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Rethinking the Tripartite Division of American Work Law

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Rethinking the Tripartite Division of American Work Law

Richard Michael Fischl†

In this Article, Professor Fischl argues that the boundaries separating the constituent subjects of American work law—employment discrimination, labor law, and employment law—are becoming increasingly porous, and he explores two distinct but related dimensions of this accelerating integration of the field. He offers numerous examples of “doctrinal integration,” settings in which nominally out-of-area law plays a significant role in governing contemporary work law topics. He then explores “functional integration,” demonstrating that the institutions central to employment discrimination and labor law—discrimination litigation and labor unions, respectively—have increasingly assumed functions traditionally played by the other. He argues that functional integration is apparent as well in the increasingly robust role of employment law in both employment discrimination and labor law contexts. Against the backdrop of these developments, Professor Fischl contends, the continued embrace of the conventional subject-matter division reflects and reinforces an increasingly false opposition between the struggle for workplace democracy and the struggle for racial, gender, and other forms of workplace justice.

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I.
POP QUIZ

Match each of the items listed in Column A with the corresponding item or items in Column B:

Column A	Column B
<ul style="list-style-type: none">• employment discrimination	<ul style="list-style-type: none">• the law of sexual harassment
<ul style="list-style-type: none">• labor law	<ul style="list-style-type: none">• legal protection for workplace protests
<ul style="list-style-type: none">• employment law	<ul style="list-style-type: none">• the employment-at-will rule

The items in Column A will be readily familiar to most readers, for they represent the “holy trinity” of contemporary American labor and employment law: employment discrimination (the law prohibiting discrimination in employment on the basis of race, gender, age, etc.); labor law (the law governing union organizing, collective bargaining, and union-member relations); and employment law (the large and growing body of common and statutory law governing the individual employment relationship).

The connection between the members of the trinity and their horizontal counterparts in Column B is likely obvious to most readers as well. In American law, sexual harassment is prohibited as a form of gender discrimination, and sexual harassment cases make up a significant portion of the claims filed under federal and state employment discrimination laws. Workplace protests receive their most familiar protection from Section 7 of the National Labor Relations Act (“the NLRA”), which guarantees employees the right to engage in a host of transgressions—from circulating petitions to participating in strikes and picketing—undertaken for the purpose of “mutual aid or protection.” As for employment at will—the common law rule under which employer and employee alike are free to part ways “for good cause or bad cause, or even for no cause”—it is no exaggeration to say that the rule and relatively recent changes to it are *the* central feature of what has come to be known as employment law.

But don’t let the readily apparent horizontal matches mislead you; on closer examination, it turns out that each of the topics in Column B “matches” not just one but all three of the areas of law listed in Column A. Thus, sexual harassment looms large not only in employment discrimination law but also in labor law, where alleged perpetrators may bring “just cause” challenges to punishment meted out by the employer and where alleged victims may have grievable claims as well. Sexual

harassment looms larger still in employment law, where once again alleged victims and alleged perps alike may find refuge. Tort claims like intentional infliction of emotional distress are frequently deployed by plaintiffs—either as damages-enhancing pendent claims in a Title VII action or as stand-alone claims when the requirements of Title VII cannot be met—and defamation or wrongful discharge actions may in a variety of circumstances be available to those who claim to have been wrongly accused.

Turning to workplace protests, legal protection may be available today not only under Section 7 of the NLRA, but also from the anti-retaliation provisions of most employment discrimination statutes (which typically protect those who “oppose” discriminatory workplace practices) as well as from such employment law sources as whistleblower statutes (which typically protect employees who “object to” or “refuse to participate in” unlawful employer activities). And the employment-at-will rule plays a role in employment discrimination and in labor law that is every bit as robust as the one it plays in employment law, providing employers with what is typically their most effective defense against discharge claims arising under either Title VII or the NLRA.

I will offer a more detailed picture of these connections in a bit, but the results of the quiz provide a fair glimpse of the development that is the central focus of this Article: For those who practice American labor and employment law—and indeed for the workers, unions, and employers whose interests are most directly at stake—the boundaries that have defined the tripartite division of the field are becoming increasingly porous, and as a result it is no longer possible, if indeed it was ever possible, to understand the constituent subjects in isolation from one another.

