In any event, employee unwillingness to reveal true preferences in part because of fear of employer retaliation and legal strictures against non-union representation make it difficult to design a significant employee voice mechanism in a non-union environment (Dunlop 1958; Estreicher 1994; Leibowitz 1998).

The current rights-based litigation system evolved out of the prior collective, labor-management system for adjudicating workplace disputes. The two parallel systems remain intact, although individual rights are now the dominant mode of dispute resolution. The rights-based litigation system is not an efficient means of resolving non-legal disputes or establishing new rules for regulation, because the system is almost entirely predicated on *legal* rights. It is slower and costlier than the collective method, allocating many of the costs of its administration to taxpayers and incurring the avoidable costs of an outside bureaucracy. It also lacks the intimate knowledge of industries' peculiarities, and flexible specialization of the "law of the shop" (Wheeler, Klaas, and Mahony 2004). Some argue that the current system's lack of pluralistic, democratic

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employee voice carries significant negative implications and costs in terms of loyalty, productivity, and other important metrics (Kochan, Katz, and McKersie 1986).

But even if individual-rights litigation is viewed exclusively as a system for resolving rights disputes, access costs reduce the likelihood of a hearing on the merits in most cases. It is extremely difficult to obtain competent lawyers to represent even indisputably wronged employees who are not paid enough to warrant the attention of competent counsel (Sherwyn, Tracy, and Eigen 1999). In effect, the current system sets different de facto standards of legal compliance for employers of low-wage earners versus high-wage earners. Lastly, the current system is better suited for terminated relationships, but relatively ill-suited for resolving disputes occurring in ongoing relationships (Eigen 2008). Essentially, the individual-rights system is analogous to divorce proceedings, but does very little in the way of counseling couples interested in staying together.

Admittedly, there are some clear advantages to the individualized rights-based model. Most of these advantages are based on the comparable advantage of judges and juries deciding employment matters. For instance, interpretation of the laws is relatively consistent because judges bound by precedent tend to interpret the law consistently across industries, employers and fact patterns. Significantly, the adjudicators (judges) are not chosen by the parties. This lends transparency to the process and reduces (if not eliminates) the oft-cited disadvantage of arbitration as a means of resolving employment disputes—the so-called, "repeat-player effect" (Estreicher 1990). On the other hand, a number of studies raise the question whether judges are unfairly biased against discrimination claimants (Clermont and Schwab 2009).

The way the current litigation system seeks to advance the claims of groups of employees is the class-action lawsuit. Proponents of this method of adjudicating workplace rights disputes make two empirical claims for it as a superior means of resolving disputes, particularly as compared to arbitration. First, some assert that class actions will afford relief to plaintiffs with claims that are too small to justify being brought individually. Second, it is argued, class actions provide an important means of enhancing employer compliance by reducing employers' abilities to benefit by delaying and forcing numerous plaintiffs to reprove the same facts or relitigate the same issues. The jury is still out on whether these claims are invariably true. The too-small stakes-to-warrant-individual-resolutions claim may be true of certain wage and hour disputes, but the estimated individual recoveries in other types of cases suggest they would justify the assertion of individual claims in an appropriately designed low-cost arbitral forum (Estreicher and Yost 2009). Others question whether the class action is really the optimum means of eradicating discrimination or even addressing most of the rights-based problems in the contemporary workplace (Nielsen, Nelson, and Lancaster 2010).

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D. THE DIMINISHED SIGNIFICANCE OF THE ADMINISTRATIVE AGENCY

The original conception of U.S. lawmakers (evidenced, for example, in the Fair Labor Standards Act of 1938) was that while there might be a modest role for the private lawsuit, the primary enforcement drive would come from a specialized administrative agency knowledgeable about the particular issues in a given industry and able, without regard to the earning power of the affected employees, to obtain not only recovery for the employees but also systemic relief capable of deterring future violations. Administrative agencies could also provide a special adjudicatory forum (evidenced, for example, in the National Labor Relations Act of 1935) that did not rely on the courts and would be less formal and forbidding to ordinary workers and their representatives.

