CHAPTER 4

EMPLOYMENT LITIGATION AND DISPUTE RESOLUTION: THE DUNLOP COMMISSION REPORT

I. THE INDUSTRIAL RELATIONS UNIVERSE REVISITED

JOHN T. DUNLOP*

In this city, 19 years ago, I spoke to this Academy on the theme of the industrial relations universe.[1] I stated then that "[i]n the last 30 years the universe of industrial relations has expanded very rapidly with ever greater complexity and detail. Our capacity, and even our concern, to portray and appreciate the greater whole has receded apace. . . . We tend to think of our parochial activity as if it were the whole."[2] These processes—both the expansion of the industrial relations universe and the incapacity to appreciate the whole—have been magnified in the intervening years.

Grievance arbitration, which I described as too often dulling the mind and hardening the seat, has been the main source of cash flow of this fraternity. I directed attention rather to the alternative roles of neutrals with wage incentives and job evaluation plans, health care and pension benefits, work jurisdiction, and other specialized areas. I stressed the opportunities for neutrals with continuing joint labor-management committees on a local, sectoral, or national basis. And I stated that a "new and expanding role in industrial relations is presented by the rapid growth in government regulations relating to . . . health and safety, pensions, affirmative action, equal pay, and so on."[3]

---

*Honorary Life Member, National Academy of Arbitrators; Lamont University Professor, Emeritus, Harvard University, Cambridge, Massachusetts; Chair, Commission on the Future of Worker-Management Relations, 1993–1995; U.S. Secretary of Labor, 1975–1976.

[1]Dunlop, *The Industrial Relations Universe*, in Arbitration: 1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, ed. Dennis & Somers (BNA Books 1976), 12.

[2]*Id.* at 12.

[3]*Id.* at 17.

It is to this theme of the relations between the expanded spheres of employment law and dispute resolution to which I return and revisit today. Moreover, it is the third question referred to the Commission on the Future of Worker-Management Relations.[4]

The Present Situation

The basic facts that describe the current and projected state of employment law disputes involving workers, unions, managements, federal and state government agencies, and the courts can be summarized in nine points:

1. There has been a vast array of new employment rights created by statutes in Republican and Democratic administrations alike over the past 60 years.[5]
2. There was more than a fourfold increase in cases in litigation in the federal courts in the period 1971–1991.[6] State court cases of wrongful dismissal have likewise grown.
3. The backlog of cases in agencies has also grown substantially. The Equal Employment Opportunity Commission (EEOC), for example, reported an inventory of 97,000 complaints at the end of 1994.
4. At the same time, funding to the agencies has been constricted so that their investigative staff has declined and is projected to decline further over the next five years.[7]
5. A number of federal statutes since 1990 have sought to encourage alternative methods of dispute resolution in federal employment statutes, but the response to date has been miniscule on the part of all parties.[8]
6. Protections for low-wage workers who lack representation is particularly constrained by the high costs of litigation. Employment litigation tends to be much more utilized by managerial and professional employees than low-wage employees.

---

[4] *See* Commission on the Future of Worker-Management Relations, Fact Finding Report (U.S. Dep't of Labor & U.S. Dep't of Commerce, May 1994) (hereinafter cited as CFWMR Fact Finding Report); Commission on the Future of Worker-Management Relations, Report and Recommendations (U.S. Dep't of Labor & U.S. Dep't of Commerce, December 1994) (hereinafter cited as CFWMR Report and Recommendations).

[5] *See* U.S. General Accounting Office, Workplace Regulation, Information and Selected Employer and Union Experiences, Vols. I & II. Washington, D.C., June 1994.

[6] CFWMR Fact Finding Report, *supra* note 4, at 134.

[7] *See* CFWMR Report and Recommendations, *supra* note 4, at 54.

[8] *See* Administrative Conference of the United States, Toward Improved Agency Dispute Resolution: Implementing the ADR Act, Report of the Administrative Conference of the United States on Agency Implementation of the Administrative Dispute Resolution Act, Thomasina V. Rogers, Chair, Washington, D.C., February 1995.

7. Most employment discrimination suits are brought by employees who have already left the job where the complaint arose and have little practical expectation of returning to the same workplace.
8. In some highly competitive sectors, particularly those with high labor costs, widespread noncompliance results in uneven treatment of workers and unfair competitive advantages for violators who undermine socially determined standards (e.g., New York and the Los Angeles women's garment industry).
9. A number of employer-based dispute resolution systems are being established by some employers in nonunion workplaces—often as a condition of employment—to respond to the expansion in litigation and to costs. Many of these unilaterally established systems do not meet the Commission's tests of fairness in one or more respects.

The present situation did not arise recently; it is the legacy of policy and administrative decisions of the Congress and administrations over the past 50 years or more.

I believe this listing of the major features of the current state of employment law should be a major challenge to a body of professional arbitrators in the industrial relations field. What do you propose should be done? And what do you propose to do about it?

Commission Recommendations

Let me start the discussion by summarizing briefly the unanimous view of the Commission.

The Commission begins from the perspective that there are some seven million workplaces in the United States that differ substantially by size, sector, occupations, composition of work force, working conditions, and quality of relations among workers, supervision, and management. The Commission is mindful that it required many years of experimentation and experience before arbitration over the meaning and application of collective bargaining agreements was accorded the defined status it enjoys under the *Steelworkers Trilogy*.[9] Accordingly, the development of any system for the private adjudication of public rights under employment law will likely require a substantial period of professional discourse

[9] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

and experimentation, which the Commission seeks to encourage, before a relatively consensual status is achieved.[10]

The Commission's view is that experimentation needs to take place in a variety of places within and among the institutions involved in employment laws, including the creation of new processes and procedures. A sketch of the particulars follows:

Workplaces

Each workplace is encouraged to establish appropriate information, training, and procedures relevant to employment law standards and dispute resolution. These arrangements need to be appropriate to the particular workplace and ideally should provide for employee involvement plans. As an illustration, the Commission set forth in Section VII[11] health and safety program elements, including worker involvement processes. In general terms:

> To be effective, a system for resolving disputes about labor standards must settle claims fairly, close to the workplace, at an early stage, in a manner consistent with law and public policy, and with direct involvement of the disputing parties rather than through litigation much later with legal representation, and with higher transaction costs. In particular, disputing parties need to achieve early and direct settlement if they are to continue to work together productively. Absent an effective dispute resolution system, litigation tends to lead to the departure of the employee, regardless of the legal verdict.[12]

Some workplaces have established employee participation plans for voluntary dispute resolution. Others have developed ombudspersons to facilitate early dispute resolution within workplaces. Still others have used outside neutral mediators. These processes have potentials and need to be carefully appraised.