This development has not gone entirely unnoticed in the American legal academy. Indeed, two recently published casebooks attempt to combine employment discrimination, labor law, and employment law materials for integrated study,¹ following the path of a well-known earlier effort now in its third edition.² Likewise, the newest addition to the employment law library incorporates discrimination and labor law themes and materials throughout its broad survey of workplace regulation.³

There is even a name for the emerging whole that is increasingly more, and more complex, than the sum of its parts: “work law” or “the law of work.”⁴ The new formulation signals the integrative effort far better than “labor and employment law,” a shorthand expression that has always

1. KENNETH M. CASEBEER & GARY MINDA, *WORK LAW IN AMERICAN SOCIETY* (2005); MARION G. CRAIN ET AL., *WORK LAW: CASES AND MATERIALS* (2005).

2. ROBERT J. RABIN ET AL., *LABOR AND EMPLOYMENT LAW: PROBLEMS, CASES AND MATERIALS IN THE LAW OF WORK* (3d ed. 2002).

3. RICHARD CARLSON, *EMPLOYMENT LAW* (2005).

4. See, e.g., *supra* notes 1 & 2.

sounded more like a list than a unified subject—a list, moreover, sorely in need of diversity training, omitting as it does discrimination from an otherwise complete inventory. So “work law” it is, at least for the remainder of this Article.⁵

It is no criticism of these texts to observe that they have relatively little to say about why and how the conventional subject-matter division of the field has lost its purchase on contemporary practice. The preface of a casebook designed for a student audience is not, after all, the place one would ordinarily expect to find an extended analysis of the sort I am offering here, and so it is no surprise that relatively conclusory statements about the futility of studying any one of the conventional subjects in isolation from the others is the most we typically get.⁶ Moreover, these texts have other pedagogically valuable points of emphasis—from providing analyses of how particular issues are addressed through different institutions and legal structures,⁷ to examining demographic and labor market developments with implications for the entire field,⁸ to exploring the political economy of the confluence of laws governing the law of work.⁹ They have thus contributed enormously to breaking a powerful mold, and they have also succeeded admirably in rendering the interaction between the conventional subject-matter regimes more visible, no mean feat. But they have only begun the task of mapping and accounting for the legal and institutional developments that are reconfiguring our field.

More surprising, perhaps, is the virtual absence of any sustained discussion of these developments in our scholarly efforts. To be sure, those in the work law field have been *writing* across disciplinary boundaries for some time, insightfully exploring various topics that do not fit neatly within

5. The new formulation is not without its own problems. As the term is used by most lawyers and academics, “work” typically refers to *paid* work (thus excluding a host of unpaid care-work activities shouldered primarily by women) and excludes a variety of subsistence activities undertaken by the ostensibly “unemployed.” See Joanne Conaghan, *Work, Family, and the Discipline of Labour Law*, and Lucy Williams, *Poor Women’s Work Experiences: Gaps in the ‘Work-Family’ Discussion*, in *LABOUR LAW, WORK, AND FAMILY: CRITICAL AND COMPARATIVE PERSPECTIVES* (Joanne Conaghan & Kerry Rittich eds., 2005). I will have more to say about those exclusions—and a number of others—in a sequel to this Article, Richard Michael Fischl, *A Critique of the Contemporary Work Law Curriculum* (forthcoming 2007).

6. See, e.g., CRAIN ET AL., *supra* note 1, at xiii (“These legal regimes overlap and relate to one another in complex ways that are obscured by categorical study”); CARLSON, *supra* note 3, at xxiv (“Naturally, antidiscrimination law and the potential for collective bargaining permeate every aspect of employment with complexity that deserves the opportunity for further study in more specialized courses. But it is impossible to isolate these topics from examination of any other part of employment law, and a course that purported to do so would hardly serve as a representative survey.”).

