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Birth of Contract: Arbitration in the Non-Union Workplace

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BIRTH OF CONTRACT: ARBITRATION IN THE NON-UNION WORKPLACE

SID L. MOLLER*

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I. INTRODUCTION

While some of the divergent aspects of employment practices in union and non-union workplaces have diminished in recent years, one of the more conspicuous and enduring distinctions relates to the constraints under which employers operate when terminating employees. For employers with a unionized workforce, contract duties as set forth in a collective bargaining agreement are, of course, central to decisionmaking. On the other hand, apart from statutory restrictions, non-union employers have customarily made decisions regarding employment terminations in accordance with self-enforcing norms.¹ While some exceptions to the employment-at-will rule have arisen in the last couple of decades, non-union employers still enjoy considerably more discretion with personnel decisions than do union employers. Employment arbitration, if widely adopted, could result in a convergence of union and non-union employment practices.

Many employers of non-union employees are indeed embracing arbitration to resolve workplace disputes.² This growing use of arbitration is a significant

1. One knowledgeable of the intricate regulation of the workplace might scoff at the notion that non-union employers are guided by “self-enforcing norms” rather than the law. The statement relates only to the termination of at-will employees, which has itself become rather complicated in recent years. For a discussion of recent developments in employment-at-will law, see *infra* Part II.B.

2. See R. Bales, *A New Direction for American Labor Law: Individual Autonomy and the Compulsory Arbitration of Individual Employment Rights*, 30 HOUS. L. REV. 1863, 1912 (1994); Tia Schneider Denenberg & R.V. Denenberg, *The Future of the Workplace Dispute Resolver*, DISP. RESOL. J., June 1994, at 48, 48-49; David Lewin, *Grievance Procedures in Nonunion Workplaces: An Empirical Analysis of Usage, Dynamics, and Outcomes*, 66 CHI-KENT L. REV. 823, 824 (1990); Evan J. Spelfogel, *Legal and Practical Implications of ADR and Arbitration in Employment Disputes*, 11 HOFSTRA LAB. L.J. 247, 269 (1993) (noting American Arbitration Association survey results); Leslie Kaufman & Anne Underwood, *Sign or Hit the Street*, NEWSWEEK, June 30, 1997, at 48. The adoption of arbitration by employers of non-union employees is in part related to a more general infatuation with ADR processes. In this regard, commentators have noted that:

The 1980s—a decade which will undoubtedly be remembered as a decade of great transitions—witnessed the serious development of the Alternative Dispute Resolution (ADR) movement. A host of reasons, including

development for two reasons. First, it signals the end of an era. Traditionally, non-union meant “non-legal”—a situation that more often than not was beneficial to employers, but in some aspects was advantageous to employees as well. While a variety of reasons might motivate employers to adopt arbitration, one of the most influential is a perception that the law has invaded and even overwhelmed the workplace; in other words, the fact that employers are ceding authority to third parties indicates a belief that the status quo involves an even greater risk, because non-union no longer means non-legal.³ Thus, on one level, adopting arbitration merely acknowledges a *fait accompli*, an acquiescence to the reality of a law-centered workplace. Second, by establishing arbitration as a common method of dispute resolution, employers are laying the groundwork for further change of a profound nature. The process would have a minimal impact on the substantive nature of employer duties and employee rights if it involved only statutory claims; but it will encompass more than that. Over time, employment arbitration will act as a magnet for an assortment of legal theories. The recognition of these claims, and the articulation of the theories supporting the claims in arbitration decisions, will lead to the functional equivalent of detailed contracts. Moreover, while the recognition of certain substantive rights of employees will be the more obvious result of this development, changes to the present state of affairs regarding procedural obligations should also be momentous.

Part II of this Article analyzes certain attributes of the non-union employment relationship by developing a picture of the traditionally governed non-union workplace and showing the effect of recent legal developments. Part III explains how certain factors inherent to the arbitration process and the employment relationship create a receptive climate for the emergence of contract. Part III begins by describing the employment arbitration process, including a discussion of its parallels to labor arbitration, and considers the

congested court dockets, a search for a “warmer way of disputing,” and a desire for increased party participation or use of community values, contributed to the ever increasing popularity and advocacy of Alternative Dispute Resolution.

Susan A. Fitzgibbon, *The Judicial Itch*, 34 ST. LOUIS U. L. J. 485, 485 (1990) (footnotes omitted); see also S. Gale Dick, *ADR at the Crossroads*, DISP. RESOL. J., Mar. 1994, at 47, 47 (analyzing the general growth trend of ADR).

3. Arbitration is, of course, a form of alternative dispute resolution. In the context of this Article, it should be emphasized that arbitration must ultimately be evaluated by comparison to full-scale litigation in the courts, and not to the informal mechanisms of dealing with workplace conflict, which tend to be the norm in non-union establishments. While this point may be somewhat elementary to some, it is noteworthy because others may consider it counter-intuitive. For example, employers may be inclined to consider the introduction of arbitration in a non-union environment as a dramatic innovation which obviously gives employees substantially more rights than they previously enjoyed. However, with such an appraisal, employers may overlook, or at least underestimate, the external pressures to provide a process which in some important ways mirrors the legal system that they hoped to avoid. The point is that arbitration will make the workplace more law-centered despite the absence of courtrooms.

peculiar challenge that employment arbitrators will face in contract disputes relating to agreements that are, at best, incomplete in their coverage. Part III also discusses the “highly relational” aspects of employment. Finally, Part IV outlines the manner in which both procedural and substantive rights for non-union employees could eventually emerge as a result of disputes being resolved in the arbitration forum. The ultimate conclusion is that a variety of influences will lead to the establishment of a *de facto* contract with something akin to “minimum standards” for employers that utilize arbitration.⁴

A word regarding the fact that this Article principally addresses disputes relating to wrongful discharge is in order. Managing a workforce involves decisionmaking across a wide spectrum of issues, including such matters as scheduling overtime, disciplining employees, assigning work, selecting personnel for layoffs in workforce reductions, designing compensation packages, and transferring employees. Comprehensive restrictions on employer discretion in the collective bargaining agreement permit unions to challenge decisions in these and many other areas. A non-union employer might also voluntarily allow employees to contest its decisions on many of these issues by agreeing to submit disputes to arbitration. Nonetheless, this Article focuses upon employee dismissals. Although employment arbitrators may consider other types of disputes on a fairly regular basis (a prime example being the imposition of severe disciplinary sanctions short of discharge), the most critical area of development will relate to wrongful discharge, at least for the first generation of employment arbitration cases. Moreover, many of the points made in this Article relating to employee dismissals generally apply to other types of grievances.

II. THE EMPLOYMENT RELATIONSHIP IN THE NON-UNION WORKPLACE

Why are employers turning to arbitration now? And why did they not begin to pursue this option twenty-five or even ten years ago? Two factors explain the current attitude toward arbitration. One is the tremendous expansion of individual rights for non-union employees. The other is the Supreme Court’s deference to the arbitration of statutory claims, most notably in its decision in

4. The following article deserves mention at this point: Stephen L. Hayford & Michael J. Evers, *The Interaction Between the Employment-At-Will Doctrine and Employer-Employee Agreements to Arbitrate Statutory Fair Employment Practices Claims: Difficult Choices for At-Will Employers*, 73 N.C. L. REV. 443 (1995). Although Hayford and Evers have a different focus, the central thesis of their article has close parallels to this Article. Most importantly, they predict that if non-union employers submit fair employment practice disputes to arbitration, a *de facto* contract could emerge which would embrace a wide range of employment practices. As will become clear, this Article is similar in some regards (for example, it is asserted that a “*de facto* contract” will likely emerge), but it focuses on different reasons for the emergence of a contract. Nonetheless, both Hayford and Evers warrant credit for their initial treatment of this topic, which the author acknowledges.

*Gilmer v. Interstate/Johnson Lane Corp.*⁵ This Part begins with a description of employee relations in the traditional workplace and then discusses subsequent developments that have fundamentally changed the non-union employer-employee relationship. The Supreme Court's deference to arbitration is discussed later in the Article.⁶

A. *The Traditional Workplace: Employee Relations in the Shadow of the Law*

The law played a decidedly unobtrusive role in the traditional workplace.⁷ To the extent that the law determined disputes relating to employee dismissals, the resolution was relatively simple and, for the most part, one-sided in favor of employers. But employee relations in a traditional workplace are much more complex than the legal rules alone might indicate. Other significant, non-legal restrictions on the exercise of employer discretion exist in the shadow of the law.⁸ The purely legal constraints will be discussed first.

Considering the law of commerce and trade from a historical perspective, Lawrence Friedman has noted that, "Contract as a branch of law can best be called residual; it dealt with those areas of business life not otherwise regulated. Its cardinal principle was permissive: agreements should be given whatever effect parties meant them to have."⁹ Prior to New Deal legislation, scarcely any governmental regulation of the employment relationship existed.¹⁰ In this context, the principle of permissiveness meant that the balance of economic power shaped the employment relationship. In theory, employers and employees had the opportunity to negotiate terms that provided employees with significant protections against being fired for malicious or arbitrary reasons. Given this framework, the employment-at-will doctrine was extremely important because it established the default rule. Absent an agreement to the

5. 500 U.S. 20 (1991).

6. *See infra* Part IV.A.2.

7. One could speak in the present tense here because significant characteristics of the "traditional workplace" persist in certain jurisdictions, primarily those in which the legislature and judiciary have been less than aggressive in expanding the legal rights of individual employees. However, because the traditional workplace in its purest sense no longer exists anywhere in the 1990s, I will refer to it in the past tense. *See generally* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 553-63 (2d ed. 1985) (chronicling increasing regulation in the United States).

8. The "shadow-of-the-law" concept has more than one meaning. For example, some have used the phrase to emphasize the absence of governmental intervention. *See* Richard E. Speidel, *Afterword: The Shifting Domain of Contract*, 90 Nw. U. L. REV. 254, 259 (1995). According to Speidel, the arbitration process itself exists in the shadows because the government is only marginally involved. However, as used in this Article, the shadow of law pertains more to the adherence to self-enforcing, non-legal norms than to the absence of governmental intervention. Although the two perspectives overlap, they are not quite the same.

9. FRIEDMAN, *supra* note 7, at 276.

10. *Id.* at 553-63.

contrary, employers were free to fire an employee in accordance with the employment-at-will mantra from landmark decisions of the nineteenth century; that is, “for good cause or for no cause, or even for bad cause.”¹¹ Consequently, if the employee failed to extract any concessions, the employment-at-will doctrine established the terms of the parties’ agreement or contract.

Whatever privileges employees theoretically enjoyed, in practice they rarely altered the status quo. The right of employers to terminate employees at will established the parties’ agreement, but only in a technical sense. The terms of such a contract did not reflect matters upon which the parties consciously assented, nor were they indicative of a true “meeting of the minds” between employer and employee.¹² Instead, these contracts did nothing to alter the rights enjoyed by the employer by virtue of prior court rulings. In essence, these court-sanctioned, employer rights comprised the contract terms because employees failed to negotiate a contract that imposed significant restraints upon employers. This failure to negotiate resulted in a contract by default and a reflection of the fact that the vast majority of employees could not exact more favorable terms from employers. While the parties technically had an agreement, such an arrangement does not contribute to a law-centered relationship.

Because the workplace was not law-centered does not mean that employers traditionally acted without significant restrictions in the area of employee discharges. Other restraining factors came into play,¹³ the most notable being a voluntary adherence to norms among parties in a long-term, ongoing relationship. An important and interesting work considering the relationship between norms and law is Robert C. Ellickson’s book, *Order Without Law*,¹⁴

11. *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 518 (1884), *overruled by* *Hutton v. Watters*, 179 S.W. 134 (Tenn. 1915).

12. Commentators have noted some of the peculiarities of the “contract” in a non-union employment relationship. See, for example, Clyde W. Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 *FORDHAM L. REV.* 1082 (1984), where Professor Summers explains:

The employment at will doctrine is cast in contract language, but it has no basis in contract law. The courts have not asked the basic contract question—what did the parties intend? Both the overloaded presumption and the superimposed spurious doctrines led the courts away from an inquiry into what the parties, as reasonable persons, understood or intended. It led to the anti-contract incantation that in the absence of a specified term the employment was at will, regardless whether that fit the parties’ intent in entering and continuing the employment relationship.

Id. at 1099; see also Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 *GA. L. REV.* 323, 409 (1986) (“Contract is a fiction when applied to an institution like informal employment.”); *infra* notes 38-40 and accompanying text.

13. Although it is outside the scope of this Article, a desire to avoid unionization also curtails the employer’s arbitrary or malicious discharge of employees.

14. ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

which is an account of how members of a rural, agricultural region of California resolved a variety of disputes arising from wayward cattle. The author's introductory comments to his work are instructive for purposes of this Article:

A principal finding is that [the parties] apply informal norms, rather than formal legal rules, to resolve most of the issues that arise among them. This finding is used as a springboard for the development . . . of elements of a theory of how people manage to interact to mutual advantage without the help of a state or other hierarchical coordinator. The theory seeks to predict the content of informal norms, to expose the processes through which norms are generated, and to demarcate the domain of human activity that falls within—and beyond—the shadow of the law.¹⁵

Drawing parallels to Ellickson's book, Professors Rock and Wachter focus on norms and the employment relationship in an article entitled *The Enforceability of Norms and the Employment Relationship*.¹⁶ The authors note that the employment relationship is particularly appropriate for study because of the "bifurcated labor market: employment relationships that utilize norms, the non-union sector, and employment relationships that utilize law, the union sector."¹⁷ Several aspects of the authors' views on distinguishing between norms and law are helpful in coming to an understanding of how the shadow of the law governed the traditional workplace:

The legal doctrine of at-will employment provides a particularly interesting case for examining the relationship between norms and law. In non-union workplaces, a clear norm exists that an employer will not discharge an employee without cause. As we will see, this norm can be understood to arise in response to the distinctive contracting problems that exist This norm coexists with the traditional (and apparently inconsistent) legal rule that, in the absence of an explicit contract establishing a specific term of employment, an employer generally can discharge an employee for good reason, bad reason, or no reason at all (the doctrine of "at-will employment").¹⁸

15. *Id.* at 1.

16. Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913 (1996).

17. *Id.* at 1916.

18. *Id.* at 1916-17.

Rock and Wachter proceed to point out significant differences in the respective cultures of union and non-union workplaces:

A striking feature of labor markets is that contracting is polarized: either firms opt for almost entirely unwritten (and unenforceable) agreements or firms adopt intricate, detailed, written contracts, along with governance mechanisms for adjudicating disputes and filling in gaps. The non-union sector relies on unwritten and unenforceable contracts while the union sector uses detailed collective bargaining agreements.

In union workplaces, parties typically negotiate detailed terms and, when disputes arise, resort to legally mandated grievance procedures, with arbitration as a final step. In a grievance, the parties will first try to negotiate a resolution, in effect, renegotiating the terms of the contract, or, perhaps more precisely, negotiating to fill in gaps that were (often intentionally) left in the contract at the time of signing. When the parties fail to negotiate a solution, and an arbitrator adjudicates the dispute, the arbitrator will look to the practices of the ILM [internal labor market] in order to fill in the gaps. Here, one observes incorporation of norms in contract interpretation. Indeed, one of the perceived advantages of labor arbitration over court enforcement involves the greater familiarity that an arbitrator is thought to have with firm and industry norms.

But note a significant difference with the non-union sector: in incorporating norms into their contract by means of the arbitration provision, the union sector, paradoxically, relies on norms less than the non-union sector, where the relationship hinges almost entirely upon norms. In the non-union sector, parties precommit not to use third party enforcement.¹⁹

Thus, until recent years, non-union employment relationships have been *influenced* by the law, but they have not been *centered* in the law. As noted above, little evidence of a conscious agreement or understanding between employers and employees regarding some of the more important terms of their relationship exists. Employees and employers rarely made their rights and duties relating to employee termination explicit in formalized contracts. In short, non-union employment relationships existed in the shadow of the law. Because the presumptive order minimized employers' obligations, no incentive

19. *Id.* at 1941 (footnote omitted).

for employers to formalize or legalize their employee dealings existed. The workplace of the 1990s is altogether different.

B. The Workplace in Transition: Changes to the Presumptive Order

Over the last two or three decades, the scope of employer discretion in personnel matters has been significantly curtailed due to legislative and judicial activism. As discussed below, these developments not only made the non-union workplace more law-centered, they also provided employers of non-union personnel with inducements to adopt arbitration as a method of resolving employment disputes.

1. The Impact of Legislation

As late as 1960, the Fair Labor Standards Act was the only employment law of consequence applicable to non-union employers.²⁰ However, federal and state legislation enacted since that time is imposing. One commentator's chronicle of these laws gives a flavor of the avalanche of legislative activity in the area:

[I]n the last thirty years, Congress has promulgated numerous statutes establishing minimum terms for employment relationships. In 1963, for example, Congress enacted the Equal Pay Act, which prohibited wage discrimination on the basis of sex. Other key statutes include Title VII of the Civil Rights Act of 1964 . . . , the Age Discrimination in Employment Act of 1967 . . . , the Pregnancy Discrimination Act of 1978, the Civil Service Reform Act of 1978, the Employee Polygraph Protection Act of 1988 . . . , the Americans with Disabilities Act of 1990 . . . , the Civil Rights Act of 1991, and the Family and Medical Leave Act of 1993.

. . . In addition to enacting state statutes that parallel the federal statutes listed above, state legislatures have passed legislation protecting employees in a wide variety of other circumstances. As of 1991, twenty-two states made retaliatory dismissal for filing a workers' compensation claim unlawful, thirty-four states have passed legislation protecting whistle-blowers, and forty-two states regulate the administration of employment-related lie detector tests. In addition, many states restrict the use of drug testing in the workplace, several have enforced workplace safety and health

20. See Bales, *supra* note 2, at 1875.

violations, and some have enacted statutes to protect employees from the adverse effects of corporate takeovers. Montana enacted the first state statute protecting workers from wrongful discharge, and similar statutes have been passed in Puerto Rico and the Virgin Islands.²¹

Recall the earlier reference to Professor Friedman's observation that "[c]ontract as a branch of law can best be called residual; it dealt with those areas of business life not otherwise regulated."²² As regulation of the workplace increased, the "residual," consisting of those matters upon which employers and employees were free to negotiate terms of employment, diminished. Yet, notwithstanding all of this legislative activity, so long as the last citadel of the employment-at-will doctrine remained intact, the workplace was not altogether law-centered. Even though its lengthy and universal reign gave it the appearance of impregnability, this doctrine suffered a sustained and somewhat successful assault, launched by the judiciary.

2. *Judicial Decisions*

As early as 1988, Professor Theodore J. St. Antoine could justifiably state that changes to the employment-at-will doctrine were so dramatic that reform was heading toward "full flower."²³ He began a commentary on the subject by crediting two authors as being instrumental to the changes:

"Seminal" is one of the most overworked words in the legal lexicon. But if ever two pieces of writing deserved that appellation, they are the 1967 article by Professor Lawrence Blades advocating judicial development of the tort of "abusive discharge" as a limitation on the doctrine of employment at will, and the 1976 article by Professor Clyde Summers advocating legislation to protect individual employees against unjust dismissal.²⁴

St. Antoine also noted that a substantial number of American courts "employed three main theories to soften the worst rigors of what was once the well-nigh universal rule that employers 'may dismiss their employees at will

21. *Id.* at 1875-77 (footnotes omitted).

22. FRIEDMAN, *supra* note 7, at 276.

23. Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 56 (1988).

24. *Id.* at 56-57 (footnotes omitted) (citing Lawrence E. Blades, *Employment at Will Vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967), and Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976)).

... for good cause, for no cause or even for cause morally wrong.”²⁵ The three doctrines sponsored by St. Antoine include “violations of public policy, or ‘abusive’ or ‘retaliatory’ discharge; breach of an express or implied contract; and breach of the covenant of good faith and fair dealing.”²⁶ In addition to the extensive use of his article by courts and commentators,²⁷ Professor Blades deserves credit for planting the seed for these common law exceptions to the employment-at-will doctrine. With regard to statutory developments, in 1988 Professor St. Antoine believed that we were on the threshold of a flurry of legislative activity that would extend “just cause” protection to employees throughout the country, although he did allow for the possibility of some delay.²⁸ This flurry of activity has yet to occur. Montana was the only state that had adopted legislation extending just-cause protections to employees at the time of St. Antoine’s prediction,²⁹ and it remains the only such state.³⁰ Consequently, it may be that Professor Summers’s article will never have an impact comparable to Professor Blades’s.

The judicial exceptions alone significantly impact the manner in which employers deal with their non-union employees.³¹ Most importantly, the common law exceptions together with the individual legislative protections discussed above (that relate to issues other than employment at will) bestow a myriad of rights upon individual employees. While employees may still have

25. St. Antoine, *supra* note 23, at 58 (quoting *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 519-20 (1884), *overruled by* *Hutton v. Watters*, 179 S.W. 134 (Tenn. 1915)).

26. *Id.*

27. At the time of publication of this Article, research indicated that Professor Blades’s article had been cited in 125 federal and state court decisions, and in approximately 200 law review articles.

28. St. Antoine, *supra* note 23, at 81. Portions of St. Antoine’s article predict the battles that employment legislation will face and attempt to take into account “both the ideal and the politically feasible.” *Id.* at 71. St. Antoine concludes:

In this the twentieth anniversary year of Blades’s truly seminal piece, an academic consensus has blossomed, a judicial consensus has taken root, and the makings of a legislative consensus have been planted. Whether it will be in the coming decade or the following, we shall shortly see on the legal landscape only the decaying husk of the doctrine of employment at will. The far more wholesome theory of just cause will have taken its place.

Id. at 81 (footnote omitted).

29. *See id.* at 71.

30. *See* MONT. CODE ANN. § 39-2-901 (1997).

31. The employment-at-will rule and its exceptions are relevant to this Article, but that fact does not warrant extensive treatment of the complex issue here. For recent writings on the issue, see Mary A. Bedikian, *Transforming At-Will Employment Disputes into Wrongful Discharge Claims: Fertile Ground for ADR*, 1993 J. DISP. RESOL. 113, 120-31 (1993), and Hayford & Evers, *supra* note 4, at 456-83.

confidence that self-enforcing norms play an important role in the workplace,³² they also recognize that a wide array of legal constraints limit their employers' actions. Consequently, although norms that reflect ideas of fair play continue to guide employers to some extent, it would be inconceivable for employers to discharge employees without paying close attention to the legal ramifications.

C. *The Modern Workplace and the Current Receptiveness of Arbitration*

Developments over the past twenty-five to thirty years have left the modern non-union workplace teetering between two models of industrial governance. The older model, pursuant to which employers made personnel decisions in accordance with self-enforced norms and only in the shadow of the law, is not altogether extinct,³³ nonetheless, the hold of the older approach is precarious, at best, in the face of strong competition from a law-centered model of workplace governance. This phenomenon partially explains the appeal of employment arbitration and the employer's motives.

Employers previously refrained from arbitration or any other formalized dispute resolution procedure because "legalizing" one aspect of the employment relationship might lead to a similar result in other areas. In light of non-legal governance being the rule rather than the exception, formalizing any aspect of the employment relationship potentially contaminated the whole. Because the non-union employment relationship is now so heavily regulated, the portion remaining in the shadow of the law is relatively limited. Therefore, arbitrating employee grievances poses no real threat to an informal, non-legal atmosphere.

As previously discussed, prior to recent developments, employers found comfort in the status quo because the basic principle underlying the employment-at-will rule greatly favored them.³⁴ The presumptive order, rebuttable only by the parties' agreement to the contrary, was that employers could fire an employee for good, bad, or no reason.³⁵ Thus, prior to the 1960s employers enjoyed the default terms under the employment-at-will rule, which were more favorable to them than any potential express contract terms. However, as current decisions recognizing exceptions to the employment-at-will rule multiply and the presumptive order falls apart, employers must abide by a wider range of policy-driven, court-imposed obligations. In the past, the alternative to a neutral arbitrator looking over the employer's shoulder was a judge who would likely find a contract which, by default, allowed the employer

32. For example, employees undoubtedly continue to expect employers to reward such things as loyalty and lengthy service and to act in a moral and decent manner.

33. While there is no escaping the dictates of federal legislation, employment-at-will exceptions in some states have been narrowly circumscribed thus far.

34. See *supra* note 12 and accompanying text.

35. See *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 518 (1884), *overruled by Hutton v. Watters*, 179 S.W. 134 (Tenn. 1915).

to do as it wished. Now, the alternative to a neutral arbitrator is a judge who may be predisposed to recognize the existence of a contract in which the employer's actions are *constrained* by one or more exceptions to the employment-at-will rule. Under these present circumstances, arbitration is obviously the more appealing alternative.

In addition to the removal of these earlier disincentives, employers have affirmative reasons to adopt arbitration. As they acclimate to a law-centered environment in which statutes and judicial decisions arm non-union employees with an impressive array of rights, employers must come to grips with a tremendous increase in the risks and other pitfalls associated with litigation. The possibility of exorbitant jury verdicts, including the imposition of punitive damages in some situations, is one such risk.³⁶ Employers must also contend with the chance and even the likelihood that the common law in this area may evolve in an unanticipated manner, exposing them to liability on new theories. Employment-at-will cases present employers with difficulties in predicting outcomes. Again, arbitration presents an attractive alternative. Employers stand to gain by having an arbitrator resolve disputes relating to wrongful discharge claims, but arbitration may also be a catalyst for some fairly important changes in the employment relationship. Some of these changes may be undesirable—and surprising—to employers. Before addressing these other ramifications, a discussion of both employment arbitration and the employment relationship that could further transform the non-union workplace is required.

III. FACTORS INHERENT TO THE ARBITRATION PROCESS AND EMPLOYMENT RELATIONSHIP INDUCIVE TO THE DEVELOPMENT OF CONTRACT

For some of the reasons already discussed, the non-union employment relationship has been a hostile environment for formalized contracts, but the inception of arbitration to resolve employment disputes changes that environment. Two factors in particular, the arbitration process and the nature of the employment relationship, should provide fertile ground for contract to take root.

A. *Employment Arbitration and Labor Arbitration: Two Distinct Endeavors*

By virtue of its lofty status, not to mention its head start of a half-century or more, labor arbitration will inevitably be the benchmark by which

36. See Denenberg & Denenberg, *supra* note 2, at 49 (“As William B. Gould IV, the chairman of the National Labor Relations Board, has noted: ‘The employer [that adopts arbitration] would be rid of the unpredictability of the jury system and the accompanying possibility of unlimited punitive and compensatory damages.’”).

employment arbitration is measured.³⁷ Moreover, many of the conventions and other features of labor arbitration will naturally influence employment arbitration practices. Therefore, although the focus of this Article is employment arbitration and not labor arbitration, a brief comparison of the two will prove useful to later discussion.

Labor arbitration occupies an authoritative position in the sphere of labor relations. Both labor and management enthusiastically endorse the process, and with few exceptions,³⁸ legal scholars and other commentators appear enamored with it as well.³⁹ Perhaps most importantly, the deference of the judicial system to labor arbitration is extraordinary.⁴⁰ Employment arbitration may eventually establish a reputation comparable to that of labor arbitration—widely acclaimed by the parties,⁴¹ celebrated by the academic community,⁴² and deferred to by the courts.⁴³ However, several features of initial employment arbitration practices make that quest problematic. To the extent that the objective is to model employment arbitration after more successful traditions of labor arbitration, it would seem that the employment arbitrator's role needs to be clearly defined, as do the rights of employees. Accomplishing these goals appears to invite, if not demand, the development of procedural and substantive contractual rights.

The distinctions between labor arbitration and employment arbitration that focus attention on the need for clarification of the arbitrator's role and the nature and scope of employee rights are three-fold. First, the focal point of labor arbitration is invariably a formal contract, the collective bargaining agreement, with well-defined terms that are understood by the parties.⁴⁴ Employer obligations and employee rights are relatively transparent, and the

37. For a thorough and insightful comparison of labor arbitration and employment arbitration, see Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187 (1993).