Federal Agencies

A few agencies have experimented with training special staff to engage in mediation and other forms of voluntary dispute resolu-

---

[10]These issues are discussed in Chapter IV of the CFWMR Fact Finding Report, *supra* note 4, at 105–37, and in Sections IV and VI of the CFWMR Report and Recommendations, *supra* note 4, at 25–33 & 43–53. The Transcript, September 29, 1994, includes the proposals and views of a wide range of interested parties: labor, management, women's organizations, neutrals, academics, etc. Arnold M. Zack, President of this Academy, presented his personal views. Members of the Commission also met on several occasions with representatives of the civil rights community and with the interested women's organizations to discuss these issues.

[11]CFWMR Report and Recommendations, *supra* note 4, at 55–57.

[12]*Id.* at 45.

tion. The preliminary efforts of the Labor Department in the Philadelphia region (Occupational Safety and Health Act and Wage-Hour) and the pilot program of EEOC are described in the Report.[13] It is clear to me that government officials accustomed to litigating or even settling lawsuits are not often well equipped to mediate or settle claims rapidly. It will require a substantial reinvention and retraining of government officials to transform agencies to play a more effective role in dispute resolution.

The Commission also envisages that these agencies may assist in the training of outside mediators and arbitrators in the substance of the laws and regulations and may develop a roster of acceptable neutrals.

Courts

The Commission is aware that the Judicial Improvements Act of 1990 directs federal district courts to improve civil case processing, and the practice of some federal courts has been to encourage mediation and other forms of alternative dispute resolution outside of resort to court litigation. In some districts this activity has been significant.

Private Arbitration That Is Binding

The Commission reports that it found a high degree of consensus regarding the quality standards required in private arbitration systems to ensure effective protection of employees' substantive legal rights. These quality standards are discussed in the Report and are briefly summarized[14] under seven points:

1. A neutral arbitrator who knows the laws in question and understands the concerns of the parties.
2. A fair and simple method by which the employee can secure the necessary information to present his or her claim.
3. A fair method of cost-sharing between the employer and employee to ensure affordable access to the system for all employees. (Maybe the agencies or the appointing agency should process arbitration fees.)
4. The right to independent representation if the employee wants it.

---

[13] *Id.* at 50–53. *See* Equal Employment Opportunity Commission, Task Force on Alternative Dispute Resolution, Report to the Chairman, Gilbert F. Casellas, Washington, D.C., March 1995.

[14] CFWMR Report and Recommendations, *supra* note 4, at 31.

5. A range of remedies equal to those available through litigation.
6. A written opinion by the arbitrator explaining the rationale for the result.
7. Sufficient judicial review to ensure that the result is consistent with the governing laws.

An integral part of the Commission's view on this topic is that the country needs to follow and evaluate more carefully the evolving workplace practices and institutions. The Commission proposed a coordinated public-private research group to track and analyze these developments.[15]

At the present time the Commission holds that binding arbitration agreements should not be enforceable as a condition of employment. The Commission believes the courts should interpret the Federal Arbitration Act in this fashion. Thus, the Commission would set aside the Supreme Court decision in the *Gilmer*[16] case.

At some time in the future, as arbitrators are trained in the details of public laws and their regulations, as agencies become more comfortable and accommodating to these processes, and as employee participation plans are established that meet the quality standards of the Commission and are respected at the workplace, it may be appropriate to reevaluate the present conclusion of the Commission.

The Commission is generally of the view that private arbitration of public law rights in workplaces with collective bargaining agreements, and arbitration clauses relating to the meaning and application of the agreement, should be treated parallel in public policy with arbitration in unorganized workplaces.[17] The same fairness standards for the present should apply to both types of workplaces.

Role of the Academy

I am familiar, of course, with the 1993 report of the Committee to Consider the Academy's Role, If Any, With Regard to Alternative Labor Dispute Resolution Procedures.[18] The Committee of the

---

[15] *Id.* at 61–62.

[16] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 55 FEP Cases 1116 (1991). *See* CFWMR Fact Finding Report, *supra* note 4, at 117–18.

[17] *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 7 FEP Cases 81 (1974), and other cases; CFWMR Fact Finding Report, *supra* note 4, at 116.

[18] *Report of the Committee to Consider the Academy's Role, If Any, With Regard to Alternative Labor Dispute Resolution Procedures*, in Arbitration 1993: Arbitration and the Changing

Academy appointed in May 1990 recommended that "the Academy should reaffirm that it neither encourages nor discourages member participation in employer promulgated arbitration."[19]

As a Charter Member, I hope this Academy will take more of a leadership role in the design and implementation of quality standards for arbitration systems to apply to public employment rights in workplaces whether or not governed by collective bargaining agreements. The country is already embarked on a significant debate and a period of experimentation with various forms of acceptable dispute resolution outside the court system. I believe the Commission's recommendations in this area provide an appropriate response to the present difficulties enumerated at the outset of this presentation. I also believe they provide a first draft of the standards that this Academy and individual arbitrators should support.

The Academy now faces a major challenge to take the lead in the resolution of disputes involving employment law, to enhance high standards for the profession of employment dispute resolution including arbitration, and to contribute to the self-interest of its members. The Academy has the potential to shape the course of dispute resolution of employment law outside court proceedings.

II. DISCUSSION

JOSEPH GRODIN*
MARSHA S. BERZON
JUDITH DROZ KEYES

Joseph Grodin: Professor Dunlop, thank you very much for a stimulating discussion of issues to which the remaining members of the panel will now turn their attention.