Although administrative agencies continue to play an important role, the legislation of the 1960s and on has largely displaced the agency as the principal enforcers and adjudicators in favor of the private lawsuit and the courts. This has occurred in part because administrative agencies operate under significant budgetary restraints, which become even more limiting when government is controlled by opponents of the underlying legislation. Courts, on the other hand, operate under budgets that are not tied to particular legislation, and hence are less likely to come under the budgetary scrutiny of opponents of the legislation. There are also questions of public administration that suggest that agencies are not likely to be able to recruit and retain quality personnel to handle efficiently and fairly retail disputes. Like the class action plaintiff bar, the administrator is likely to focus on high-profile "impact" cases rather than address the needs of most workers.

E. THE CHALLENGE OF EMPLOYER-INITIATED ADR

Paradoxically, the costs of the litigation system, coupled with fear of jury trials and class actions, have prompted many employers to unilaterally adopt systems of alternative dispute resolution (ADR) and other strategies for addressing rights-based workplace conflict such as Human Resource Management (HRM).

Generally speaking, ADR often includes two components: mediation and arbitration. Some programs combine both, some use one to the exclusion of the other. Several surveys of participant experience with private mediation and arbitration show high levels of participant satisfaction (Lipsky and Seeber 2006; Lipsky, Seeber, and Fincher 2003). Introduction of an informal internal process or mediation before arbitration tends to increase participant satisfaction (Bendersky 2003). A strength of employment mediation in particular is that it can help bridge power differentials, offering employees a useful mechanism to get their employer to listen to them, and enabling the parties to explore innovative solutions (Carnevale 1986; Moore 2003). Third-party assisted mediation can reduce barriers to conflict resolution by avoiding some of the

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perils of dyadic negotiations such as escalation of commitment and conflict spirals (Brett, Shapiro, and Lytle 1998; Lewicki, Weiss, and Lewin 1992).

Employment arbitration is the more controversial of the ADR components. Several studies to date have reported on outcomes in arbitrations conducted under the auspices of the American Arbitration Association (AAA). The positive side is that arbitral proceedings are a good deal quicker than litigation, employees are more likely to proceed pro se to hearing than they would in court, and claimants are more likely to obtain a hearing despite lower salaries than plaintiffs in employment litigation. On the other hand, claimant win rates and median awards in arbitration tend to be lower than plaintiff win rates and awards in court actions (Colvin 2010; Sherwyn, Estreicher, and Heise 2005). Sound comparisons between arbitration and litigation are difficult to make, however, because different types of cases and claimants may end up in arbitration than those engaged in litigation. Moreover, the intensive screening process that goes on during litigation suggests a more substantial winnowing-down process than occurs in arbitration. In addition, cases are more likely to go to hearing in arbitration irrespective of merit than would be true of the more expensive, more formal litigation process (Sherwyn, Estreicher, and Heise 2005; Sherwyn, Tracy, and Eigen 1999). Because the overall story is positive from the employee standpoint, some prominent early critics have reassessed their views of employment arbitration (St. Antoine 2008).

A persistent criticism of employment arbitration is the so-called "repeat player effect" – that is, because employers are likely to face several claimants in the process, they will fare better than a single claimant who is a one-time player (Bingham 1997). As a later study suggests (Bingham and Sarraf 2004), the effect disappears when certain minimum rules of fairness, such as the widely adopted "Due Process Protocol," are observed. The repeat-player effect is, in any event, irrelevant to the present discussion because it simply reflects the advantages that large employers would have under any system, arbitration or litigation (Colvin 2010; Galanter 1974). Whatever reputational and informational benefits the employer has are largely mirrored on the claimant side by the organized plaintiff employment bar (Estreicher 1997; Estreicher 2001). A claim that does point to a possible systematic advantage for employers is the "repeat arbitrator effect" – that is because the same arbitrator will be appearing in more than one dispute with the employer, that arbitrator might be inclined to give close calls to the employer (Colvin 2010). If this is a real problem, it may be readily addressed by requiring more transparency of arbitrators' past clients, or by changes in the rules of arbitration service providers requiring notice of, and perhaps a default rule barring, such reappearance (at least in the absence of the mutual consent of the parties).