38. For perhaps the most notable criticism, see PAUL R. HAYS, LABOR ARBITRATION: A DISSENTING VIEW (1966). Also see Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1082 (1984), where the author argues that “[t]he dispute-resolution story trivializes the remedial dimensions of lawsuits.”

39. See, e.g., Charles B. Craver, *Labor Arbitration as a Continuation of the Collective Bargaining Process*, 66 CHI.-KENT L. REV. 571 (1990) (discussing the role of arbitration in collective bargaining).

40. See, e.g., ELKOURI & ELKOURI, HOW ARBITRATION WORKS 29 (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997) (noting that the courts “have honored the ‘private contract’ nature of arbitration by wisely limiting their roles in the process.”).

41. See, e.g., Bales, *supra* note 2, at 1870 (noting that “[a]rbitration [has] completed the metaphor of industrial organization as a self-contained mini-democracy”).

42. See, e.g., Bernard D. Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, 34 U. CHI. L. REV. 545, 561 (1967) (expounding on the “usefulness of arbitration and the integrity of arbitrators”).

43. See ELKOURI & ELKOURI, *supra* note 40, at 29.

44. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (focusing on collective bargaining agreements).

contract is a check on the arbitrator's power because it is the sole source from which the arbitrator derives authority.⁴⁵ Most likely, none of these statements will pertain to the typical non-union situation. Second, labor arbitration is a triangular affair, one that involves the collective bargaining representative, the employer, and the employee, which is significant because of the belief that unionized employees are more likely to be on a level playing field.⁴⁶ The power of the union is an important factor in the perceived fairness of the proceedings.⁴⁷ Employment arbitration, on the other hand, pits individual employees against their respective employers. Finally, labor arbitration sets out to resolve problems that arise from private lawmaking, as defined by the parties' own creation—the contract. By contrast, the adjudication of employee rights that are based on public legislation will occupy a prominent position in employment arbitration. Each of these distinctions is discussed below.

1. *When the "Designated Contract Reader" Has Nothing to Read*

Unionized employees have little doubt as to the meaning of their labor contracts or agreements. In fact, the contract takes on a tangible reality in most union shops, when the union steward and other officers of the local union instinctively reach for dog-eared copies of a collective bargaining agreement to answer questions or to challenge the employer's authority on particular decisions. Many supervisors and other managerial officials, not just the labor relations professionals, are also intimately familiar with the parties' contract and regularly consult it for guidance in carrying out various personnel decisions. Not every unionized workplace follows such a pattern, but for a substantial portion of the dealings between employers and employees to revolve around interpretations of a highly visible agreement is not unusual. In such instances, a culture of widespread contract familiarity naturally develops.

When a neutral arbitrator considers unresolved grievances, the centrality of the parties' contract is brought into focus, as evidenced by the observations of numerous courts and commentators.⁴⁸ For example, in one decision from the famous *Steelworkers Trilogy*⁴⁹ the United States Supreme Court wrestled with the matter of arbitrability, declaring that:

[A]n arbitrator is confined to interpretation and application of

45. *Id.* at 597.

46. See Samuel Issacharoff, *Contracting for Employment: The Limited Return of the Common Law*, 74 TEX. L. REV. 1783 (1996).

47. See *id.*

48. See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. at 597 (explaining that an arbitrator's authority is derived from the collective bargaining agreement); Meltzer, *supra* note 42, at 558.

49. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.⁵⁰

The focus on the contract itself has been a key issue in other legal disputes relating to labor arbitration. One nagging issue in labor arbitration involves the arbitrator's responsibility when an award warranted by the collective bargaining agreement is repugnant to either statutory mandates or public policies.⁵¹ The reasoning of some scholars on this question confirms the dominant role of the parties' contract. For example, Professor Bernard Meltzer, one of the leading proponents of the view that arbitral fidelity extends principally to the contract, cautioned that "[a]rbitrators should in general accord a similar respect to the agreement that is the source of their authority and should leave to the courts or other official tribunals the determination of whether the agreement contravenes a higher law,"⁵² because the arbitrator is "the proctor of the agreement and not of the statutes."⁵³ The point is perhaps most simply and concisely made by Professor St. Antoine in his statement that the labor arbitrator is the parties' designated "contract reader."⁵⁴

While the employment contract is quite tangible to most unionized employees, it could not be more obscure and nebulous to their non-union counterparts. As one commentator states, "In most cases, of course, the 'contract' is invisible: the terms and conditions are those fixed unilaterally by the employer, subject to the minima prescribed by statute. Employees 'negotiate' only by accepting or rejecting the employer's proffered terms."⁵⁵ Granted, certain valuable employees are able to negotiate some form of job security, such as tenure, into an individualized contract. However, ill-defined employment contracts, to the extent that a contract is even perceived to exist, are more common. Neither the employers nor the employees are likely able to articulate the terms of their relationship; only those who are somewhat sophisticated in legal matters would envision the existence of a contract in the absence of a tangible document, signed by the parties, and setting forth the

50. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. at 597.

51. See generally Patricia A. Greenfield, *How Do Arbitrators Treat External Law?* 45 *INDUS. & LAB. REL. REV.* 683, 691 (1992) (discussing arbitration use and the consideration of statutory standards when making determinations).

52. Meltzer, *supra* note 42, at 558.

53. *Id.* at 560.

54. Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 *MICH. L. REV.* 1137, 1140 (1977).

55. Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 *CHI.-KENT L. REV.* 59, 69 (1993) (footnote omitted).

terms of their legal relationship.⁵⁶

For an arbitration system to be effective in a non-union environment, both employers and employees must have confidence in the employment arbitration process. For this to occur, all parties must understand the limits of the arbitrator's authority. As deliberated earlier, labor arbitrators are creatures of the collective bargaining agreement; thus, infidelity to the agreement can result in the nullification of their decision.⁵⁷ While the absence of a contract in the non-union context may be tolerated initially, as employment arbitration matures and employment relationships become more sophisticated, the parties will undoubtedly become dissatisfied with submitting their disputes to an arbitrator who has only a vague set of standards for guidance. Ironically, dissatisfaction with arbitration may be intensified if the courts begin to exhibit a non-deferential attitude toward arbitration decisions due to concerns regarding the scope of the arbitrator's authority.

2. *The Solo Employee Versus the Employer*

The increased use of employment arbitration has caused legal scholars to begin paying attention to it. Yet the process already has its detractors. Some of the harshest criticism of employment arbitration stems from the fact that employees act individually, unlike labor arbitration where the collective strength of the union is brought to bear for the benefit of employees.⁵⁸ Other

56. In noting the significance of the employment-at-will doctrine which governs many non-union job relationships, Professor Clyde W. Summers makes several insightful observations regarding its effect; namely, Summers notes the historic "invisibility" of the employment contract for non-union employees:

The important point here is that judicial acceptance of the employment at will doctrine effectively eliminated for most workers all rights as to the future from the contract of employment, and thereby drained it of all substantial content. . . .

When employment is at will, contractual rights and duties largely disappear or become empty shells, for rights and duties arising out of a continuing relationship can have little substance when either party can terminate the relationship at any moment for any or no reason Addison, though theoretically incorrect, was substantially right when he stated, "there is in truth no contract of hiring at all."

Summers, *supra* note 12, at 1085 (quoting 2 C. G. ADDISON, A TREATISE ON THE LAW OF CONTRACT § 887 (3d Am. ed., Jersey City, N.J. 1883)).

57. See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

58. See Samuel Issacharoff, *Contracting for Employment: The Limited Return of the Common Law*, 74 TEX. L. REV. 1783 (1996). Professor Issacharoff states:

Not only do unions offer the services of shop stewards or other union officials who handle large

criticisms focus on the fact that employers present arbitration clauses within the context of adhesion contracts.⁵⁹ Scholars also criticize several systemic advantages of employers, such as their “sophisticated understanding of the process and the ‘institutional memory’ needed to wrest an advantage”⁶⁰ during arbitration. Another possibility is that arbitrators will be biased in an employer’s favor because the employer is a repeat player, while the employee is merely a one-time participant.⁶¹ Critics have also questioned whether employees will be adequately represented at their arbitration hearings, or whether they will be severely disadvantaged because employers are more likely to use experienced advocates.⁶² Even pro-arbitration commentators have noted that “[a]ny system of arbitrating disputes without a union, even one created with the best of intentions, will require a number of structural adaptations.”⁶³ Most criticisms focus on shortcomings of the current employment arbitration process and argue for the implementation of procedural reforms to safeguard the interests of individual employees.⁶⁴

The pressure to assure procedural protections for non-union employees in the arbitration process will likely continue. Some of the criticism has been so strident that it is difficult to foresee how employment arbitration can ever be accepted as a legitimate means, like labor arbitration and other ADR mechanisms, unless the process guarantees significant procedural rights to employees. Securing such rights would, of course, contribute mightily to the establishment of contractual protections for employees and thus create a law-centered relationship.

numbers of grievance and arbitration procedures, but also they have access to collective funds to pay for lawyers in major arbitrations. Neither the expertise born of experience nor the ability to tap collective resources for the creation of a public good is available to individual employees facing discharge.

Id. at 1806 n.75.

59. See Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 474-76 (1996); Michael Z. Green, *Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap for the Unwary Consumer?*, 5 LOY. CONSUMER L. REP. 112, 117-19 (1993); Jennifer A. Marler, Note, *Arbitrating Employment Discrimination Claims: The Lower Courts Extend Gilmer v. Interstate/Johnson Lane Corp. to Include Individual Employment Contracts*, 74 WASH. U. L.Q. 443, 471-73 (1996).

60. Denenberg & Denenberg, *supra* note 2, at 49.

61. See Cole, *supra* note 59, at 452-54, 474; Denenberg & Denenberg, *supra* note 2, at 50; Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI-KENT L. REV. 753, 764-65 (1990); Matthew W. Finkin, *Commentary on “Arbitration of Employment Disputes Without Unions,”* 66 CHI-KENT L. REV. 799, 800 (1990).

62. On the importance of experienced advocates in the ADR process, see Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1, 45-47 (1987).

63. Denenberg & Denenberg, *supra* note 2, at 49.

64. See *supra* notes 44-47 and accompanying text.

3. *Vindicating Statutory Rights: New Grist for the Arbitration Mill*

The nature of labor arbitration is such that the focus is upon the contractual rights and obligations as set forth in the collective bargaining agreement. These contracted rights commonly overlap with statutory rights; nevertheless, the labor arbitrator's primary purpose is to adjudicate any contract in dispute.⁶⁵ Statutory-based claims have traditionally played an incidental role in labor arbitration cases.⁶⁶ Employment arbitration, on the other hand, will likely differ from labor arbitration in that statutory rights will, by the design of employers, occupy a relatively prominent place in the cases. Indeed, in the post-*Gilmer* era, many employers of non-union employees may well envision employment arbitration as involving statutory-based claims almost exclusively.

As noted above,⁶⁷ employment arbitration generally has engendered calls for procedural reform to protect individual employee rights. Because statutory rights could be adjudicated in a non-governmental forum perhaps has been the most compelling factor behind the push for procedural reforms and protections. Arguably, courts and administrative agencies are, by training and orientation, dedicated to the aggressive enforcement of public policy as expressed by legislation. In contrast, arbitrators are creatures of the parties' private agreement,⁶⁸ which gives rise to concerns over the privatization of justice through employment arbitration, especially given the employment arbitrator's accountability to only the private, appointing authorities. Unlike employment arbitrators, labor arbitrators are accountable to the legislative authorities who enacted the labor law arbitration standards.⁶⁹ In employment arbitration the applicable law is public while the arbitrator's accountability is private, which fuels critics' demands for constraints on employment arbitrators. To whom should employment arbitrators be ultimately accountable? What general standards of justice should they apply when interpreting employment statutes? What standards should courts use in reviewing employment arbitrators' decisions? In some ways, the issue of the arbitrator's public and private divergence overlaps the concern that an individual employee will be disadvantaged when arbitrating a dispute.⁷⁰ However, adjudicating statutory

65. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

66. Some of the rationale in the *Gilmer* decision could be read to allow for more arbitration of statutory-based claims in the unionized workplace in the future, although the Supreme Court has yet to rule specifically on this point.

67. *See supra* notes 44-47 and accompanying text.

68. *See Cole, supra* note 59, at 455-56.

69. Malin & Ladenson, *supra* note 37, at 1226-40. Principally focusing upon the accountability issue, Professors Malin and Ladenson make a strong case against employment arbitration and argue for stronger institutional constraints on employment arbitrators, including de novo judicial review of arbitral interpretations of law. *Id.*

70. *See supra* notes 58-64 and accompanying text.

rights will necessitate minimum due process guarantees.⁷¹

In summary, labor arbitration's prominent role is the result of a combination of factors. The parties in a unionized environment embrace arbitration because it is advantageous to both. Courts defer to labor arbitration decisions, and legal scholars and commentators support the process because it is quite compatible with a number of important national labor and employment policies. Employment arbitration, on the other hand, will establish itself as a legitimate alternative to litigation only if it too serves and protects the rights of all parties and develops in conformity with public policies.⁷² Achieving these objectives will require the parties to be more attendant to the formal recognition of contractual terms or their functional equivalent.

Certain attributes of the arbitration process will promote the development of a contractual ordering, but are not the sole reasons that a detailed formalization of employer duties and employee rights will eventually emerge. The very nature of the employment relationship fosters such a development because it is a "highly relational exchange."

71. The process of arbitrating statutory claims could also have an impact on the substantive terms of the contract between an employer and its non-union employees. In resolving disputes based on statutory claims, arbitrators may occasionally engage in a far-ranging scrutinization of employment policies and practice and render decisions that have an impact beyond the circumstances of the aggrieved employee. Admittedly, courts and administrative agencies can and do proceed in a similar fashion. However, the arbitration process may seem less threatening and more accessible to employees, and, therefore, may be more frequently utilized. Also, an arbitrator may be more apt to fashion a "creative" remedy than a court or an administrative agency. Again, a move away from self-enforcing norms toward a law-centered workplace appears inevitable.