On my immediate left is Marsha Berzon and to her left is Judith Droz Keyes. Ms. Berzon is a union lawyer, serving as Associate General Counsel of the AFL-CIO. Ms. Keyes is a partner in the firm of Corbett & Kane, representing management.

World of Work, Proceedings of the 46th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1994), 325.

[19] *Id.* at 341.

*In the order listed: J. Grodin, Member, National Academy of Arbitrators; Professor, University of California Hastings College of Law; M.S. Berzon, Associate General Counsel, AFL-CIO; Partner, Altshuler, Berzon, Nussbaum, Berzon & Rubin, San Francisco, California; J.D. Keyes, Partner, Corbett & Kane, Emeryville, California.

It would appear that there is an emerging consensus along the lines described in the Dunlop Commission report and in today's presentation by Professor Dunlop, that if arbitration of statutory claims is to occur, it should occur within the framework of certain procedural guidelines that would assure basic fairness. That consensus is reflected in the Protocol that Arnold Zack announced at today's luncheon. It is reflected also in the rules of the American Arbitration Association's (AAA) California Employment Dispute Resolution Rules that some of us in this room helped formulate. Under those rules and consistent with the Protocol, if arbitration of statutory claims does occur, certain ground rules must apply. For example, that the arbitrator will have authority to provide for such discovery as may be necessary in order to do justice to the dispute; that the arbitrator will be expected to render a written opinion; that arbitrators will have at their disposal the full range of remedies that would be available in court had the matter been taken to court; that the claimant will have an opportunity to participate along with the employer in the selection of the arbitrator; and that arbitrators will be screened for their knowledge and background in the area.

Those are points that are reflected in the Dunlop Commission report as part of its recommendations. And as to them I take the liberty of assuming (and I will see in a moment whether my assumption is correct) that there is very little controversy, either with respect to the propriety of those criteria of fairness, or with respect to the proposition that both organizations that promote arbitration and individual arbitrators have a responsibility and obligation with respect to the implementation of those criteria. What I propose for our panel to do is to focus on the more controversial areas.

One of those is reflected in the proposal of the Commission report, that there be sufficient judicial review to ensure that the result is consistent with governing law. I interpret this to mean that the Commission is proposing that the scope of judicial review in the case of statutory arbitration be broader than it is normally with respect either to grievance arbitration under labor agreements in section 301 of the Taft-Hartley Act or under the Federal Arbitration Act and other comparable state statutes. Is that desirable, and if so, what should the standard of review be? Should organizations promoting arbitration and individual arbitrators play a role in promoting that criterion as well? And the other significantly more controversial question is whether arbitration of statutory agreements should be enforced where they are the product of

involuntary commitment through condition of employment. As to that issue, the rules of the AAA take no position, and the Protocol recently signed is schizophrenic—presenting both views with equal force and enthusiasm.

Let me open the first question. Am I correct in assuming that there is a consensus that you all would share with respect to the desirability of criteria for procedural fairness. Marsha?

Marsha Berzon: I would say that there is a consensus insofar as they go. I note that they are relatively general. As one gets more specific about them, there is quite likely to be some disagreement. I also find it somewhat difficult to discuss the question of any of these fairness issues without regard to whether we're talking about a truly voluntary—that is, after the fact—agreement to arbitrate as opposed to one that is imposed as a condition of employment. Leaving that disquiet aside, I note that there could be issues, for example, with respect to providing for counsel—that is, what does it mean to provide for counsel in situations in which statutory attorney fees are not available and high-end sorts of recoveries are unlikely. Does there have to be a provision for attorney fees even where the statute doesn't so provide? Or, can we assume that in most of these instances, when we're talking about statutory, as opposed to contractual, rights, most of these statutes provide for attorney fees. I think we're all assuming that where statutes provide for attorney fees, they will be available in arbitration. If they are not available in arbitration, then the arbitration would not be sufficient to meet the requirement of enforcing statutory remedies. So questions like that are likely to come up with respect to the provision of attorneys.

Similarly, with respect to the requirement that opinions be written, that general requirement leaves a lot of questions open: Are these opinions published? Are the opinions precedent? And why are private parties going to pay to provide the carefully reasoned opinions that good judges provide at the government's own expense? So what do we mean when we say that opinions should be written, and what's going to happen to these opinions? Given particularly the desire of many employers in entering into these sorts of agreements for privacy rather then exposure, the employers are likely to insist on confidentiality with respect to who the parties are and, perhaps, some of the facts of the underlying case.

Similarly, the cost-sharing statements are somewhat vague and unclear. How will costs be shared by the parties? Obviously, this is

a very important question when you're talking about low-income people or even moderate-income people. Will there be a cap on the amount that the employee will contribute, for example, one week's pay or something like that? On the other hand, there is the consideration that if the employer pays for the arbitration entirely, then the arbitrator appears to the employee as an employer shill, so to speak, and that's not a very good impression. So there are questions that have to be determined as to what the actual cost-sharing scheme will be.

Finally, with respect to arbitrator selection, there are various questions that could arise as well. So, the guidelines generally are fine at the level of generality that they're written, but hard issues will arise in application.

Judith Droz Keyes: Well, I certainly agree that there is an emerging consensus. There is by no means unanimity yet on virtually any of these issues, and I agree with Marsha that we can achieve (without a great deal of difficulty) a sort of surface-level agreement on many of them. But as we begin to probe more deeply, it becomes more difficult. And I am aware of the fact that there is a wide range of opinion among the employers' bar—among employers themselves—as to the way it ought to be, what is fair. But I don't think there's any doubt any longer that employers must be sensitive to these issues, particularly in the areas that have been identified, and that if we're going to have something that is going to work in the long term, we've got to come up with some answers to these questions. I do note, for example, if we compare the Protocol, which we just received today, with the Dunlop report and the new AAA rules, we see a great deal of commonality. But even there, there are some divergences that could become significant.