7. See CARLSON, *supra* note 3, chs. 2 (definition of employee), 3 (hiring practices), 4 (compensation and benefits), 8 (job security), & 10 (dispute resolution); CRAIN ET AL., *supra* note 1, chs. 3 & 6 (job security), 9 (employee voice), & 15 (arbitration of workplace disputes); RABIN ET AL., *supra* note 2, chs. 3 (health and safety) & 4 (economic security and capital mobility issues).

8. See CRAIN ET AL., *supra* note 1, ch. 2.

9. See CASEBEER & MINDA, *supra* note 1, *passim*.

any one of the conventional subjects.¹⁰ But very little has been said about how contemporary lawyers are increasingly *practicing* across those boundaries or the resulting discontinuity between “the law on the books”—in this case meaning the law as we legal academics portray it—and “the law in action.”

Yet it is not my aim here to argue that contemporary work law is “really” a unified field and no longer three separate and distinct areas of law. Each of the conventional subjects is associated with its own statutes, case law traditions, specialized administrative agencies and procedures, and separately organized and indexed practitioner research tools. Indeed, there is more than enough in each instance to fill a three-credit law school course, a gaggle of seminars, and a lifetime’s worth of CLE sessions. Nor should the emergence of “borderline cases” that straddle conventional doctrinal boundaries come as big news. The subjects we teach in American law schools, in work law and elsewhere, are invariably works-in-progress. Categories overlap, boundaries shift and blur, and all the while the real world serves up situations that blithely traverse the most carefully drawn lawyerly or philosophical distinctions.

In their inception, of course, the three conventional work law subjects were in each case a response to developments in the field; there was something new to study and—*voilà!*—there were scholars studying it, courses teaching it, conferences devoted to it, and eventually even an AALS section bearing its name and a flurry of eponymous commercial study guides.¹¹ But academic practices frequently take on a life of their own, and the frames of reference they produce may eventually obscure more than they reveal. Indeed, though we often speak of the subjects we teach as if they were the products of nature or irresistible logic, they are far more frequently artifacts of history, convention, imagination, and not the least contestation. Like other legal concepts deployed by lawyers and academics alike, they are *arguments*, designed to persuade a particular audience about the way the world is and, in no small measure, the way we think it ought to be. The important question is therefore one of framing and emphasis:

10. See, e.g., Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1 (1988) (examining race and gender issues that come into play in the application of workplace tort doctrines such as intentional infliction of emotional distress); Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA—Not!*, 28 HARV. C.R.-C.L. L. REV. 395 (1993) (analyzing the confluence of employment discrimination and labor law doctrines that deny self-representation to working women of color); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 325 (2005) (proposing an institutionalized role for employee participation in employer self-regulation processes that would “straddl[e] the conventional divide between labor law and employment law”).

11. I offer a more nuanced account of these developments in Fischl, *A Critique of the Contemporary Work Law Curriculum*, *supra* note 5.

What do we highlight, and what do we obscure, by embracing one organization and rejecting others?

Simply put, the discrete lenses provided by the conventional subject-matter trinity make it difficult to bring into focus two distinct but related dimensions of what I will refer to as the accelerating integration of American work law. Thus, we are on the one hand experiencing an accelerating *doctrinal* integration of our field, as the settings in which nominally out-of-area law plays a significant governance role are rapidly proliferating. Those settings include not only the topics covered in the pop quiz (sexual harassment, workplace protest law, and employment at will) but also a number of others—from the enforcement of individual arbitration agreements to the rules governing the interpretation and effect of employee handbooks—that are similarly central to the contemporary practice of work law.

We are likewise increasingly confronting a *functional* integration of work law, a development evident in what I will refer to as the “cross-migration” of employment discrimination law and labor law, as the institutions central to each field—discrimination litigation and labor unions, respectively—have increasingly assumed functions traditionally played by the other. Functional integration is apparent as well in the robust role of employment law in employment discrimination litigation (where employment law claims are frequently deployed by alleged victims and perpetrators alike) as well as in labor law (where such claims are increasingly deployed in the context of organizing and representational efforts).