72. Some might argue that employment arbitration can never expect to receive the judicial deference that is afforded labor arbitration because labor arbitration is more than a method of resolving disputes; it is viewed as an extension of the collective bargaining process itself. Dean Harry Shulman articulated as much in the 1950s:

The arbitration may be resented by either party as an impairment of its authority or power. It is susceptible of use for buck-passing and face-saving. And it may sometimes encourage litigiousness. But when the system works fairly well, its value is great. To consider its feature of arbitration as a substitute for court litigation or as the consideration for a no-strike pledge is to take a foreshortened view of it. In a sense it is a substitute for both—but in the sense in which a transport airplane is a substitute for a stagecoach. The arbitration is an integral part of the system of self-government.

Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1024 (1955); see also Charles B. Craver, *Labor Arbitration as a Continuation of the Collective Bargaining Process*, 66 CHI.-KENT L. REV. 571 (1990) (discussing the role of arbitration in labor arrangements); Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 917 (1979) (discussing how "[c]ollective bargaining shapes labor arbitration and gives it power").

B. *Relational Contract Theory*

Analyzing the legal relationships that exist between employers and employees when no union is involved can be somewhat perplexing. Although litigants, as well as the courts, invariably resort to the “rhetoric of contract”⁷³ when resolving employment disputes, in some ways the parties’ contractual relationship seems to encompass much more—and much less—than what lay persons and some legal analysts consider when they contemplate a contract.

Over the past two to three decades, the traditional employment-at-will rule has been subjected to an assault resulting in a myriad of exceptions to the rule.⁷⁴ Moreover, while commentators have often used contract principles to explain and justify the employment-at-will rule,⁷⁵ the exceptions being generated are increasingly difficult to explain under established contract theory.⁷⁶ While newer theories of contract “that depart substantially from the usual ways that the law has been conceptualized”⁷⁷ may not be universally accepted, the insights of some of these theories can be quite illuminating in particular circumstances. The nature of the employment relationship is such that relational contract theory appears to be a valuable tool for understanding the evolution of the law in this area. Understanding the fundamental premises of relational contract theory may enhance one’s appreciation for the role arbitration could play in the emergence of contract.⁷⁸

73. See Linzer, *supra* note 12, at 327 (quoting Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403, 1403 (1985)).

74. See *supra* text accompanying notes 26-32.

75. See *supra* note 12 and accompanying text.

76. See Linzer, *supra* note 12, at 345-56. With regard to the employment-at-will exceptions, Linzer notes that in some instances they seem to be “old wine in new bottles” and, in other cases, “new wine in old bottles.” *Id.* at 345.

77. Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283, 1283 (1990).

78. For an illuminating look at the interaction of various theories of contract, see Robert A. Hillman, *The Crisis in Modern Contract Theory*, 67 TEX. L. REV. 103 (1988). Reflecting upon the zeal and sometimes myopic views of contract scholars, Professor Hillman observes that “[s]ome analysts even take the position that one can explain all of modern contract law solely on the basis of one principle or another.” *Id.* at 104. He counters with his view, based on “a flexible, pragmatic model of modern contract law,” *id.* at 103, and argues that “all we can hope and need to know is that freedom of contract and other principles share the spotlight.” *Id.* at 104. Similarly, Hillman concludes that “[i]n short, conflicting and complex theories, principles, rules, and policies dominate modern contract law and together govern the relations of people in our society.” *Id.* at 133. Professor Hillman considers several theories in this essay, including the relational vision of contract law. Consistent with his balanced perspective regarding other theories, Professor Hillman demonstrates how modern contract law comprehends relationalism’s “description of reality,” *id.* at 127, concluding that “[m]odern contract law is not only relevant but also reasonably well suited for today’s highly relational world. Modern contract law’s broad view of ‘agreement’ reinforces relational norms; in many instances, these norms also constitute enforceable contract terms.” *Id.* at 135.

Professor Hillman’s arguments are persuasive in that no single theory, including

1. *The Fundamentals of Relational Contract Theory*

Commentators have credited Professor Ian Macneil with originating the relational theory.⁷⁹ Accordingly, Professor Macneil's writings are a good place to begin for a general understanding of the theory.⁸⁰ Professor Macneil identifies contracts that involve ongoing relations as a distinctive form of economic exchange, one that is to be differentiated from exchanges not involving a continuing relationship between the parties:

Contractual ordering of economic activity takes place along a spectrum of transactional and relational behavior. At one end are discrete transactions. Discrete transactions are contracts of short duration, involving limited personal interactions, and with precise party measurements of easily measured objects of exchange, for example, money and grain. They require a minimum of future cooperative behavior between the parties and no sharing of benefits or burdens. They bind the two parties tightly and precisely. The parties view such transactions as deals free of entangling strings, and they certainly expect no altruism. The parties see virtually everything connected with such transactions as clearly defined and presentiated. If trouble is anticipated at all, it is anticipated only if someone or something turns out unexpectedly badly. The epitome of discrete contract transactions: at noon two strangers come into town from

relational contract theory, can explain all of modern contract law and that modern contract law incorporates relational principles when appropriate. Arguably, the manner in which modern contract law comprehends relationalism's "description of reality" is readily apparent in the employment law context.

79. *E.g.*, RANDY E. BARNETT, *CONTRACTS* 1263 (1995) ("The undisputed originator of relational theory is Professor Ian Macneil.").

80. The relational theory is quite complex and naturally must be oversimplified here. Materials that address this topic in detail abound. *See, e.g.*, Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1091 (1981) (describing the "core provisions of relational contracts" and relating these performance standards to their contractual provisions); Wallace K. Lightsey, *A Critique of the Promise Model of Contract*, 26 WM. & MARY L. REV. 45, 48 (1984) ("criticizing the promise model of contract and suggesting an alternative model"); Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483 (1985) [hereinafter *Relational Contract*] (providing a comprehensive summary of relational contract law); Ian R. Macneil, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340, 341 (1983) [hereinafter *Values in Contract*] (discussing "three intersecting dimensions" in the universe of contract to better comprehend contractual values); William C. Whitford, *Jan Macneil's Contribution to Contracts Scholarship*, 1985 WIS. L. REV. 545, 545 (1985) (discussing "the impact of Macneil's writings on the work of other academics writing about contract law"). Two articles that consider contract theories more generally, but that also provide relatively concise descriptions of relational contract essentials are Feinman, *supra* note 77, at 1299-304, and Hillman, *supra* note 78, at 123-28.

opposite directions, one walking and one riding a horse. The walker offers to buy the horse, and after brief dickering a deal is struck in which delivery of the horse is to be made at sundown upon the handing over of \$10. The two strangers expect to have nothing to do with each other between now and sundown; they expect never to see each other thereafter; and each has as much feeling for the other as has a Viking trading with a Saxon. A modern example with many of these characteristics is a purchase of nonbrand name gasoline in a strange town one does not expect to see again.

At the other end of the contract spectrum are ongoing relations. Being more diverse than well-honed discrete transactions, they are more difficult to describe concisely, but the following are typical characteristics. The relations are of significant duration (for example, franchising). Close whole person relations form an integral part of the relation (employment). The object of exchange typically includes both easily measured quantities (wages) and quantities not easily measured (the projection of personality by an airline stewardess). Many individuals with individual and collective poles of interest are involved in the relation (industrial relations). Future cooperative behavior is anticipated (the players and management of the New York Yankees). The benefits and burdens of the relation are to be shared rather than entirely divided and allocated (a law partnership). The entangling strings of friendship, reputation, interdependence, morality, and altruistic desires are integral parts of the relation (a theatrical agent and his clients, a corporate management team). Trouble is expected as a matter of course (a collective bargaining agreement). Finally, the participants never intend or expect to see the whole future of the relation as presentiated at any single time, but view the relation as an ongoing integration of behavior to grow and vary with events in a largely unforeseeable future (a marriage; a family business).⁸¹

Professor Macneil argues that the doctrinal law associated with classical and neo-classical contract theories is generally appropriate for cases involving discrete exchanges, but that these contract principles are ill-suited for relational contracts.⁸² While neo-classical contract theory focuses on the promises or assent of the parties in determining duties owed, the relational contract

81. IAN R. MACNEIL, *CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS* 12-13 (1978).

82. See *Relational Contract*, *supra* note 80; *Values in Contract*, *supra* note 80.

approach begins with a premise that the promise is not the only, or even the most, important and effective projector of exchange.⁸³ According to Macneil, “Command, status, social role, kinship, bureaucratic patterns, religious obligation, habit and other internalizations all may and do achieve such projections.”⁸⁴

A couple of critical points should be emphasized. First, when visualized along Macneil’s spectrum of transactional and relational behavior, employment is one of the most highly relational of all economic exchanges.⁸⁵ Second, the promises or assent of the parties is by no means the principal basis of contract for highly relational exchanges. Other factors such as status, habit, and norms in some ways play a more prominent role.⁸⁶

2. *Relational Contract Principles at Work in the Arbitration Context*

Some of the most influential academic writers on the subject of labor and employment law are experienced labor arbitrators.⁸⁷ As such, their scholarship provides insight into both the theoretical aspects of contract law and the more practical considerations faced by professional arbitrators. Although some of the earlier scholarship pre-dates much of Professor Macneil’s work and, therefore, does not include the terminology associated with relational contracts, parallels to relational contract theory are unmistakable. Particularly noteworthy is the recognition that agreements are invariably incomplete and that the parties intend for a “contract reader” to flesh out the terms when a problem arises.⁸⁸ Thus, Dean Shulman argues:

83. Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 715 (1974).

84. *Id.* (footnote omitted).

85. Professor Macneil analogizes the distinction between transactions and relations to that made by sociologists between nonprimary and primary relations. He observes:

Three characteristics distinguish primary from nonprimary relations. First, in the former, response is to whole persons rather than to segments

Second, in a primary relation, communication is deep and extensive . . . ‘[w]hile [i]n nonprimary relations communication is limited to specific topics’

The third characteristic of primary relations is that personal satisfactions are paramount

Id. at 722. In summary, he distinguishes contract transactions from contract relations by stating that “although both involve economic exchange, only the latter include whole person relations, relatively deep and extensive communication by a variety of modes, and significant elements of non-economic personal satisfaction.” *Id.* at 723. He goes on to note that “[i]n our society, the most primary contractual relation is marriage, with employment relations likely to be next.” *Id.* at 725.

86. *Id.* at 715.

87. See, e.g., Shulman, *supra* note 72 (providing insight into arbitration based upon his experience as a labor arbitrator).

88. See St. Antoine, *supra* note 54, at 1140.

There is never . . . enough time to do an impeccable job of draftsmanship after substantive agreement is reached
 . . . [For this and related reasons, the labor] agreement then becomes a compilation of diverse provisions: some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration with an expression of hope and good faith.”⁸⁹

Professor Archibald Cox expresses similar views, characterizing the labor contract as “an instrument of government, not merely an instrument of exchange [and as] ‘the industrial constitution of the enterprise, setting forth the broad general principles upon which the relationship of employer and employee is to be conducted.’”⁹⁰ Finally, Professor Alan Schwartz observes that one of the marked characteristics of collective agreements is their incompleteness and that, when litigation ensues, courts frequently complete the contract by filling in the omitted terms.⁹¹

89. Shulman, *supra* note 72, at 1004, 1005.

90. Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1492 (1959) (quoting *NLRB v. Highland Park Mfg. Co.*, 110 F.2d 632, 638 (4th Cir. 1940)). The text surrounding the quoted excerpt gives one a broader appreciation of the author’s perspective:

The resulting contract is essentially an instrument of government, not merely an instrument of exchange. “The trade agreement thus becomes, as it were, the industrial constitution of the enterprise, setting forth the broad general principles upon which the relationship of employer and employee is to be conducted.” It is largely for these reasons that collective-bargaining agreements provide their own administrative or judicial machinery—the ascending steps of the grievance procedure culminating in final and binding arbitration. The administration of a labor contract often resembles the administration of a basic statute by a specialized agency such as the Federal Trade Commission or the National Labor Relations Board.

Id. (footnote omitted) (quoting *Highland Park Mfg.*, 110 F.2d at 638).

91. Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUD. 271, 272 (1992). Professor Alan Schwartz observes that relational scholars disagree about how courts should supply terms to an incomplete contract. *Id.* at 275. He notes that some would adhere to an “‘external’ relational approach” by using norms that transcend the relationship; that is, “judges should be guided by society’s sense of what is fair, distributionally just, and adequately participatory.” *Id.* Other relational scholars argue that the “norms of the relationship” should be the source from which the rules are derived. *Id.* According to Professor Schwartz, this “internal” relational approach could then follow one of two possibilities: “One possibility is to view contractual relationships as little societies in which values evolve over time. Then, criteria for resolving disputes inhere in the interpretation that best reconciles these ‘local’ values.” *Id.* at 276. The “second way . . . is

Several passages in the *Steelworkers Trilogy* indicate that the United States Supreme Court is not oblivious to the relational aspects of a collective bargaining agreement. For example, the resonance of the relational contract principles is obvious in the *Warrior & Gulf* decision, where the Court explained that the collective bargaining agreement “is more than a contract; it is a generalized code to govern a myriad of cases that the draftsmen cannot wholly anticipate.”⁹² In light of such reasoning, one could plausibly argue that the Court deferred to arbitration in the *Trilogy* partly because it recognized the relational nature of the employment contract. Assuming that to be the case, making the additional observation that arbitrators are capable of fleshing out incomplete contractual terms becomes important. Thus, the Court stated:

The labor arbitrator is usually chosen because of the parties’ confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as

to base decisional criteria on what parties probably expect of each other.” *Id.*

92. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). A more extensive excerpt from the opinion may be helpful in identifying the Court’s recognition of relational concepts:

The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant. . . .

. . . Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. Many of the specific practices which underlie the agreement may be unknown, except in hazy form, even to the negotiators. Courts and arbitration in the context of most commercial contracts are resorted to because there has been a breakdown in the working relationship of the parties; such resort is the unwanted exception. But the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.