Other research challenges head-on that employers are unfairly and systematically favored by neutral third parties in employment ADR over employees (Sherwyn, Tracy, and Eigen 1999; Wheeler, Klaas, and Mahony 2004). These researchers maintain that arbitrators tend to be retired judges and other long-time practitioners with interests in maintaining their established reputations for integrity and neutrality. Also, arbitrators are jointly selected by both sides. They are often not selected by employers or employees, as such, but by the legal counsel representing each party; lawyers are the real repeat players.

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As with the selection of labor arbitrators in a unionized context, each side's counsel is able to vet arbitrators based on available information. This system of bipartite selection reduces or eliminates the repeat-player effect when both employer and employee are represented by counsel.

Another criticism of employment arbitration is that it is being used by employers to immunize themselves from the deterrent effect of class actions (Gilles 2005). Until the Supreme Court got involved first reading silence in arbitration agreement as authorizing classwide arbitration and more recently reversing the presumption, arbitration was not commonly associated with class claims. Under the Court's recent *Stolt-Nielsen* (2010) ruling, employers have no need of express provisions purporting waive arbitrator authority to hear class claims. The Court will still, however, need to resolve whether employees covered by an otherwise binding arbitration agreement cannot be named representatives of, or otherwise participate in, a class action where the federal statute in question indicates a legislative policy favoring the class action mechanism for claims under that statute. The question would be whether in the context of a particular statute, the class action vehicle is a nonwaivable substantive feature of statutory scheme rather than a procedural device providing economies that can be effected by other means.

The overarching rule is that employer-provided employment arbitration involves a change of forum – certainly, the loss of a civil jury trial – but no change in the substantive rights of employees (*Gilmer* 1991). Although some employers still try, most employers understand that the arbitrator has to apply applicable law and award legally available remedies if violations are found.

In addition to ADR, Human Resource Management ("HRM") is often included in the array of models for reducing and resolving workplace disputes (McCabe and Lewin 1992). HRM is construed broadly here to encompass work practices that emanate from the philosophy of conflict-avoidance at the workplace. As Kochan, Katz and McKersie put it, the aim of HRM is to "increase the participation and involvement of individuals and informal work groups so as to overcome adversarial relations and increase employee motivation, commitment, and problem-solving potential" (1986:147). Examples of HRM practices aimed at reducing and resolving workplace conflict include quality of working life (QWL), quality circles (QC), employee involvement (EI), labor-management participation teams, and high-performance work systems (HPWS). As demonstrated by several empirical studies, these measures tend to have either a neutral or slightly positive effect on firm productivity, and a positive effect on employee attitudes, grievance and absenteeism rates (Freeman and Kleiner 2000; Godard and Delaney 2000; Kochan, Katz, and McKersie 1986). Similarly, Spencer (1986) found a positive relationship between hospitals' adoption of HRM strategies like employee-management meetings, counseling services, ombudsman services, question and answer programs and survey feedback and employee satisfaction and high retention rates. Relying on British data, Bryson, Willman, Gomez and Kretschmer (2007) have demonstrated a similar, positive correlation between HRM and several key measures of reduced workplace conflict.

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HRM does not itself supply a forum for adjudicating rights disputes but, like a well-functioning mediation, "open door," or ombudsman process (Rowe 1997), it helps create a supportive environment to promote employee acceptance and utilization of the ADR system. It may also help identify and rectify causes of disputes before they blossom into more serious affairs (Ichniowski, Kochan, Levine, Olson, and Strauss 1996). The strength of such systems ultimately rests on the degree to which employees are aware of their surroundings, identify themselves as individuals committed to their jobs and their employers, and employers make reciprocal commitments to their employees. Because HRM is likely to take root where the employment relationship is one of mutual trust and dependence, it is not surprising that positive employee attitudes toward HRM practices correspond with greater employee satisfaction and pluralistic democratic participation in work (Rusbult, Farrell, Rogers, and Mainus 1988).