For example, one of them talks about the right to have a "representative" of the employee's own choosing. I wonder about that. I wonder if we will actually have something that in the end is effective all the way around. When we talk about statutory claims I wonder whether there ought not to be a requirement that the representative be authorized. Of course, if we were in court, it would have to be a lawyer admitted to practice in that jurisdiction. I'm not sure whether that's what we would want to say or whether we would want to be somewhat broader than that. But I think we need to be clear that the representative ought not to be the brother-in-law of the entry-level employee. For the employee's protection, as well as for the protection of the system and the

arbitrator, I think we need to give some thought to who the representative should be. It's not quite enough to say that the employee ought to have the right to a "representative," although I certainly agree that the employee ought to have a right to a representative.

Another area of controversy is discovery, or "enough information" or "access to information" as the Protocol puts it. I think it's a mistake when employers attempt to push the limits by eliminating the prehearing and enter arbitration cold. In the end, they are going to suffer the consequences of that overreaching. It's not going to work, it's not going to be respected, and it's wrong. We need to have a way of sharing information efficiently, but of course, the question is how do we do that. Should we provide for depositions as we would in a judicial proceeding, or should the process be less formal, something with which we are more familiar in the context of arbitration.

All of these things must be worked out because I think arbitration isn't going to go away for the reasons that have been identified in the Dunlop Commission report. There are pressures here that are building; there are pressures that I see from my employer clients. And we can talk, if we have time, about what some of those pressures are at the practical level. Why are we here? Why do employers want arbitration? Is it because, as the cynics would say, they really want to rip off the employees and prevent them from having any sort of fair remedy for legal wrongs? I don't know. Maybe some do, but I don't believe that that's what is motivating most employers, and I certainly don't believe that that's what is behind the groundswell we're seeing. I think we have to be more thoughtful and more objective than that. So I think we are at a point where it is important to analyze these issues and try to come to some agreement with respect to them. So Joe, yes, I also see consensus in all of the areas you've identified.

John Dunlop: Well, I intervene merely to say that I quite agree that at this stage any one of these standards in the Commission report or the Protocol is preliminary, and there are obviously many questions when they are applied to specific situations, and the answers must be developed. That's why I would like to see the Academy with experts in this area involved in the early stages of developing new social institutions dealing with the workplace. As our report repeatedly emphasizes, the workplace has come to be, in many ways, the most important institution in our society. It is where people earn their living; there is more distributive income;

there is a larger proportion of the population in it than ever before. It has become a training institution of significant importance, and it is a workplace that has the right to all these new statutory rights. We're entering a new era, and we need to develop these institutions gradually in the same way that other institutions are built. But it is time to begin, and this Academy has a key role in effecting those standards and interpreting their meaning.

Joseph Grodin: I'd like to turn to what is perhaps the most fundamental and controversial question. Perhaps under that heading we could talk about this question of judicial review. What should our public policy be with respect to the enforceability of an agreement requiring arbitration of statutory claims as a condition of employment? There are a number of legal issues that we might profitably discuss in connection with this. For example, as Professor Dunlop suggests, there is the issue left open in *Gilmer*[1] with respect to the interpretation of the exclusion in the Federal Arbitration Act of agreement to arbitrate. Does the exclusion apply only to persons who cross or carry goods across state lines—what I call the "schlepper rule"—or should it be construed more broadly? That is a question that is boiling now in the lower courts and is sure to come back to the Supreme Court before too long. Meanwhile, there are proposals in Congress and state legislatures to limit the enforceability of arbitration agreements that are made a condition of employment. Setting aside the means by which that public policy might be effectuated, what should public policy be with respect to this issue? I suppose another way of asking that question, Marsha, is to ask if we do all these wonderful things to assure fairness, can we then say that we will now have a creature that is fair and that is the equivalent of the statutory procedure; so that there's no reason why agreements to arbitrate claims within that procedural framework should not be enforced? Or are there remaining problems?

Marsha Berzon: I would say that there are definitely serious remaining problems that should caution us against enforcing agreements that purport to be entered into as a condition of employment. In saying that, I note the caveat that I am not talking about *real* old-fashioned employment agreements for CEOs and such, negotiated at arms' length. I'm not sure how you would define that category, but you might define it by whether the term of years for guaranteed employment is contained in the agree-

[1] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 55 FEP Cases 1116 (1991).

ment, or by the salary provided. So I'm not referring to a $250,000-a-year, five-year employment contract of detailed terms, for example.

What is happening now, however, is that an employer who hands an application for employment to middle-level or lower-level employees, says that as a condition of taking this job, the applicants must recognize that they will agree to submit any statutory claims or any issues arising out of the employment relationship to the system set up by the employer. Under these circumstances, I continue to see a number of insuperable problems to the enforcement of those kinds of so-called "agreements."

First of all, these statutes that we are talking about all have different enforcement schemes. The enforcement schemes were developed for various reasons, and they are meant to be appropriate to the various statutes at hand. And so what we are talking about is leveling all of these schemes into a single scheme, that is, the one that the employer chooses to impose.

Judy raised the question of *why* employers are interested in that sort of leveling. I don't think it's cynical to suggest that the reasons are mainly twofold. One reason for leveling is to avoid high-end awards, and the other is to avoid public condemnation and exposure with respect to employment discrimination determinations because that's mainly what we're talking about here. Therefore, the question becomes what is the utility in these two features of the statutory schemes. It seems to me that those two aspects of the statutory schemes are extremely useful in inducing compliance with statutory norms without the need for any litigation. The fear of high-end awards is likely to lead to compliance with the underlying rules rather than encouraging the testing of them in a number of small arbitrations. And it is also the public exposure that is likely to lead large employers to comply with the statutory norms rather than not to do so and invite employee lawsuits.

There is also the repeat-user problem, which I know you have all heard discussed before, that problem that large employers, particularly, are repeat users of arbitrator services, while small employers are not. Even if one tries to fix that problem by some sort of random selection of arbitrators, there is still the fact that in the end, arbitrators are being paid by the parties. There is a tendency of arbitrators that union lawyers have noted to not ascribe to the employer discriminatory motive. There's a difference between holding that an employer discriminated on the basis of sex or gender and holding that an employer discharged someone without good cause. There is a tendency we've noted for arbitrators to

shy away from the former, and, in addition, to shy away from really substantial monetary awards, sufficient in our view to completely compensate employees the way they would be compensated in court.