Id. at 578-81 (citation and footnote omitted).

criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.⁹³

The differences between union and non-union workplaces are profound, as are the distinctions between labor arbitration and employment arbitration.⁹⁴ However, as is the case with its unionized counterpart, non-union employment is a highly relational or intertwined exchange.⁹⁵ Consequently, employment arbitrators will find themselves construing contracts in which incompleteness is inevitable. If we assume the existence of a highly relational exchange, with details to be filled in from outside the promissory language used by the parties, the most obvious inquiry is: from whence will the detail emerge? Because many sources exist, the answer is not simple.⁹⁶

The preceding discussion demonstrates that certain structural elements are in place for the development of contracts. Part IV of this Article addresses those forces that arbitration will bring to bear upon the non-union employment relationship and considers the types of specific contract terms that could emerge as a result.

IV. ARBITRATION AS MIDWIFE TO THE BIRTH OF EMPLOYMENT CONTRACTS

In a unionized workplace, the collective bargaining agreement sets forth

93. *Id.* at 582. The views of the Supreme Court in the *Trilogy*, as exemplified by the quoted excerpt, have led to observations that the arbitrator is the parties' "joint *alter ego* for the purpose of striking whatever supplementary bargain is necessary to handle the anticipated unanticipated omissions of the initial agreement." St. Antoine, *supra* note 54, at 1140.

94. See Craver, *supra* note 72 (analyzing the view that labor arbitration is an extension of the collective bargaining process).

95. See Macneil, *supra* note 83, at 725. Professor Samuel Issacharoff has discussed some of the inherent difficulties in establishing a relatively complete employment agreement and has observed that the incompleteness of such a contract is particularly problematic because it generally relates to two critical times in the "life-cycle [of the] relationship: at the formation of the contract and at its final stages." Issacharoff, *supra* note 46, at 1786.

96. See Macneil, *supra* note 83, at 715.

certain restrictions on managerial discretion.⁹⁷ While employers and employees are not likely to articulate the nature of their relationship by utilizing Hohfeldian terminology,⁹⁸ they no doubt intuitively recognize that the contract formally establishes and recognizes duties of employers and correlative rights of employees. Collective bargaining agreements also include detailed procedures that employees must follow to lodge formal complaints against their employers, the usual form being a grievance procedure that culminates in submission of unresolved disputes to a labor arbitrator. Thus, the collective bargaining process results in the empowerment of unionized employees.

By simply agreeing to submit disputes to arbitration, employers of non-union employees will not immediately empower their employees in a similar fashion. However, as employment arbitration matures, the functional equivalent of a contract will begin to emerge. With this development, non-union employees will eventually obtain rights that are similar in kind, if not degree, to those which unionized employees presently enjoy. These standards will be procedural as well as substantive in nature. Let us consider the procedural components first, because they will likely emerge prior to the substantive rights.

A. Establishment of Procedural Regularity

Collective bargaining agreements provide detailed procedural guidelines for the resolution of disputes through the grievance procedure, which can culminate in arbitration. A non-union workplace, on the other hand, is more likely to involve an ad hoc approach for dealing with problems in the employer-employee relationship, and the approach will vary from one employer to the next. Moreover, a wide array of options is available for those non-union employers that do elect to formalize their methods of resolving employment disputes. For non-union employers adopting arbitration, several significant factors should drive the development of a somewhat homogenous set of procedural standards governing dispute resolution.

1. Relational Contract Principles

From a theoretical perspective, some exchanges are largely transactional or discrete, while others are much more relational or intertwined; employment typifies what many would characterize as a highly relational contract exchange.⁹⁹ One of the principal tenets of relational contract theory is the belief

97. See, e.g., ARNOLD M. ZACK & RICHARD I. BLOCH, LABOR AGREEMENT IN NEGOTIATION AND ARBITRATION 129-59 (2d ed. 1995) (discussing how collective bargaining agreements limit managerial rights).

98. See WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (Walter Wheeler Cook ed., 1964).

99. See *infra* Part.III.B.1.

that only in regard to discrete exchanges are the parties able to more or less completely “presentiate” or plan for all contingencies.¹⁰⁰ As Professor Macneil remarks, “[T]he participants [in a relational exchange] never intend or expect to see the whole future of the relation as presentiated at any single time, but view the relation as an ongoing integration of behavior which will grow and vary with events in a largely unforeseeable future”¹⁰¹ One consequence of this view is that the parties expect trouble or disputes as a normal part of their relationship and, therefore, tend to place a strong emphasis on planning processes for resolving problems.¹⁰²

The adoption of arbitration in the non-union employment context is understandable because employment is a highly relational activity that naturally fosters the development of some kind of process for resolving disagreements among its participants. Non-union employment presents an environment that is receptive to procedural innovation and one that will likely produce a further refinement of those procedures already in effect, because extensive planning for dispute resolution is inherent with highly relational exchanges.¹⁰³

2. *Judicial Mandates*

Another significant consideration is that non-union employees will likely base a substantial number of their “grievances” (to borrow terminology from the union context) upon rights derived from statutes. Two factors explain the eagerness of employers to adopt arbitration in the non-union context: (1) the expansion of individual employee rights and the resultant “legalization” of the workplace and (2) the strong endorsement of arbitration by the Supreme Court. With regard to the latter, the Court has demonstrated a somewhat remarkable deference to the arbitration of employee statutory claims, especially in recent years, but that deference presupposes adherence to conditions established by the Court. Because those conditions will necessarily lead to the establishment of procedural standards, a brief overview of the Court’s holdings is warranted.

In *Alexander v. Gardner-Denver Co.*¹⁰⁴ the United States Supreme Court held that an employee who took a claim through arbitration pursuant to a collective bargaining agreement was not precluded from pursuing a subsequent federal lawsuit under Title VII of the 1964 Civil Rights Act.¹⁰⁵ “Commentators understood *Gardner-Denver* and its progeny to establish a general rule that an employee could litigate a statutory claim regardless of a contractual promise to

100. See Ian R. Macneil, *Restatement (Second) of Contracts and Presentiation*, 60 VA. L. REV. 589, 589 (1974).

101. *Id.* at 595.

102. See Macneil, *supra* note 83, at 786-90.

103. See *id.*

104. 415 U.S. 36 (1974).

105. *Id.* at 59-60.

arbitrate.”¹⁰⁶ Subsequently the Court held that employees with claims under the Fair Labor Standards Act,¹⁰⁷ First Amendment claims under 42 U.S.C. § 1983,¹⁰⁸ and claims arising under the Federal Employers’ Liability Act¹⁰⁹ could proceed with their suits, notwithstanding the prior arbitration of their claims pursuant to a collective bargaining agreement.

For a number of decades, *Gardner-Denver* stood for the relatively simple proposition that employees, as well as parties in other, non-employment contexts, could not be compelled to arbitrate statutory claims.¹¹⁰ With the so-called *Mitsubishi Trilogy* in the mid- to late-1980s, the Court allowed compulsory arbitration of statutory claims based upon antitrust, securities, and racketeering laws, thereby seriously undermining the *Gardner-Denver* rationale.¹¹¹ On the heels of its “increasing confidence in arbitral resolution of statutory claims,”¹¹² the Court considered the issue of compulsory arbitration in the case of *Gilmer v. Interstate/Johnson Lane Corp.*¹¹³ The plaintiff in *Gilmer* alleged his employer fired him because of his age which violated the Age Discrimination in Employment Act of 1967 (“ADEA”). His employment required him to register with the New York Stock Exchange, and the registration application contained a clause by which Mr. Gilmer agreed to compulsory arbitration of employment disputes.¹¹⁴ Consistent with its reasoning in the *Mitsubishi Trilogy*, the Court held that Gilmer’s agreement entitled his employer to compel arbitration of the ADEA claim. While the *Gilmer* decision involves complex issues that are beyond the scope of this Article, one aspect of the decision, the focus on arbitration procedure, is directly relevant.¹¹⁵

106. Michael R. Holden, Note, *Arbitration of State-Law Claims by Employees: An Argument for Containing Federal Arbitration Law*, 80 CORNELL L. REV. 1695, 1728 (1995) (footnote omitted).

107. See *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981).

108. See *McDonald v. City of West Branch*, 466 U.S. 284 (1984).

109. See *Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557 (1987).

110. See Holden, *supra* note 106, at 1728.

111. The three decisions comprising the *Mitsubishi Trilogy* are *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987), and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). One commentator observes that “[t]he Supreme Court began reversing years of judicial hostility to the arbitration of statutory rights in *Mitsubishi Motors*,” and notes that by the time it had decided the *Rodriguez de Quijas* case, “judicial skepticism toward arbitration all but disappeared.” Bedikian, *supra* note 31, at 131 n.124.

112. Bales, *supra* note 2, at 1885.

113. 500 U.S. 20 (1991).

114. *Id.* at 23.

115. The majority in *Gilmer* neatly sidestepped what many see as a crucial issue relating to the enforceability of agreements to arbitrate employment disputes, that being the question whether § 1 of the Federal Arbitration Act (“FAA”) literally excludes all employment contracts from coverage under the Act. See *Gilmer*, 500 U.S. at 25, n.2; see also Holden, *supra* note 106 (commenting on compulsory arbitration and the FAA). *But cf. Gilmer*, 500 U.S. 36-41 (Stevens, J., dissenting). Given the uncertainty regarding the ultimate interpretation that the Court will give to § 1, one cannot unequivocally assert that employment agreements to arbitrate are enforceable under the FAA, or that they will be in the future. On the other hand, such

Relying upon the reasoning of *Gardner-Denver*, Mr. Gilmer quite understandably attacked the arbitration process itself, claiming that its informality made it inadequate to protect statutory employment rights.¹¹⁶ Gilmer's arguments regarding the procedural inadequacies of arbitration included claims of biased arbitration panels and insufficient discovery opportunities for the parties, as well as claims that arbitrators would fail to issue written opinions and that they would possess only limited remedial authority.¹¹⁷ The Court rejected each of Gilmer's claims, relying heavily upon the arbitration rules of the New York Stock Exchange.¹¹⁸

While the Court affirmed its current endorsement of arbitration, the endorsement is qualified. Implicit in *Gilmer* is the principle that the judiciary will defer to arbitration only if the process does indeed adequately protect the rights of employees. The lower federal courts and the state courts are clearly attentive to this consideration and have been for a number of years pre-dating *Gilmer*.¹¹⁹ Employers cannot predict in advance whether an employee that pursues a claim through arbitration will be asserting a statutory claim. The reasonable and perhaps the only prudent strategy, then, is to design an arbitration process with procedures that adequately protect employee rights; otherwise, the finality of the decisions becomes problematic. Attorneys that advise employers in planning for arbitration will, of course, be aware of this issue and will counsel the adoption of tried-and-true processes with the end result being a standardization of arbitration procedures.

Another factor that will tend to formalize non-union employment arbitration and to compel compliance with a relatively uniform set of procedural guidelines will be the necessity of having the proceedings comply with statutory and regulatory guidelines. For example, the Uniform Arbitration Act,¹²⁰ adopted by thirty-four states and the District of Columbia,¹²¹ establishes procedures for the arbitration hearing,¹²² requires that parties have the right to be represented by an attorney,¹²³ grants the arbitrator authority to issue

enforcement is likely because of the Supreme Court's apparent inclinations or because Congress could simply amend the FAA if the Court concludes that § 1 excludes all employment agreements. In either case, one premise of this Article is that employment agreements to arbitrate will be enforceable for the foreseeable future.

116. *See Gilmer*, 500 U.S. at 28.

117. *Id.* at 30-33.

118. *Id.*

119. *See, e.g., Rios v. Reynolds Metals Co.*, 467 F.2d 54, 58 (5th Cir. 1972) (holding that a court may defer to an arbitrator's decision only where Title VII Rights are protected); *Renny v. Port Huron Hosp.*, 398 N.W.2d 327, 329 (Mich. 1986) (stating that an arbitrator's decision "shall be final unless the court finds as a matter of law that the procedures used did not comport with elementary fairness").

120. UNIF. ARBITRATION ACT, 7 U.L.A. 1 (1997).

121. *Id.* at 1.

122. *Id.* § 5.

123. *Id.* § 6. Section 6 also states that a waiver of the right to representation prior to the hearing is ineffective. *See id.*

subpoenas for the attendance of witnesses and the production of “books, records, documents and other evidence,”¹²⁴ and requires that awards be in writing.¹²⁵

3. *External Pressures*

Although the judicial system’s insistence upon procedural protocol is alone sufficient to move the adoption of standard arbitration procedures, other matters related to the alternative dispute resolution system will also contribute to the establishment of procedural regularity. These include the publicized opinions of academics and other non-partisan observers of the employment relationship, as well as arbitrators and employment law practitioners, who express views regarding the need to extend procedural fairness to non-union employees in the arbitration process.¹²⁶

Considered in combination, the adhesive nature of a compulsory arbitration agreement and the fact that the assigned employee must face the employer without the support of a union have attracted widespread criticism.¹²⁷ As a consequence, some commentators have simply rejected compulsory arbitration as inherently unfair, and even those who generally embrace the Supreme Court’s endorsement of arbitration, as exemplified by the reasoning in *Gilmer*, are more often than not quick to preach the necessity of procedural protection for employees.¹²⁸ The use of mandatory arbitration has created a lively

124. *Id.* § 7(a).

125. *Id.* § 8(a).

126. See, e.g., Mark Berger, *Can Employment Law Arbitration Work?*, 61 UMKC L. REV. 693 (1993) (noting various procedural concerns).

127. Focusing on only two principal objections to employment arbitration might suggest that the substitution of arbitration for litigation before a court or governmental agency is a simpler question than it really is. Numerous policy considerations are implicated by such a move and, consequently, attentiveness to the two objections singled out will hardly resolve all of the concerns. However, the more comprehensive criticisms of arbitration support the call for an expansion of procedural rights and a more rigorous application of substantive law. For some of the more penetrating and insightful analyses of those areas in need of attention see *id.*; Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C.L. REV. 81 (1992); Brunet, *supra* note 62, at 31; Estreicher, *supra* note 61.