PART II: PROPOSED REFORM

A. IMPROVEMENTS NOT REQUIRING LEGISLATION

1. AN UPDATED DUE PROCESS PROTOCOL

In thinking of how to improve the current system, the initial focus should be on making improvements that do not require new legislation, which is politically difficult to achieve. On such important first step is to build on the 1995 task force representing employer and employee representatives and arbitration service providers that promulgated "A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship" (Bales 2005; Dunlop and Zack 1997). The Due Process Protocol has been widely adopted by companies and, importantly, is used by the AAA and JAMS to screen the kinds of employer-promulgated ADR programs they are willing to administer.

As it has been fifteen years since its promulgation, the time is ripe for an updating of the Protocol, to capture the issues that have become salient in the interim. Everyone is going to have his or her own favorite list, but provisions rejecting employer-promulgated changes in the applicable limitations period and available statutory or contractual remedies should be featured. Also, employees should not be required to pay forum or arbitrators fees if the arbitration is pursuant to an employer-promulgated agreement or program; the most that an employee should have to pay would the equivalent of court costs. In addition, the Protocol should develop tightened disclosure standards to require potential arbitrators to disclose any prior decisions or other ties involving the same employer or its representative or employee or his or her representative. The AAA has begun publication of its awards in redacted form. The revised protocol might state that such publication should be required as a condition of judicial enforcement. Such an admonition would not be binding on the courts, but would help promote best practices and may influence judicial standards (*Cole* 1997).

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The Equal Employment Opportunity Commission (EEOC), which enforces federal antidiscrimination in employment laws, and other federal and state agencies, should consider adopting a policy of abstaining from investigating any charge in which the charging party is subject to an arbitration agreement that complies with the revised Due Process Protocol. The agency would not be forswearing jurisdiction but, rather, deferring its process until completion of the ADR process. After an award has been rendered (and possibly after it has been confirmed), the agency might dismiss the charge (or under certain statutes, issue a right-to-sue letter) if it approved the process and the result or bring an enforcement action if it found serious fault with either (*Waffle House* 2001; Estreicher 1990).

Work should be done, perhaps as part of the Protocol revision process, to facilitate research on employment ADR. For example, a tracking system should be implemented by the AAA, JAMS, and other participating arbitration service organizations to obtain data on the income of the claimant, whether the claimant is represented, whether the claimant had to go through some earlier process, such as mediation, before invoking arbitration, if the case settles (and for which relief), length and nature of any discovery. All of this can be done in a manner that preserves the anonymity of the parties.

2. PRO SE REPRESENTATION

The major challenge for any ADR system is to reduce costs and complexity so that pro se claimants are able to participate meaningfully on their own in the adjudication. However, pro se representation runs the risk of reducing the levelness of the playing field. Perhaps as part of the revised protocol, any forum fee (to be paid by the employer) could pay for provision of a staff facilitator to help pro se claimants with pleadings, discovery notices and even play advocacy roles under certain conditions. Some companies have provided an employee insurance benefit that helps pay some of the costs of representation. An effort also should be made by adherents to the Due Process Protocol to interest pro bono offices of major law firms and clinics of major law schools to undertake the representation of relatively low-salaried claimants in the ADR process. Unions also should consider playing a greater role in supplying representation.

B. LEGISLATED IMPROVEMENTS

On the legislative front, we oppose current efforts in Congress to amend the Federal Arbitration Act to prohibit predispute arbitration agreements (Rutledge 2009). At least if applied in the employment context, this is a case of throwing out the baby with the bath water, as first argued more than a decade ago (Sherwyn, Tracy, and Eigen 1999). Employment arbitration, if it is properly structured and regulated, improves the likelihood that employees, and most especially those who are relatively low-paid, will be able to obtain an adjudication on the merits of their rights disputes with the employer. Abolition

of employment arbitration simply relegates those employees to the courts to fare as best they can on their own in a complex, formal litigation environment (Landsman 2008).

Any law prohibiting predispute arbitration also effectively dulls the incentive of employers to provide for employment arbitration in the first place because from an ex post perspective (i.e., after the dispute has arisen) only those claims not likely to attract lawyers will seek arbitration; the claims attracting lawyers will pursue litigation. Employers are not likely to provide for employment arbitrations in such circumstances. However, from an ex ante perspective (i.e., before any dispute has arisen), employers have an incentive to provide arbitration for most employees because the employer cannot predict which claims will secure counsel and go to court and which claims will not. Ex ante, a predispute arbitration process creates benefits for the vast majority of claimants at the expense of the few "Cadillac" claims that prosper in the current system (Estreicher 2001; Estreicher 2005; Sherwyn, Estreicher and Heise 2005).