There are also two other issues. One is the relative distribution of information among the employees and the employer at the time when they enter into the original agreement. That is, the employers have some idea what litigation is likely to look like, and therefore some sensible way of deciding what sorts of procedures they want to agree to. The employees have never seen one of these proceedings before and don't think they will get into any trouble anyway. Therefore, employees will pretty much sign whatever they're given concerning hypothetical future litigation at the time they are given the job. In addition, employees who refuse to sign whatever they're given—even if they're told they don't have to sign it—fear that they will be labeled as noncooperative and probably *will* be labeled as noncooperative. Finally, there are efficiency issues about a system of private law, when you are talking about elucidating public statutes as opposed to the collective bargaining agreements that are grist for the mill of arbitration. That is, public statutes have a period of development in which a sort of national dialogue through the courts and litigators is important. One wonders, for example, whether *Griggs v. Duke Power Co.*,[2] the sexual harassment case, and a number of other landmarks of employment discrimination law would ever have come about in a world in which most of the disputes were being decided by private dispute resolution mechanisms, rather than by a public system.

So for all of those reasons, I continue to have grave problems as to the fairness of a system of imposed arbitration.

Joseph Grodin: Judy, do you concede?

Judith Droz Keyes: Oh no. I don't discount the problems. I think anyone, whichever side of the table you're on, must be thoughtful about *all* of these issues. But let me say that having been in the practice of employment law for 20 years, I, like *many* of you, came at this issue from the perspective of labor arbitration under a collective bargaining agreement. I certainly understand the distinctions and wouldn't, for a moment, say that they are the same, because they're not. But that's the perspective from which I approached the issue initially when I first began thinking about it,

[2]401 U.S. 424, 3 FEP Cases 175 (1971).

and it is the perspective that I still come from. And from that perspective, I don't distrust arbitration, I don't distrust arbitrators, and I'm a little surprised when I hear about the level of distrust of arbitration and arbitrators that is so often brought into this debate. We have, for purposes of our discussion right now, assumed that the fairness safeguards are in place. I think we have to assume that in order to focus the discussion, and I do assume that because I think that if those fairness safeguards are not there, it would be a different discussion. But once we assume fairness in the selection of the arbitrator, the payment of the arbitrator, the qualifications of the arbitrator, a fair exchange of information, and the right to representation, an opinion will be rendered, whether or not it's made public. Then what is the source of distrust? What is the notion of thinking that simply because it's in arbitration somehow it's going to be unfair or there's going to be a resolution that is biased in some way? I don't come at it from that perspective. And so while I understand the issues that are raised, I haven't quite experienced them in the way that I sometimes hear.

Marsha mentioned two motivators for employers wanting to impose arbitration, to require arbitration, to mandate it, if you will, for their employees. Employers are afraid of high-end awards, and they don't want the public condemnation and exposure of either litigation or an adverse verdict. Let me take the second issue first. I certainly agree that the idea of confidentiality is often attractive. And I would say, though, that in adopting arbitration initially, if we are talking about the kind of "mandatory arbitration" that is required of all employees in advance of the dispute, employers are *not* at that moment thinking of adverse verdicts. What they're thinking about is the exposure, the publicity of a claim whether or not that claim has merit. We all know that the vast majority of claims that are brought—whether they're Equal Employment Opportunity charges or actual filings in court—are settled anyway. And frequently, at least in the private sector, they are settled with a confidentiality provision. So I'm not sure that the motivation of confidentiality is one that is wrong in some way and ought not to be respected because we also want a system of fair resolution that *does* maintain confidentiality. I'm not sure that's bad. I understand the related issue regarding the development of the laws, that *is* a concern, and I don't quite know how to address that. But in terms of the individual employer wishing to maintain confidentiality, I agree that that's a motivation, but I'm not sure that that's bad. In terms of wanting to avoid high-end awards, of course any one of us

as an employer would want to do that. But I can say that from my experience, that is *not* one of the motivators as a factual matter, as a practical matter. And the reason for that is, as is the case with most of us, employers don't think it's going to happen to them. I mean that's not why employers adopt arbitration. They're not sitting there saying, "Oh my, a $7.1 million verdict was just rendered to someone else; I think we're likely to be hit or could be hit with this, so let's do something that gives everybody the right to arbitrate a claim so we can avoid this $7.1 million verdict." They don't expect it.

It's the vagaries of the jury system, yes, and the uncertainty, and the unpredictability, and the difficulty of evaluating a case. These thoughts are there as one of the advantages and attractivenesses, if you will, of arbitration, but not the, "I think I'm going to be hit with the $7.1 million verdict so let me real quick mandate arbitration for all of my employees."

But what Marsha did *not* mention is what in my experience is the primary motivator. It really is the cost of litigation, the cost in terms of dollars, time, and energy, and many other costs as well, such as people leaving the workplace and damaged relationships. The costs of litigation are enormous, and employers, in my experience, are motivated to do what they can to avoid those costs. And I don't think there's anything inherently wrong with that either. Why not avoid those costs if we can, and in their place, erect a system that is fair, which again is the assumption that I make.

And a final point is when we are talking about the public policy issue—which Professor Grodin asked us to address here, in other words, to analyze as an issue of U.S. public policy, where are we—we have to recognize that there are so many variables, it is impossible to talk in one sentence or one paragraph about employers and what employers are motivated to do and whether or not we ought to permit the idea of mandated arbitration. Marsha discussed one of the variables—the arbitration agreement with the CEO—but there are so many others. How sophisticated is the workplace? Where are we geographically? Is it public or private? We all know that in the public workplace there is a form of almost mandatory arbitration through civil service systems that has to be exhausted and processes of that nature. The variables are enormous, and they begin very quickly to get into issues of fairness, such as "knowing waiver." And we know that before arbitration will be enforced, there must be a knowing waiver. You can't have employees who don't speak English, for example, sign something that they don't understand and expect that a court is going to respect that and

mandate arbitration. So the waiver has to be knowing; it's got to be explained in some way before the courts are going to respect it. But there are so many variables that to say, "Never will we as the Academy respect mandated arbitration"—or put more accurately perhaps, "Never will we support arbitration as *one* of the requirements of a workplace."—I just think it isn't in our public policy interest in the long term.