128. See, for example, Estreicher, *supra* note 61, at 796, where Professor Estreicher notes:

[P]rivate arbitrators who sit to dispense public justice will be subject to the due process requirements that govern any form of public adjudication. In the American legal culture, this will, of necessity, result in increasing levels of formality that reduce whatever advantages of speed and informality arbitration traditionally has enjoyed. It is doubtful that a doctrine of stare decisis can be successfully resisted, simply to ensure that statutory norms are being applied—here, as an exercise of direct governmental authority rather than through the filter of a private contract—in a

controversy, the focus of which is perhaps most clearly visible in the spirited debates that have led to the adoption of “protocols” by influential players in the arbitration establishment.

A specially appointed national committee focused on the debate in its Report and Recommendations of the Commission on the Future of Worker-Management Relations (“Report”), first released in 1994. The Report declares that, to assure accuracy and fairness, private arbitration systems must provide the following:

- a neutral arbitrator who knows the laws in question and understands the concerns of the parties;
- a fair and simple method by which the employee can secure the necessary information to present his or her claim;
- a fair method of cost-sharing between the employer and employee to ensure affordable access to the system for all employees;
- the right to independent representation if the employee wants it;
- a range of remedies equal to those available through litigation;
- a written opinion by the arbitrator explaining the rationale for the result; and
- sufficient judicial review to ensure that the result is consistent with the governing laws.¹²⁹

The Commission on the Future of Worker-Management Relations was somewhat ambivalent on the question of the legal enforceability of an employee’s agreement to arbitrate, concluding that “private arbitration systems . . . will have to prove themselves through experience before the nation is in a position to decide whether employers should be allowed to require their employees to use them as a condition of employment.”¹³⁰ Others have been less acquiescent. For example, both the Equal Employment Opportunity Commission and the National Labor Relations Board have opposed the use of mandatory arbitration agreements in certain situations,¹³¹ and “[t]he National Employment Lawyers Association (NELA) . . . threatened to boycott the American Arbitration Association . . . over [the issue of] mandatory

relatively evenhanded and doctrinally coherent
manner.

129. See BNA, REPORT AND RECOMMENDATIONS OF THE COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS § IV.3, at 31 (1995), *reprinted in* 6 Daily Lab. Rep. Doc. 55 (Jan. 10, 1995).

130. *Id.* § IV.2.

131. See William K. Slate II, *Out-of-Court Resolution of Employment Disputes*, 215 N.Y.L.J. 3 (1996).

arbitration.”¹³² Discontent with mandatory arbitration extends to groups that ordinarily do not focus on employment matters.¹³³ Even arbitrators themselves appear to disagree over such issues. For example, an ongoing dialogue within the most prestigious and exclusive organization of labor arbitrators, the National Academy of Arbitrators, reveals a deep division in that body, evidenced by its refusal to admit employment arbitrators into its membership.¹³⁴

Partially in response to the threatened NELA boycott, and presumably because of its own concerns over the fairness of mandatory arbitration, the American Arbitration Association convened a National Employment Conclave in September 1995 “to address current issues in the application of employment dispute resolution procedures for contracts of employment, personnel manuals and employee handbooks.”¹³⁵ The Association endorsed “A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship”¹³⁶ (“Due Process Protocol”), in which a special task force recommended due process standards. This Due Process Protocol is quite detailed and demonstrates a zeal for extending to non-union employees procedural rights comparable to those enjoyed by union employees in the labor arbitration process. The extent to which the Due Process Protocol guarantees employees’ rights is evidenced by the political diversity of the groups that have endorsed it. These groups include “the American Bar Association Labor and Employment Section, the American Civil Liberties Union, the Federal Mediation and Conciliation Service, the National Academy of Arbitrators and the Society of Professionals in Dispute Resolution.”¹³⁷

In May of 1996, the American Arbitration Association (“AAA”) issued new National Rules for the Resolution of Employment Disputes (“National Rules”), reflecting the guidelines outlined in the Due Process Protocol.¹³⁸ These National Rules are based on “the AAA’s *California Employment Dispute Resolution Rules*, which were developed by a committee of [persons representing diverse interests].”¹³⁹ In 1998, the AAA provided a practical guide

132. *Id.* at 3–4.

133. *See, e.g.*, Kaufman & Underwood, *supra* note 2, at 48 (“Civil-rights groups like the NAACP and the National Organization for Women see a sinister plot afoot.”).

134. *See* Denenberg & Denenberg, *supra* note 2, at 49 (reflecting upon the Academy’s wrangles over the issue and its 1993 refusal “to expand its constitutional statement of purpose to cover ‘those engaged in the arbitration of labor-management and employment [i.e., non-union] disputes on a professional basis’”) (quoting Anthony V. Sinicropi, Presidential Address: The Future of Labor Arbitration: Problems, Prospects, and Opportunities (May 27-31, 1992), in *ARBITRATION 1992 IMPROVING ARBITRAL AND ADVOCACY SKILLS*, 1993, at 1-20).

135. *See* Slate, *supra* note 131, at 4.

136. *Id.*

137. Agnes J. Wilson, *Resolution of Employment Disputes*, 217 N.Y.L.J. 3 (1997).

138. *American Arbitration Association Releases New National Rules for the Resolution of Employment Disputes to Ensure Due Process, Adhere to Protocol*, NEWS RELEASE (American Arbitration Ass’n, New York, N.Y.), May 21, 1996, at 1-2.

139. AMERICAN ARBITRATION ASS’N, *RESOLVING EMPLOYMENT DISPUTES: A PRACTICAL GUIDE 3* (1998).

for employers in developing ADR procedures to resolve workplace disputes, noting that “[d]ue process safeguards are critical to any employment dispute resolution program because they ensure a fair and equitable forum for both employee and employer.”¹⁴⁰ In that guide, the Association provided a checklist to aid employment arbitration program drafters.¹⁴¹

Finally, in addition to the many external pressures, one must consider the impact of the participants in the process. While it seems clear that an employee’s right to counsel will be a required due process safeguard,¹⁴² attorneys accustomed to procedural rights will likely press for innovations and regularity in the arbitration context. Moreover, one can anticipate that employment arbitrators will be recruited from the ranks of labor arbitrators.

140. *Id.* at 1.

141. *See id.* at 8-12. Although reproducing the entire checklist would be too lengthy, the subject headings capture the essential coverage of the checklist, as well as the range of issues covered by both the National Rules and the Due-Process Protocol, because the checklist is reflective of those governing documents:

Include a fair method of cost-sharing between the employer and employee to ensure affordable access to the system for all employees.

....
Use a neutral ADR provider and an established, fair procedure to govern the arbitration.

....
Specify the qualifications and number of arbitrators.

....
Specify the employees to be covered.

....
Specify the nature of the claims to be covered.

....
Give employees clear notice of their right of representation.

....
Provide time frames for filing a claim that are consistent with applicable statutes of limitation.

....
Provide for fair and adequate discovery.

....
Allow for the same remedies and relief that would have been available to the parties had the matter been heard in court

....
State clearly that it does not preclude an employee from filing a complaint with a federal, state or other governmental administrative agency

....
Provide adequate notice to employees prior to the plan implementation.

....
Ensure that the employment ADR plan is written in a clear and easily understood manner.

Id.

142. AMERICAN ARBITRATION ASS’N, NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES (INCLUDING MEDIATION AND ARBITRATION RULES) 18 (1998).

Labor arbitrators' familiarity with the procedural rights for employees, as set forth in collective bargaining agreements, and their regular observation of such practices in labor arbitration proceedings, will naturally influence the manner in which they conduct employment arbitration hearings.

Ultimately, these factors will result in a heightened sensitivity to the procedural rights of employees, which will lead to the establishment of procedural regularity for employment arbitration. When a clear demarcation of the boundaries of what is acceptable or required with regard to procedural rights becomes apparent, a relatively homogenous set of standards is likely to ensue. While one may not initially perceive this development as creating the functional equivalent of contract rights for individual employees, upon reflection this would seem to be the case. If mandatory arbitration compels employers to comply with certain procedural standards, then the procedural aspects will become, in essence, implied terms of the employer-employee agreement.

One interesting effect of such a development is that extending procedural rights to employees will have ramifications reaching beyond those cases that proceed to arbitration. Arbitrators will be inclined to consider whether employers afforded their employees due process at each stage of their interaction. As such, the non-union employer will discover the reality of what may be termed a "de facto contract," even in situations that do not proceed to arbitration. Because employers will be unable to anticipate which employment disputes will culminate in arbitration, it will be necessary either to comply with certain duties essentially as if they were set forth in contract or risk having an arbitrator overturn their personnel decisions.

Numerous factors will likely bring about a relatively extensive and detailed array of procedural rights for employees whose employers opt for arbitration. While this in itself would be a noteworthy phenomenon, the potential development of substantive duties and rights present an equally intriguing scenario.

B. Creation and Growth of Substantive Rights

The "Birth of Contract" reference in this Article's title indicates a presupposition that no contract presently exists for non-union employees, but that would overstate its position to some extent because certain technical attributes of a contract already govern the relationship between employers and their non-union employees. However, these contracts are typically quite rudimentary with regard to both the breadth and the depth of their coverage. Therefore, agreements to submit workplace disputes to arbitration do have the potential for effectuating fundamental change if they result in contract terms becoming greatly elaborated and otherwise enhanced. Thus, employment arbitration will play midwife to the birth of contract.

While many have made urgent pleas over the past few decades to extend

rights of job security to employees,¹⁴³ employers have been impervious to these pressures due largely to the employment-at-will doctrine. That barrier is no longer impenetrable, but it remains intact, perhaps even more so than some employers realize.¹⁴⁴ A number of factors related to employment arbitration will in effect open the gate, allowing the principle of employee job security to take hold in the form of contract terms or their functional equivalent. These factors are discussed later in this Article.¹⁴⁵

1. *Opening the Gate Wide: Framing the Issue for Arbitration*

When a dispute under a collective bargaining agreement proceeds to labor arbitration, a fundamental concern for the parties is how to frame the issue submitted to the arbitrator. Employers typically prefer an issue that is narrow in scope, which restricts the arbitrator to a particular contract provision, and sometimes negotiate specific contract terms restricting the arbitrator's authority.¹⁴⁶ The objective is to preclude decisions based on a generalized notion of justice or fairness, which would impose duties upon the employer in addition to those set forth in the contract.¹⁴⁷

What about framing the issue for arbitration in the non-union context? Presumably, non-union employers, like their union counterparts, will attempt to frame the issue such that an arbitrator is not free to "invent" duties or obligations. On the other hand, if employers wish to avoid litigation and assure the finality of the arbitration decision, the arbitrator must be given the authority to adjudicate claims relating to any and all legal rights of an aggrieved employee.¹⁴⁸ If the issue before an employment arbitrator is whether the

143. See, e.g., Blades, *supra* note 24 (discussing the imbalance of power in an employment-at-will relationship and the need for procedural protections); Summers, *supra* note 24 (noting the need for employee protection against unjust dismissal).

144. See Sid L. Moller, *The Revolution That Wasn't: On the Business as Usual Aspects of Employment at Will*, 27 U. RICH. L. REV. 441 (1993) (observing that the exceptions to the employment-at-will doctrine may not have as profound an impact as some may think).

145. See *infra* Part IV.B.5.

146. See ELKOURI & ELKOURI, *supra* note 40, at 125-28, 320-24 (regarding the statement of the issue and the scope of arbitration).

147. See, e.g., *id.* at 886 (noting that arbitrators may read a "just cause" firing requirement into a collective agreement that fails to expressly address this issue).

148. Lawyers tend to have a myopic view, seeing the world from a law-centered perspective. As such, lawyers sometimes have a lack of appreciation for competing views. One example is the notion that non-union employment arbitration is more akin to a resolution of intra-family squabbles than an adjudication of claims based on legal entitlements. Theoretically, a third party might be called in to calm the waters of a troubled relationship, without exalting the parties' claims to a legal status in the process. See Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 431 (1986). However, as a practical matter, such a non-legal approach is incompatible with employment arbitration. The legal focus is obvious with regard to the arbitration of statutory claims; but even with regard to other grievances, a contractual agreement to submit claims to a neutral third party for binding resolution, and because the arbitrator's decision is legally enforceable, will

employer has violated a legal right of the employee, it follows that arbitrators will be scrutinizing employee claims that are based on legislation as well as those based on the common law.

The significance of styling the issue in such an open-ended fashion is apparent. While labor arbitrators must determine whether a particular provision (or a relatively small number of provisions) of a collective bargaining agreement has been breached, employment arbitrators will have more discretionary authority. Legal developments outside the boundaries of the particular workplace may be implicated. Considering the non-union employment relationship and its traditional governance by self-enforcing norms rather than explicit rules, one discovers employment arbitration will involve more than disputes over particular contractual provisions. This fact could compel employers to clearly articulate contract terms. Note the rationale behind such a move as explained by the following excerpt:

Assuming that contract's greater ability to bind motivates the choice between norms and contract, why does there seem to be a bipolar distribution of solutions, in both the ILM [internal labor market] and commercial contexts? Why are commercial relational contracts so detailed? Why is there such a sharp distinction between the unwritten and unenforceable non-union ILM and the detailed CBA [collective bargaining agreement] of the union ILM?

The best explanation for the bipolar choice between norms and contracts is the similarly bipolar choice between self-enforcement and third party enforcement. Once it is worthwhile to the parties to write a contract, for whatever reason (to protect sunk investments in the power plant/coal mine context, to bind the untrustworthy employer, or to pursue union wage premia in an ILM), they must try to write contracts that are as explicit as possible. By opting for third party enforcement and thereby foregoing the benefits of a self-enforcing norm-governed interaction, the parties expose themselves to third party error and opportunistic behavior. The two available mechanisms for minimizing this vulnerability are, first, the choice of the third party decisionmaker (that is, providing for expert arbitration), and, second, detailed terms to guide the decisionmaker. Not surprisingly, one finds these provisions in both long-term commercial relational contracts and union CBAs.¹⁴⁹

necessarily confer a legal status on the rights and duties that emerge from the proceedings.