Against the backdrop of these developments, our continued embrace of the conventional subject-matter division reflects and reinforces an increasingly false opposition between legal strategies that rely on workplace organizing and collective action (on the one hand) and those that rely on litigation and related institutional practices (on the other). More fundamentally, the conventional division reflects and reinforces an increasingly false opposition between the struggle for workplace democracy and the struggle for racial, gender, and other forms of justice in the workplace and beyond.

There is obviously more at stake here than casebook or curriculum content, important as they may be; indeed, in a work-in-progress, I consider the implications of the argument I am making for the way we present the law of work to American law students.¹² But my sights are set on a somewhat different target in this Article. Bear in mind that the tripartite subject-matter division framed the way most legal academics were introduced to the law of work. It organized the courses we took in law school and, until relatively recently, it organized much of the practice of

12. *See id.*

work law as well. When we entered the legal academy, it organized our teaching assignments and thus continued to influence the way we approach the subject in our daily lives. Scholarly conferences, panels, and symposia have almost invariably been organized around the division as well, and the work law curriculum at the lion's share of American law schools continues to be organized in that way. So it is hardly a coincidence that most of us continue to teach and write as if the conventional subject-matter boundaries remain intact, a habit with less than salutary consequences for the way we think about—as well as the way we influence practitioners and practitioners-to-be to think about—developments in our field that have begun to render those boundaries obsolete.

What might we learn about the contemporary law of work if we ignore those dissipating boundaries?

II.

LOOK, MA, NO BORDERS:

THE DOCTRINAL INTEGRATION OF AMERICAN WORK LAW

As the results of the pop quiz suggest, the conventional division has lost much of its purchase on the practice of work law, and the number of contexts requiring a thoroughgoing familiarity with the law and/or legal institutions associated with two or even all three of the conventional work law subjects is steadily increasing. I want to explore two distinct but not unrelated dimensions of this accelerating integration of the field, turning in this part of the Article to examples of what I'll refer to as "doctrinal integration" (settings in which the rules governing a particular legal issue are drawn from multiple subjects) and, in the next part, to examples of what I will refer to as "functional" or "institutional integration" (settings in which legal institutions are playing out-of-area roles).

* * *

The accelerating integration of doctrinal materials is characterized by several closely related developments. Thus, allegations of employer misconduct increasingly give rise to the possibility of multiple or alternative claims drawn from across the boundaries of the conventional work law subjects, with important implications for the availability of particular remedies and for choice of forum. (Recall in this connection the sexual harassment and workplace protest illustrations in our pop quiz, where in each case liability was potentially governed by rules drawn from all three conventional subjects.) Moreover, parties increasingly find themselves subject to conflicting obligations that are likewise oblique to the conventional subject-matter boundaries. As a result, efforts to chart a safe passage are complicated by the fact that Scylla and Charibdis may not appear together on the same map. (Recall once again our sexual harassment

illustration, where employer efforts to avoid or mitigate employment discrimination claims might generate labor law or employment law claims on the part of the alleged perpetrators.) The task for the parties and their lawyers is complicated further still by the fact that the rules governing particular legal topics are increasingly influenced and in many cases even treated as controlled by out-of-area case law. In particular, common law doctrines conventionally associated with employment law—the “background” rules of contract, tort, and property—have emerged to play a vital role in the application of the statutes and doctrines that govern employment discrimination and labor law cases. (Recall here our employment-at-will illustration and the important role that this centerpiece of employment law plays in discharge cases under Title VII and the NLRA.)

These phenomena are increasingly evident in a variety of work law topics. I will address a number of those topics here, beginning with those covered in our pop quiz (sexual harassment, workplace protests, and employment at will) and then proceeding to consider a number of others (proof of motive in discharge cases, mandatory individual arbitration, and employee handbooks). What the selected topics have in common—beyond their value in illustrating the accelerating doctrinal integration of work law—is that each lies at the heart of contemporary practice, looming large in the day-to-day experience of practitioners and clients alike.

A. Sexual Harassment

I begin with the regulation of sexual harassment, for some time a central feature of American employment discrimination law.¹³ Yet in contemporary practice, discrimination doctrine is only one dimension of sexual harassment law; labor law and employment law play important roles as well, for sources associated with each of those areas create important additional vehicles for challenging harassment as well as potentially countervailing protection for alleged perpetrators.