Joseph Grodin: I'd like to pose a question to the panel for a brief response and then open it up to your questions and comments and, of course, any further comments by Professor Dunlop.

The panel has assumed in its discussion so far that it is primarily employers who stand to benefit from arbitration of statutory claims, or at least we haven't discussed so far the benefit that may accrue to employees. Now if we assume that we're talking about employees who see a $7.1 million pot at the end of the litigation rainbow, there isn't much question as to whether they would prefer to arbitrate or litigate. Even though the arbitrator may have authority to award punitive damages, and even though the arbitrator is perceived as friendly and sensitive with respect to the particular issue, I don't know the last time an arbitrator rendered an award of $7.1 million in punitive damages in an employment law case. And my guess is when that happens, that arbitrator will go on to do something else.

On the other hand, there are employees with relatively small claims who, under the present system, are unable to find a lawyer to pursue their claim. And now the answer might be, and here I'm inviting an economic analysis, let's just say that we'll return to the common law rule that existed before the enforcement of arbitration agreements. We will enforce agreements to arbitrate existing disputes, but we will not enforce agreements to arbitrate future disputes involving statutory claims in the workplace. So if a dispute arises and the employer and the employee can agree to arbitrate that dispute, there's no problem. But we will not enforce agreements to arbitrate future disputes. What would happen under such a system? Well, obviously the employee who sees the big claim at the end of the rainbow is not going to agree to arbitrate under those circumstances. On the other hand, can it be expected that the employer would agree to arbitrate across the board? Or, is the employer likely to advise that in the case of small claims that the employee find a lawyer and litigate, knowing that it will be impossible for the employee to do so.

There is, arguably, a trade-off here that is reflected also in Ted St. Antoine's proposal for arbitration under the wrongful termination statute. Do we perhaps need to have a system in which we accept arbitration of future disputes across the board in order to provide a benefit to those employees who would not otherwise have a tribunal in which to litigate their claims? Marsha, what is your thought?

Marsha Berzon: My thought in general is that the access to counsel problem is largely taken care of in the discrimination statutes by access to court-awarded attorney fees. That means that the attorney is making the judgment as to the likelihood of success, but that if the employee does have a likelihood of success, even a relatively low-paid employee, for that kind of claim, can get an attorney.

The other kinds of claims that you were talking about, wrongful termination sorts of claims, are obviously different because they depend upon the so-called contract of employment that, in this instance, is largely dictated by the employer and would not provide for attorney fees. I note that Ted St. Antoine's statute did have a provision for attorney fees that was intended to take care of a large part of that problem. If one takes care of that problem, then one also takes care of, or at least begins to take care of, the return-customer problem that I described earlier, especially if there is available some method of choosing the arbitrator, such as an appointment system by a state agency or some other system that does not exacerbate the return customer problem.

As to statutory claims, though, only for post-hoc kinds of arbitrations is the option a good one. That is, situations in which the arbitration decision is made *after* the claim arises. There *are* instances, and I know there are now many, in which both sides *will* choose to mediate or to arbitrate rather than to go to trial. So the employee will be able to do that in many instances. I don't see any benefit to the employee from a system imposed at the outset with regard to statutory causes of action.

Joseph Grodin: Judy or Professor Dunlop, do either of you have comments otherwise?

Judith Droz Keyes: Well, let me just say briefly that as a practical matter the attorney fees provisions in the discrimination laws do not make those laws accessible to low-income employees. These employees are not aware of their rights, and they don't seek to enforce their rights for all sorts of reasons. It is the higher-end employees who bring the claims, whether they be discrimination

claims with attorney fees provisions or not. As a practical matter, litigation is not brought by lower-level employees. Furthermore, I would note that in the Protocol that we've just been given, there is a provision for an arbitrator having the authority to provide for fee reimbursement in the interest of justice. And I will tell you, I don't disagree with that. I think that's the right way to go.

Joseph Grodin: Floor is now open for questions and comments.

Norman Brand: Two questions. I am hearing the assumption that a high-end award in an individual case is the best method for advancing the statutory goals embodied in the antidiscrimination statutes. Question one: How do we know that's true? Second, almost all of the problems that the panel has been describing seem to arise because of the privatization of the public system. Professor Dunlop tells us that a new institution is being created. Should we begin to consider whether this new institution should be a specialized employment court system, similar to state family law courts or federal tax courts?

Joseph Grodin: Anybody want to tackle either of those questions? Professor Dunlop.

John Dunlop: The labor-court proposal again. I'll take that and leave to my colleagues the front end. Our Commission did spend quite a lot of time talking about labor courts, and many of my colleagues and I have studied it. Ben Aaron has written extensively on it. I think our view is that it's not a very practicable suggestion in the United States. There are many reasons. This would lead me to a long discussion about industrial relations systems, about which I've written several books. I don't think you can graft onto the U.S. system either a worker's council or the industrial court systems of European countries. It doesn't fit, the transfusion won't work. In abstract terms it might be better to have one place where all concerns are brought, but our system inherently is a much more diffuse one. Now if we are going to start from scratch and redo the U.S. industrial relations system, many of us would make some changes. It's the "screwiest" system in the world in the sense that there's none like it. It's out on one end of the spectrum. Where else are there exclusive representation elections? So my view is that while it's a nice idea, it "ain't going to be."

Now one other comment on this, in the next decade, we in this country are going to have both administrative agencies and the courts deciding much of employment law. And we're going to see the growth of new arbitration and mediation. I think one ought to continue to be pragmatic about things as the United States has

been historically. Let's see how it goes. Maybe at some point some consolidation might be appropriate but let's not start with the industrial court idea.

Joseph Grodin: Marsha, do you have any thoughts with respect to the question about the efficacy of the trickle-down theory as applied to employment law.