Legislation abolishing predispute employment arbitration would not, of course, preclude employer-promulgated mediation programs. Even if mediation is required as a condition of employment, most claimant representatives will agree to mediation if the relevant statute of limitation is tolled. Although some employers rely on mediation alone (Malin 2004), the question is whether most employers will be willing to pay for the costs of mediation if they cannot preclude a lawsuit in most cases. We believe most will not.

Public policy considerations are often raised in support of a prohibition of mandatory predispute arbitration. The concern is that because the current litigation system relies extensively on the initiative of private parties, to the extent private arbirtration displaces litigation, society will lose the benefit of rulings that make a significant contribution to the elaboration of public law. This point is not without merit but is overstated. Much of private litigation results in private settlements not public rulings. Moreover, the loss to public law is mitigated by a requirement that arbitration awards be published (as is currently the case for employment arbitration awards under the AAA's auspices) and by the enhanced ability of administrative agencies -- not bound by private arbitration agreements (*Waffle House* 2002) and freed of retail claims by arbitration -- to bring systemic litigation.

Based on what is practically and politically feasible as of this writing, employer-promulgated ADR should be the basis of an employment adjudication system that supplements the work of courts, administrative agencies and, in the union sector, the grievance and arbitration process. We say this because unless adequate resources are provided to administrative agency adjudicators or courts to handle responsibly the vast increase in self-represented employee claims – which we think unlikely—the appropriate legislative response even for critics of employer-promulgated ADR is to develop safeguards that help minimize their legitimate concerns without driving employers to abandon the process entirely.

If we were starting from scratch, we would be inclined to consider a system similar to Great Britain's. In the United Kingdom, complaints are initially referred to the

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Advisory, Conciliation and Arbitration Service (ACAS) for attempted conciliation. If unresolved, complaints are heard by tripartite industrial tribunals. Employees with less than fifty-two consecutive weeks of work are exempted from general statutory protection against unjust dismissal. The burden is on the employer to show a legitimate reason for the discharge, such as misconduct. The law has been interpreted to require only good faith and reasonable belief, not that the employee in fact committed the infraction (Estreicher 2008). Unsatisfied employees may appeal tribunal decisions to an Employment Appeals Tribunal ("EAT") and to courts of law for questions of law. While reinstatement is a possible result, employees tend to prefer a monetary award (doubled where an order of reinstatement is rejected by the employer). Wrongful dismissal awards are subject to a statutory cap; discrimination awards are not. These awards tend to be modest—certainly by U.S. standards (Estreicher 2008).

The UK approach started as a wrongful dismissal statute and over time also assumed adjudicatory authority over discrimination claims. The UK system mixes government-supplied mediation services with a tripartite government-funded, public adjudication. The system supersedes any common law cause of action for breach of the employment agreement and employment statutes; employment disputes that go to the regular civil courts are limited to libel and slander, certain torts and claims for injunctive relief for breach of restrictive covenants. Class actions are not authorized.

There may be some institutional features of the UK approach that are difficult to replicate here. One such feature is the tripartite adjudicatory structure used in England. With our low union density in private companies and the fact that employers tend not to form representative associations in the employment law field, it will take some ingenuity to develop a regularized procedure for selecting employer- and employee-side adjudicators.

The more difficult question is whether there is any political will to adopt something like the UK system. Lawyers representing employees would not necessarily oppose such legislation if they could remove all caps on recovery and retain their ability to bring lawsuits (including class actions) in the courts. Employers might support such legislation, if it did not include abolition of employment at-will and there was some institutional guarantee of modest awards of the UK variety. Most employees, we believe, would be best off under the UK approach but we cannot get there politically. Therein lies the dilemma for law reform.

We do believe, however, that working with what is in place at many companies, much can be done to improve employer-promulgated ADR to pick up many of the desirable features of the UK approach but in an American flavor responsive to U.S. legal and popular culture.

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