149. Rock & Wachter, *supra* note 16, at 1946.

Compelling an employer to adopt a detailed employment contract in order to guide the arbitrator supports this Article's thesis that employment arbitration will lead to the emergence of contract. For a host of reasons, many employers will likely choose not to pursue this option. In that case, other factors will come into play, as the entire world of employment law jurisprudence is the arbitrator's oyster.¹⁵⁰

2. *Arbitration of Statutory Claims*

One cannot claim that employment arbitration will create statutory rights. On the other hand, when an arbitrator scrutinizes an employer's statutory duties, the arbitrator will probably incorporate the statutory duties by reference into the employment contract. In this scenario, the statutory obligations take on the functional equivalence of contractual duties. Even if the substance of the statutory and contractual rights is largely redundant, the process of "activating" statutory rights through arbitration is significant. One ramification of this process is the availability of an alternative forum for employees, one that is more accessible than a government agency or the court system.¹⁵¹ Other factors could also be of some consequence, such as the manner in which employment arbitrators tend to fashion remedies as compared to that of administrative agencies and the courts, and the extent to which courts ultimately defer to the decisions of employment arbitrators.

Although having arbitrators determine whether an employer has violated the statutory rights of employees is a notable development, the resolution of

150. The guidelines issued by the American Arbitration Association support the assertion that arbitrators will be given an expansive charge to hear employee claims. In a recent publication, the AAA states the following:

Under the National Rules for the Resolution of Employment Disputes, the arbitrator may grant any remedy or relief that the arbitrator deems just and equitable, including any remedy or relief that would have been available to the parties had the matter been heard in court. This authority includes the right to award compensatory and exemplary (or punitive) damages, attorneys' fees, and other remedies to the extent those remedies would be available under applicable law in court. The National Rules for the Resolution of Employment Disputes do not permit programs to place restrictions on available remedies.

AMERICAN ARBITRATION ASS'N, *supra* note 139, at 11.

151. One commentator notes that labor arbitration is well accepted by unions and union members, in part because "[i]t provides an informal environment and process that employees understand." Fitzgibbon, *supra* note 2, at 488. Although Fitzgibbon directs these comments to labor arbitration, a similar comfort level might be expected in the non-union context. Fitzgibbon also notes that cost is an important factor for non-union employees: "[I]f the majority of discharged at-will employees *in fact* could not afford to go to court but could obtain an effective decision in arbitration, any exhortation of the virtues of the judicial process might be meaningless." *Id.* at 499.

disputes involving common law rights is more likely to alter dramatically the present status quo of the non-union employment relationship. Rights extended to employees through legislation constitute something of a known quantity. But common law rights, especially exceptions to the employment-at-will rule, have rapidly expanded over the past couple of decades, and this area of the law remains largely unsettled.

3. *Relational Contract Principles and the Common Law Rights of Employees*

Earlier, this Article explained the basis for a belief that the principles of relational contract theory are helpful in analyzing employment agreements.¹⁵² Professor Peter Linzer's work¹⁵³ is further support for the usefulness of non-traditional contract theory in explaining modern employment law. Professor Linzer's general focus is on the blurring of the traditional divisions of private law (tort, contract, and property law in particular), but specifically as manifested in the context of employment law.¹⁵⁴ His analysis of the origins of rights and duties in the workplace leads to his conclusion that:

[P]rivate law is a relatively seamless area in which the society, speaking primarily through the courts, assigns rights and duties based on relationships among people and firms, in light of many factors, among them the particular community needs, the needs of the parties themselves, their relative power, fairness among them *and* their assent. The traditional tort-contract-property lines are not irrelevant, and work fairly well in simple situations (which may be very important). They are close to useless when we are talking about a relationship that is complex and that changes over a long time.¹⁵⁵

Consistent with his theme that private law demarcations are blurred in the employment context, Professor Linzer concludes that courts draw upon a blend of tort, contract, and property law principles when defining the terms that govern the employment relationship.¹⁵⁶ Additionally, he points out that classical contract law has evolved to reflect the current recognition of broad public interests in the contracts arena, rather than the strictly private concerns of another era.¹⁵⁷

152. *See supra* Part III.B.1.

153. *See* Linzer, *supra* note 12.

154. *Id.* at 356.

155. *Id.* at 326-27 (footnote omitted).

156. *Id.* at 425.

157. *Id.* at 379.

Professor Linzer's views have a great deal of merit, at least insofar as he describes what is actually occurring in these cases. Courts have been increasingly receptive to the view that a contract between an employee and employer is not limited to those matters upon which the parties have expressly agreed.¹⁵⁸ Several sources contribute to the establishment of employer duties and employee rights, the most significant being norms of conduct and party expectations. Moreover, courts also appear receptive to the view that, in a highly relational situation, the rights and duties of the parties are not static; instead, they are openly adjusted throughout the relationship.¹⁵⁹

One might question the significance or even the relevance of court decisions that impose contractual obligations upon employers, despite the lack

158. *See, e.g., id.* at 363 (discussing the Court's willingness to read a property right to a job into an employment contract absent an explicit term).

159. One commentator observes:

While well-constructed contractual voluntarism may be sufficient for common-law evaluation of early-stage employment relations, it is insufficient for the evolving employment relation. The life-cycle model of employment presents shifting relations between employer and employee. As Schwab properly notes, the incentives and risks operating on the parties change precipitously across this relationship.

Issacharoff, *supra* note 58, at 1797 (citing Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8, 38-51 (1993)). The following excerpt is also relevant to this discussion:

But contrary to this "discrete transaction model," most transactions today involve long-term dealings between parties who continue to have contact with each other over the years. These are "contractual relations," in which the needs of the parties will change with external circumstances. Yet in the "classical" (i.e., Williston) and "neoclassical" (i.e., Corbin) models of contract, the parties must address all those needs, consciously and consensually, at the moment the contract is made. All future contingencies must be drawn back to the present—they must be "presentiated." The parties must deal with changes after the moment of contracting by later mutual agreement, or else the courts must use the cumbersome devices of excuse, such as for mistake or impracticability. Otherwise the terms presentiated at the time of contracting, perhaps years in the past, must govern. Macneil proposes a "relational" approach that will permit the rights and duties of the parties to be openly adjusted *during* the relationship. Other important writers on contracts have accepted aspects of Macneil's relational analysis, and have used its approach to deal with changes in long-term promissory arrangements.

Linzer, *supra* note 12, at 392-93 (footnotes omitted).

of an express agreement between the parties, where the controversy is subject to arbitration rather than judicial review. Nevertheless, if arbitrators have the duty to recognize any legal rights that an employee has in a particular jurisdiction, then arguably the arbitrator must engage in an analysis which parallels that of the courts within the pertinent jurisdiction. Thus, if the arbitrator believes that a state's courts would prohibit an employer from discharging an employee for reasons violative of public policy, then the arbitrator is bound to rule against an employer that has committed such a violation. The same holds true for the other principal exceptions to the employment-at-will rule; namely, the implied covenant of good faith and fair dealing and those obligations that arise from a so-called "implied contract." The fact that an exception to the employment-at-will rule might find its way into the non-union employment relationship as the functional equivalent of a contractual term of employment warrants a closer look at how an employment arbitrator should handle those exceptions.¹⁶⁰

4. *Exceptions to the Employment-At-Will Rule*

Although the analytical constructs adopted by courts that have recognized exceptions to the employment-at-will rule are beyond the scope of this Article, the reasoning of one court in a landmark decision illustrates how employment arbitrators could recognize employer duties and employee rights in circumstances that some employers, at least, will find surprising. In *Toussaint v. Blue Cross & Blue Shield*¹⁶¹ the Michigan Supreme Court dealt with the question of whether an employment handbook constituted an employment contract that obligated the employer to comply with its terms. The handbook provided that employees could be terminated only for just cause. In concluding that the employer had indeed assumed such an obligation, the court reasoned as follows:

While an employer need not establish personnel policies

160. Although the lines have been blurred, as noted by Professor Linzer, *see* Linzer, *supra* note 12, the right to challenge a discharge because it violates public policy is commonly characterized as an action in tort rather than contract. *See* Moller, *supra* note 144, at 471-78, 481. While not minimizing the importance of the distinction, intuition leads one to believe that the characterization of a discharge as either a tortious act or a contractual breach will ultimately be of lesser significance in arbitration. When employment arbitrators adjudicate claims based on allegations that the employer violated public policy, their mode of analysis will remain essentially the same, however the claim is styled. Although the employer's obligations will be derived from policies that are extraneous to the employment relationship, the dispositive question will be whether the employer breached a duty it owed to the employee. Accordingly, one might characterize the obligation as the equivalent of an implied contractual duty such that employers cannot discharge employees for reasons violative of public policy. In that case, the only meaningful difference between characterizing the action as one in tort or as one in contract will relate to the issue of remedies.

161. 292 N.W.2d 880 (Mich. 1980).

or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly. No pre-employment negotiations need take place and the parties' minds need not meet on the subject; nor does it matter that the employee knows nothing of the particulars of the employer's policies and practices or that the employer may change them unilaterally. It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation "instinct with an obligation."¹⁶²

Consider the ramifications of the *Toussaint* rationale. What circumstances create a workplace relationship "instinct with an obligation" to terminate employees only for just cause? This standard is vague, much different than the requirements of classical contract doctrine.¹⁶³ Under the standard articulated in *Toussaint*, one could plausibly argue that the employer creates such a situation by agreeing to arbitrate employment disputes. At the very least, in jurisdictions that have adopted the implied contract exception, arbitrators will have the license to scrutinize the history of an employment relationship in search of words and actions that establish a voluntary assumption of duties by the employer. Similar reasoning would apply to the other exceptions to the employment-at-will rule. Unfortunately, discerning which employee discharges are offensive to "public policy" and the type of circumstances that will constitute a violation of the employer's implied covenant of good faith and fair dealing will most likely be problematic.

All three exceptions to the employment-at-will rule are flexible, which provides decision makers with a tremendous amount of latitude. While this Article notes that exceptions provide the theoretical justifications necessary to eviscerate the employment-at-will doctrine, commentators also recognize that because the standards are so indefinite they could be interpreted narrowly so

162. *Id.* at 892 (footnote omitted) (quoting *Wood v. Lucy, Lady Duff Gordon*, 118 N.E. 214, 214 (N.Y. 1917)).

163. Regarding the *Toussaint* decision, Professor Linzer states that "[w]hat appears to be a somewhat loose construction of an offer and acceptance really reflects a major change in the substantive law of employment relations." Linzer, *supra* note 12, at 349. Additionally, Professor Linzer accurately identifies the court's rationale as "heresy as far as traditional contract law is concerned." *Id.* at 351.

as to disallow only the most egregious actions of employers.¹⁶⁴ In essence, the exceptions present courts with an opportunity to make policy determinations. If employment arbitrators have the same opportunity, the exceptions could accommodate a broad expansion of employee rights. Over time, arbitrators possibly could apply the exceptions to the employment-at-will rule in a manner that would transform the non-union employment relationship.

Implicit in the preceding explanation is the assumption that arbitrators are prone to make policy determinations that are more favorable to employees than to employers; that is, they are likely to “push the envelope” by a broad application of the employment-at-will exceptions. This assumption may be suspect because a substantial percentage of arbitrators will undoubtedly be hesitant to assume an activist or creative role. If nothing else, the need to maintain acceptability would contribute to moderation in this regard. However, under close analysis of the institution of labor arbitration and some of its more notable traditions, the likelihood of an expansive view of employer duties and employee rights becomes apparent.

5. *Arbitration Traditions and Practices*

While unionized employees almost invariably enjoy protection from discharge without cause, non-union employees typically do not enjoy such protection. Nevertheless, non-union employees have been the beneficiaries of numerous other legal protections in the past two or three decades as a result of legislative and common law developments. But, for the most part, these developments do not amount to contract rights, and, therefore, the models of governance for unionized and non-unionized relationships remain fundamentally different. Assuming that some substantive contract rights emerge as a consequence of employment arbitration, perhaps the most compelling question is whether a discharge-for-cause-only obligation, or something comparable, will evolve. Given the conventions of labor arbitration, and the likelihood that such conventions will influence the thinking of employment arbitrators, a move toward the development of enhanced job security rights for non-union employees seems probable.¹⁶⁵

164. See Moller, *supra* note 144, at 481-82. Although Moller’s article makes reference to only two of the exceptions, the principle stated has application to all three.

165. The National Conference of Commissioners on Uniform State Laws adopted a Model Employment Termination Act in 1991 which provides employees certain rights of job security and utilizes arbitration as the principal enforcement mechanism. See Theodore J. St. Antoine, *The Making of the Model Employment Termination Act*, 69 WASH. L. REV. 361, 369-70, 376-78 (1994). As the reporter for the committee that proposed that law, Professor St. Antoine wrote, “Adopting the arbitration format would immediately make available the vast body of arbitral precedent concerning substance and procedure that has been developed in countless decisions over the years.” St. Antoine, *supra* note 23, at 77. Professor St. Antoine’s statement may not apply equally to the at-will situation when a statute is not involved, but his insights are significant, even if they only lead us to conclude that one cannot realistically expect “the vast body of arbitral precedent” to be ignored by employment arbitrators. For further insight, see

As explained, the employment-at-will rule essentially established the terms of an employment agreement by default, because if the parties had no explicit understanding of contractual restrictions on the employer's discretion, then a court would conclude that none existed. This judicial mindset is significant to the analysis of decisions in which the courts have adopted or applied exceptions to the employment-at-will rule. Limiting employer discretion constitutes a disturbance of the status quo and, in many jurisdictions, a dramatic departure from long-observed norms. Consequently, employees often only obtain legal relief when the actions of their employers are egregious. The tradition of labor arbitration is in some regards exactly the opposite. The conventional approach of labor arbitrators is such that job security is presumed and employer actions that threaten such security are closely scrutinized. A couple of examples will illustrate this close scrutinization.