Marsha Berzon: I guess I have three comments. One is that, as to high-end awards, the question really is whether such as award is merited or not in the first place. I differ with Judy on the basic question of why employers want this arbitration of statutory causes of action. I believe they want it because they believe that they will be able to either settle or get a litigated award cheaper, for less money. Whether it's less money than a $7.1 million award or less than $200,000—so the award is $100,000 instead—it's still less.

Joseph Grodin: Well, excuse me, I need to interrupt you because I think the question was not about the justifiability and isolation of the $7.1 million award. But the question is this, if I understood it correctly: If we must make a choice with respect to how best (1) to compensate employees for wrongs done to them, and (2) to deter employers from wrongful acts and violation of public policy, would we choose a system that poses the possible threat of a huge award as its primary armament, or would we instead adopt a more egalitarian system?

Marsha Berzon: I was just going to say I think the question is a very good one, and I will try to answer it only by analyzing my clients, since I don't have any statistical information and don't know of any studies that respond to the question.

Judith Droz Keyes: There is no doubt that seeing a huge verdict on the front page of the San Francisco newspaper or the *New York Times*, or whatever, does wake people up. There's no doubt it does cause people to reflect and say, "Oh my goodness, that could happen here, maybe. Perhaps we should make sure we do a sexual harassment prevention training program or something." It does have that effect, but so does having a claim brought. Whether it's an EEOC charge or something else, it forces people to think about and discuss what was done, what happened. Whether the price is $7.1 million or something considerably less doesn't make a whole lot of difference when we're trying to figure out what went wrong and how we can prevent this in the future. So speaking anecdotally, both do have a deterrent effect. I don't know that one has any more of a deterrent effect than another, frankly. And you've already heard my views on the public policy aspects.

Joseph Grodin: There are studies in the area of tort law reform by learned scholars who purport to know things about this, but I think we don't have time to go into that now in depth.

Gladys Gershenfeld: My question is for Ms. Keyes. In enumerating rather quickly a variety of due process standards that we're familiar with, you put one in that jarred me and perhaps others when you said, "The arbitrator should be certified." We don't generally take certification casually, and the general opinion is that we are certified by acceptability by the parties. While we certainly encourage training in the intricacies of employment law, I don't know how serious you were about listing that item.

Judith Droz Keyes: Well, thank you for that question, and if I said "certified" I didn't mean to. What I meant to say was something more like "credentialed," or perhaps "qualified" would have been a better word. What I was meaning to say was simply that we weren't choosing the vice president of human resources to be the arbitrator. We weren't choosing someone who was not neutral, or not qualified to be an arbitrator. I personally didn't mean to go beyond that, although I would say, particularly if we're dealing with a statutory claim as contrasted with a wrongful termination claim or a claim that is more generic and intuitively understandable, such as the Americans with Disabilities Act, it *is* important to due process, to fairness, to be sure that there's an arbitrator involved who understands the law, as well as issues of evidence, fairness, and due process. This relates to some extent to the issue of judicial review, which we haven't talked about, but I think it is important that both parties have access to an arbitrator who understands the law. How we determine that, I don't know.

Joseph Grodin: Well, I think that Professor Dunlop would emphasize training rather than certification per se. The Commission report talks about a neutral arbitrator who knows the laws in question and understands the concerns of the parties. The AAA rules provide that arbitrators serving under these rules shall be experienced in the field of employment law. I would just observe that perhaps that field is different when we're talking about individual arbitration in the nonunion sector. In the union sector, both parties have equal access to information about arbitrators. Arbitrators have a track record, and the law of supply and demand works quite well. When we're talking about an individual who is in the market to select an arbitrator from a list of people he or she doesn't know anything about, to say to him or her, "Buyer beware," takes on a different significance.

Cliff Palefsky: I have a question. I think both the American Bar Association and the AAA Protocols are very good, and it was actually quite easy to reach a consensus on what due process is. I would point out that all of these additional considerations—discovery, review, certification—are only required because it is not a voluntary decision to choose your arbitrator, to design your own process. None of them would be necessary if the process was voluntary. But let's assume that we have a broad consensus on what is fair, what is due process. Shouldn't there be some ethical standards promulgated by this organization that would require an arbitrator to not accept a case that does not comply with a consensus of minimum standards? That's the first question. The second one is, while we discussed public policy, no one mentioned the jury trial. It's in the Constitution of the United States, it's in the Constitution of California, it's in the Civil Rights Act. I'm not sure it's our role to be standing here debating what's public policy, and I'm not sure it's for the employers of this country to determine what public policy is. It has already been determined. I think we have to recognize that arbitration is an alternative, and it should be voluntary. But the ethical question, I think, is very fitting for this audience.

Joseph Grodin: I'd like to take both of those questions. First, do arbitrators have an ethical obligation to refuse to take cases in which appropriate procedural safeguards do not exist? Do organizations, such as the National Academy of Arbitrators, have an obligation to promote that principle? Anybody want to comment on that? My own answer is "yes" to both questions. Anybody disagree with that?

Judith Droz Keyes: I feel like I don't have the jurisdiction to answer that question, but I would say that it would be helpful, frankly. And I would agree to that.

Joseph Grodin: Is that a third consensus?

Judith Droz Keyes: I think it might be an emerging consensus point, perhaps. I don't know where we will find clarification. Maybe we'll have a statute. Congress may do something. There's the Petris bill in California that would do some of this. Maybe it will come legislatively, in which case at least we'll know. Maybe it's going to come out of trial courts, or law and motion judges, or the Ninth Circuit. Eventually, we'll receive some clarification of what are and are not minimum requirements. What will be respected on review, whatever that standard of review emerges to be. But it would certainly be helpful in the interim if we had guidance from

organizations such as this, who turned around and said, "You can write whatever you want in your application form or handbook, but we as an organization won't participate if these kinds of provisions aren't there." That would be helpful from my perspective.

Joseph Grodin: Let me pose a more difficult, controversial question. Do arbitrators have an ethical obligation to refuse to accept an assignment under an arbitration agreement that they believe or have reason to believe is not a product of voluntary agreement, but rather a condition of employment? And, do organizations have an obligation to encourage that position?

Judith Droz Keyes: No.

John Dunlop: I wouldn't have much trouble in answering your last question also in the affirmative. I've done some of this, as a matter of fact.

Jim Adler: I'm a management attorney in Los Angeles. I think that this discussion, like many on this subject, is fascinating, but I think there are many myths or false premises. The first myth is that the current system is fair. It's hard to imagine a more unfair system than one that has 100,000 cases pending before the EEOC with no relief in sight and which has, essentially, a lottery system where somebody receives an undeserved $17 million or $15 million in punitive damages.

The second false premise is that employers want predispute mandatory arbitration. If employers of this country wanted predispute mandatory arbitration, we'd have it. Now the one interesting thing is that we don't hear from employees. We hear from employee representatives, and we know they don't like it. We hear from employer representatives, and they generally seem to like it, I think, because of the fear of high jury verdicts and the high cost. But we don't know what employees want.

John Dunlop: May I comment on your interesting remarks very briefly. First, I started out by saying there were nine major difficulties with the existing system. If you thought that pointing out nine difficulties meant that the system was fair, that's a form of logic I'm not used to. Everyone recognizes that there are many difficulties.

The second point, I don't know about your clients, but I do know that there are many employers in the United States who are introducing unilateral systems. Our report explicitly describes in great detail the Brown & Root system. That is specified in our report, and all of those systems that I know of include a phrase that bothers many of my colleagues, namely, the employer can decide tomorrow morning to get rid of the whole system. And I don't know

how to deal with that question of fairness. It has many technical as well as employment relationship aspects to it. Maybe your clients aren't rushing into this business, but there are many places in the United States where these systems are being introduced today.

Joseph Grodin: A question was raised earlier that perhaps deserves comment, and that has to do with the representation of employees as a group as distinguished from unions and trial lawyers in this process.

John Dunlop: That was the point. We had in our report the first comprehensive survey, by all modern methods, of the views of individual employees and their supervisors. One of those views deals with employees' desire for a system to resolve their problems. They want to deal with their employer in groups, and ultimately they do not want hostility in the workplace.

Jack Stieber: Like the previous speaker, I find it rather ironic that the discussion here has taken the form of whether or not employers want arbitration for discharged employees. When this discussion started 10 to 15 years ago, the starting point was the protection of employees, and as a result, the Model Employment Termination Act was developed. I have elsewhere developed figures that suggest that approximately 2 to 2.5 million nonunion employees are fired each year. If those employees had the opportunity to appeal to an impartial tribunal under rules somewhat similar to what we have under the union-management contracts, about 150,000 of them would get their jobs back. Now, I think, it's highly desirable and appropriate to discuss in this forum what would be the kind of parameters that we would want to have under this system. But in doing so, we should not lose sight of the fact that before we can attain perfection, it might be advisable to start something that would give these couple of million employees an opportunity to have a shot at getting their story heard and perhaps getting their jobs back. And in time, I think we would develop the kind of approaches that would protect employees and employers from some of the undesirable effects that we've discussed here. But I think we should keep in mind that even today, despite the fact that Professor Dunlop says more and more employers are willing to experiment with this system, overwhelmingly, employers are not in favor of introducing arbitration on either a voluntary or compulsory basis. But it's rather for the benefit of employees that a new approach has been suggested.

Marsha Berzon: We really need to be clear about the difference between the statutory issues that we're discussing today and wrong-

ful termination claims. The enterprise of Ted St. Antoine's committee, the Model Employment Termination Act, is really a different inquiry from the one that I understood we were to discuss today. That is, we are dealing now with situations in which the employees have statutory rights, and the issue is: "Are they to be adjudicated in the way that Congress or the state legislatures intended that they be adjudicated—largely by jury trials now—or in some other fashion?" And I would agree with you that providing the mass of people who are discharged with some recourse is one that would be helpful to employees. But I regard it as a different question from the one we are discussing. To answer it, one would have to decide, first, are they going to have any substantive rights of a contractual sort such as under a collective bargaining agreement. And only then does the issue arise as to how those contractual issues are to be determined. The substantive question is primary in that instance.

Michael Beck: I had the misfortune of chairing the Academy's committee that was to look into the Academy's role in alternative dispute resolution. And I say that, misfortune, because Professor Dunlop reported that we made our report in 1993. That was true. It was supposed to be only a two-year committee when we started in 1990. When we started examining the issue the committee held a unanimous view that guidelines or standards should be proposed by the Academy, whether or not those guidelines or standards would become code provisions or binding on the arbitrator. That is to say, on the one hand, they could be voluntary (arbitrators could look at those standards and determine whether the plan was something they want to operate under), or as it has been suggested here, the standards could be mandatory or binding. The arbitrator couldn't accept an arbitration case if, in fact, the plan didn't meet the standards. We had a tremendous amount of opposition from the AFL-CIO because, as I understood it, and I talked to a number of their officials, the feeling was that, if the Academy put forth standards or guidelines, we in a sense would be putting forth a certified plan that would reduce the union's efficiency in organizing. And I think that applies both to statutory claims and employer-promulgated arbitration of unjust terminations. And as I listen today, it seems that at least one union representative is willing, if we can find those perfect standards, to go along with a guidelines approach. And I'd be particularly interested in her comments.

Marsha Berzon: Again, I'm going back to what I just said. I do think that there is a great difference in this regard. First of all,

there's a critical difference between statutory and quasi-contractual sorts of claims. I say "quasi-contractual" because in the nonunion context, the substantive standards are being established by the employer unilaterally, as a functional matter, and not through negotiation. Number two, I said quite clearly, I think, and I believe I am in this regard speaking for the AFL-CIO, that I am opposed to and would not agree with any form of *imposed* arbitration as to statutory schemes either. Therefore, all that we in the labor movement are comfortable with at this point are the promulgated standards as applied to agreements to arbitrate that arise *after* the dispute has arisen. And I don't see how anybody could disagree with that, which is basically a form of settlement of the underlying claim. So I don't think there's been any backtracking at all. Maybe I wasn't sufficiently clear as to what I was saying before.

Joseph Grodin: Ladies and gentlemen, I am going to declare the official proceedings closed and thank Professor Dunlop and the participants. I invite those of you who are interested in informal discussion to join us.