Subcontracting, which in the context of the present discussion means the transfer of work normally performed by bargaining unit employees to the employees of another employer, is sometimes an extremely contentious matter in unionized environments.¹⁶⁶ Questions regarding the employer's discretion to subcontract are not uncommon in labor arbitration.¹⁶⁷ The situation in which the contract is silent on the issue is especially problematic. On this point, the reasoning of one highly regarded labor arbitrator is illuminating:

Job security is an inherent element of the labor contract, a part of its very being. If wages is the heart of the labor agreement, job security may be considered its soul. Those eligible to share in the degree of job security the contract affords are those to whom the contract applies. . . .

The transfer of work customarily performed by employees in the bargaining unit to others outside the unit

Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986). Judge Edwards explains:

In other areas, we could capitalize on the substantive expertise and standards developed by well-established ADR mechanisms. For example, the experience and standards developed through decades of labor arbitration and mediation could prove particularly useful in settling disputes between nonunionized employees and their employers in cases of "unjust dismissal." Labor arbitrators have developed fine-tuned standards for just-cause terminations, which they could easily transfer to the nonunion workplace, thus providing similar protection to nonunion employees.

Id. at 681 (footnote omitted).

166. *See, e.g.*, *New Britain Mach. Co. v. United Elec. Workers, Local 207*, 8 Lab. Arb. (BNA) 720 (1947) (Wallen, Arb.) (arbitrating a dispute arising from the transfer of watchmen duties from union members to non-union guards).

167. *See id.*

must therefore be regarded as an attack on the job security of the employees whom the agreement covers and therefore on one of the contract's basic purposes.¹⁶⁸

Collective bargaining agreements that contain no express limitation on the right of the employer to discharge employees present a similar issue. In *How Arbitration Works*,¹⁶⁹ a familiar reference publication for labor arbitrators, the authors point out that although some arbitrators are unwilling to read a just-cause limitation into the contract, many others take the opposite position, concluding that absent a clear provision to the contrary, it must be implied that employers are restricted to just-cause discharges.¹⁷⁰ Interpreting the labor agreement otherwise would reduce to a nullity the fundamental notion of workers' security in their jobs.¹⁷¹

Much more could be said regarding both the prominent status of job security in the labor arbitrator's hierarchy of values and of the significant role that the protection against abusive or arbitrary discharge plays in the analytical framework of labor arbitration decisions. These points demonstrate that, on this particular issue, the labor arbitration decision-making process is fundamentally different from that of the courts. Whereas the "default contract" for courts has historically been one of employment at will, the absence of explicit contract directives does not preclude labor arbitrators from imposing restrictions on employer discretion. Due to labor arbitrators placing such a high value on employee job security, employers in labor arbitration cases cannot confidently assume that they have the freedom to discharge employees unless they have successfully negotiated explicit contract terms to that effect.

Because labor arbitration involves a collective bargaining agreement that almost invariably includes a just-cause provision and because it presents any number of distinguishing policy considerations as compared to the non-union situation, it would be understandable if the reader discounts the significance of the tendencies noted above. However, one should not be too quick to dismiss labor arbitration as a "wholly-other" endeavor. As explained earlier, the courts have articulated standards in the recognized exceptions to the employment-at-will rule that are not self-defining, which means the decision maker will have some latitude in determining whether a contract exists. Consider again the specific example of the implied contract exception. Also, recall the *Toussaint* court's focus on the reasonable expectations of employees and its conclusion that the situation was "instinct with an obligation."¹⁷² It seems apparent that those conversant with the values and conventions of labor arbitration will have some proclivity toward applying such a pliant standard as that presented by the

168. *Id.* at 722.

169. ELKOURI & ELKOURI, *supra* note 40.

170. *Id.* at 884-86.

171. *Id.* at 886.

172. *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917).

implied contract exception in a manner that recognizes job security for employees.¹⁷³ Echoing a point made earlier, the same could be said for the determination of whether discharges are violative of public policy or are in contravention of the employer's good faith and fair dealing obligation.

Employers of non-union employees may seek to avoid using labor arbitrators because of a concern that the labor arbitrators will indiscriminately import principles from the union context into the non-union environment. Employers may partially succeed with this objective, especially if they are relatively sophisticated in their arbitrator selection process, but it will be a surprise if one is able to read a number of employment arbitration decisions in twenty years and not see the influence of labor arbitration in the decision makers' thought processes.

The impact of labor arbitration will likely be attributable to many factors and will likely surface in a multitude of situations, such as: the reasoning articulated by experienced labor arbitrators who cannot completely separate labor arbitration from employment arbitration; the non-discriminate borrowing of labor arbitration principles by inexperienced arbitrators who do not fully appreciate the differences between union and non-union contractual relations; the thoughtful analysis of arbitrators who reason by analogy to labor arbitration decisions because no other precedent is quite apropos to the case at hand; and the slanted rationalizations by arbitrators who, although designated as "neutrals," are in fact thinly veiled partisans who aggressively support the expansion of employee rights. It will be impossible to establish employee arbitration as an entirely separate institution, altogether immune from the influences of labor arbitration. At least some of the traditions, norms, precedents, analytical constructs, and even the personalities involved with labor arbitration, will inevitably surface in employment arbitration.¹⁷⁴

Many of the influences mentioned previously will result in the development of detailed contractual agreements in the non-union context. Consider the following hypothetical. Assume that an employer is doing business in a state that recognizes the implied contract exception to the employment-at-will rule, and further that an employment arbitrator has concluded that certain representations of the employer have created a situation in which employees reasonably expect that they will be discharged for cause only. If the arbitrator reinstates an employee fired for theft because in the past the employer had not fired other employees who had stolen property and also because the employee in question had a spotless record prior to his infraction, then the arbitrator is borrowing principles from labor arbitration that have

173. Ironically, at least from the employer's viewpoint, some arbitrators might conclude that providing for the arbitration of disputes creates some level of contractual job security for employees.

174. See generally Fitzgibbon, *supra* note 2, at 500-16 (providing insight into the arbitrator's approach to dispute resolution and highlighting several customs of the labor arbitration process that likely will find their way into non-union employment arbitration).

evolved over the years in discharge cases. While the employer in this instance has neither negotiated a contract with its employees whereby it assumes contractual duties nor unilaterally promulgated an employee handbook that obligates it to follow certain procedures in discharge cases, the arbitrator's decision will in some regards establish similar duties.

In the foregoing hypothetical, suppose that the employer's CEO is advised of the arbitrator's decision. After being educated on the principles of just-cause terminations and the concepts related to them,¹⁷⁵ the CEO insists that the company must do whatever is necessary to establish its right to discharge employees for theft, even if it is a first offense and the employer has acted leniently in the past. One practical solution in these circumstances would appear to be the promulgation of a written policy stating that, notwithstanding any implied or express agreements relating to employee job security, the company reserves its right to terminate employees caught stealing, even if it is a first offense and without regard to the manner in which the employer has disciplined employees in the past. An astute employer may realize that the policy statement should address other areas in which a first offense could result in discharge and amend the statement accordingly. The employer may be even more ambitious and decide that turning a discipline case over to an arbitrator without any guidelines is too risky. Such an employer may expand the policy statement to cover the issue of discipline in its entirety.

Note what has occurred in this scenario. Guided by labor arbitration principles, the arbitrator has imposed contract obligations upon the employer. The employer responds by essentially creating a more elaborate contract by issuing its policy on discipline for theft (or on discipline more generally). This fairly unremarkable hypothetical demonstrates how contractual agreements, relatively complex and not unlike collective bargaining agreements, could arise in the non-union employment relationship.

A real-life example confirms the possibilities suggested by the hypothetical above. In a 1997 arbitration case, two non-union employees who had completed a mechanic training course filed grievances because they were not promoted to a higher-graded classification.¹⁷⁶ The employees claimed that on every prior occasion, promotions followed graduation from the training program.¹⁷⁷ In response, the company argued that its handbook did not provide for such an automatic promotion.¹⁷⁸ The arbitrator framed the issue as follows:

This case requires the Arbitrator to determine the role of

175. For example, the requirements of progressive discipline and non-discriminatory treatment.

176. See *Indiana Mich. Power Co.*, 107 Lab. Arb.(BNA) 1037, 1038 (1997) (Render, Arb.). The employees had been laid off as a result of a restructuring by the company. *Id.* at 1038. Their claims related to the severance pay they received, which would have been greater if they had been classified at a higher grade. *Id.*

177. *Id.* at 1040.

178. *Id.* at 1039.

past practice in a non-union setting where the employer has made certain representations to its employees in an Employee Handbook *which handbook is admittedly not contractual in nature*. The real question is whether past practice or a customary way of doing things has any role in non-union arbitration under an employee handbook such as the one involved in this case. There is very little guidance in the published arbitration decisions at this point.¹⁷⁹

In explaining his rationale for sustaining the grievances, the arbitrator began by noting the importance of past practice in the company-union setting:

Under certain circumstances, past practice can become a binding part of the labor agreement which can only be changed through negotiation. A binding past practice may work to the benefit of the company in one situation and to the union in another. The point is that the doctrine of binding past practice is seen as a useful concept for both companies and unions under certain circumstances. . . .

One of the reasons for the existence of the doctrine of past practice, whether a given practice is binding or not, is that it helps create a more stable working environment which benefits the company, the union and the employees.¹⁸⁰

Having noted the importance of past practice in the union situation, the arbitrator expressed his opinion that “past practice can serve the parties well even when operating under a non contractual handbook.”¹⁸¹ He concluded his reasoning on this point as follows:

Simply put, the Arbitrator is at a loss to understand how the company could treat employees fairly and equally if it did not take into account the way that it treated other employees. Thus, the Arbitrator concludes that the doctrine of past practice makes sense in a non-union setting when a company has a *non contractual handbook* which makes pledges to the employees.¹⁸²

One could consider this decision as the picture of things to come, a picture worth a thousand words and more, illustrating several of the key points in this Article. The arbitrator considered the significance of a handbook which even

179. *Id.* at 1041 (emphasis added).

180. *Id.*

181. *Id.*

182. *Id.* at 1042 (emphasis added).

he characterized as non-contractual. Yet in the highly relational context of employment, previously governed by norms voluntarily adhered to by the parties, a neutral third party must determine which party is to prevail. These norms then become the basis of contractual rights and duties, because the analytical construct of arbitration inevitably channels the inquiry in that direction. Moreover, despite the predictions that arbitration will not be easily transplanted to the non-union context, the arbitrator in this case relied upon labor arbitration conventions in his decision. Thus, the formerly invisible individual employment contract might become visible.

V. CONCLUSION

The non-union workplace has a long tradition of self-governance, with most of the interactions between the parties being based more on the employer's voluntary adherence to informal norms than on their obligatory compliance with legal constraints. However, over the past twenty-five years, numerous employment-related legal initiatives have resulted in the government's assuming an increasingly significant regulatory function in the non-union context. As statutory guarantees of employee rights proliferated and the number of jurisdictions adopting judicially-created exceptions to the employment-at-will rule multiplied, it became more difficult to describe precisely governance in the non-union workplace. In a sense, the present state of affairs suggests a bifurcated system in which employers necessarily yield to legislative and judicial commands, where applicable, but at the same time maintain a relatively informal (that is, "non-legal") relationship with employees in those areas the law has yet to penetrate.

Apparently, a substantial number of employers of non-union employees are choosing to submit employment disputes to arbitrators. This trend will lead both to the emergence of contract obligations or their functional equivalent and to the relatively informal practices of the past being supplanted by a more formal, law-centered system of governance. The material with which to build a contractual model is already present in the non-union employment relationship. In this highly relational exchange, one might regard the duties of the employer and the correlative rights of the employee as having potential energy, stored energy not yet released.¹⁸³ If a substantial number of employers opt for arbitration, this will change. Although not as formalistic as litigation before courts or administrative agencies, arbitration is an adjudicatory function

183. Employee successes based on exceptions to the employment-at-will rule have activated some of these rights and duties. However, litigation of this type, especially when the plaintiff prevails, tends to involve egregious or otherwise inappropriate employer behavior and is both atypical and infrequent in a particular employment setting. Arbitration, on the other hand, could become much more commonplace and perhaps even routine in some work environments and, therefore, more likely to involve relatively ordinary issues relating to personnel management. In such circumstances, the articulation of employer duties and employee rights is more apt to invade the consciousness of the parties, making the contract a tangible reality.

and has much in common with such processes. The requirements of procedural fairness and a decision-making methodology designed to weigh competing claims will inevitably lead to the articulation of rights and duties. Even first-year law students will recognize these as constituting the essence of contract. Some of the claims presented to employment arbitrators will be grounded on legislation which will accentuate the need to provide procedural rights to employees and will promote the development of rigorous legal analysis by decision makers.

Once employers and their attorneys fully appreciate the ramifications of these developments, prudence will dictate a conservative course of action,¹⁸⁴ which translates to a set of “minimum standards” with regard to both procedural and substantive matters. Otherwise, the risk that an arbitrator will impose such standards when the employer feels it can least afford them remains. Some employers will elect to articulate these standards in a handbook or employee manual, especially if they wish to limit the arbitrator’s discretion; other employers will simply abide by the minimum standards, which arbitrators could easily recognize as implied contract terms unless the employment agreement provides otherwise.¹⁸⁵ In either situation, a contract or its functional equivalent will emerge and the non-union employment relationship will be profoundly altered as a result.

184. See, e.g., Richard A. Bales, *Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements*, 47 BAYLOR L. REV. 591 (1995) (defining the minimum components that compulsory arbitration agreements must possess to ensure judicial enforcement).

185. One incentive for the adoption of standard terms, or acquiescence to those standard terms which are implied as a matter of law, is the promotion of efficiency by reducing transaction costs. As one commentator notes, legally-implied, standard terms “establish a set of ready-made contract terms, and whenever the parties would have included similar provisions in their agreement, they are made better off by being spared the time and expense of having to do so.” Anthony Kronman, *Paternalism and the Law of Contracts*, 92 YALE L. J. 763, 766 (1983).