1. Labor Law and Sexual Harassment

Labor law first. Most contemporary collective-bargaining agreements have both an antidiscrimination provision (whereby the employer and the union both agree not to discriminate against employees on the basis of race, gender, national origin, etc.) and a “just cause” provision (whereby the employer promises not to discipline or discharge any employee in its

13. For the ten-year period ending in 2006, between 12,000 and 16,000 charges alleging sexual harassment under Title VII were filed each year with the EEOC and various state and local fair employment practices agencies. See SEXUAL HARASSMENT CHARGES—EEOC & FEPAS COMBINED: FY 1997 – FY 2006 (table), <http://www.eeoc.gov/stats/harass.html>.

absence).¹⁴ Allegations of sexual harassment may be grievable under either or both provisions. Thus, antidiscrimination clauses typically take the form of an express commitment to abide by applicable antidiscrimination statutes and regulations, in effect incorporating the law of sexual harassment by reference. Sexual harassment that results in adverse action—typically “quid pro quo” harassment, where the victim refuses to accede to a supervisor’s sexual demands and suffers the consequences—provides a straightforward “just cause” claim, and “hostile work environment” harassment that drives a victim to depart the firm, or to perform poorly enough to prompt dismissal, may be challenged under “just cause” principles as well.¹⁵

As it happens, each of the relevant contractual provisions is itself in no small measure a reaction to legal incentives created by sources *external* to labor law. Thus, antidiscrimination provisions may help both parties to establish their bona fides as equal employment opportunity institutions, and a refusal by either party to agree to one during collective bargaining could constitute damning evidence in any subsequent discrimination litigation; indeed, securing an antidiscrimination provision in collective bargaining is an obvious goal of any employer or union that puts a premium on either the fact or the appearance of EEO compliance. For their part, “just cause” provisions are high on the list of benefits that drive union-organizing campaigns—and are at or near the top of a union’s demands in first-contract bargaining—precisely because job security is so hard to come by in a non-union setting, where the common law employment-at-will doctrine almost invariably governs.¹⁶

Although many sexual harassment claims thus are at least potentially grievable, American unions have frequently failed to pursue them, focusing instead on the plight of alleged perpetrators when the latter are fellow members of the bargaining unit; indeed, challenges to the discipline or discharge of alleged perpetrators have been a prolific source of “just cause” arbitrations.¹⁷ But this state of affairs is in no small measure the product of incentives created by a confluence of legal doctrines—drawn from

14. See BASIC PATTERNS IN UNION CONTRACTS 7, 127 (14th ed. 1995) (antidiscrimination provisions appear in 87% of the collective-bargaining agreements sampled, and “cause” or “just cause” provisions appear in 92% of such agreements).

15. See, e.g., *Exxon Co. v. Baton Rouge Oil & Chem. Workers Union*, 105 Lab. Arb. Rep. (BNA) 846 (1995) (finding dismissal for poor work performance grievable where performance was response to pattern of sexual harassment).

16. See Richard Michael Fischl, *A Domain into Which the King’s Writ Does Not Seek to Run: Workplace Justice in the Shadow of Employment-at-Will*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES* 253, 274-75 (Joanne Conaghan et al. eds., 2002) [hereinafter Fischl, *Workplace Justice*].

17. The classic study on this important topic is Marion Crain, *Women, Labor Unions, and Hostile Work Environment Sexual Harassment: The Untold Story*, 4 TEX. J. WOMEN & L. 9, 29-44 (1995); see also Reginald Alleyne, *Arbitrating Sexual Harassment Grievances: A Representation Dilemma for Unions*, 2 U. PA. J. LAB. & EMP. L. 1 (1999); Ann C. Hodges, *Strategies for Combating Sexual Harassment: The Role of Labor Unions*, 15 TEX. J. WOMEN & L. 183 (2006).

employment discrimination as well as labor law—that govern the topic of sexual harassment.

For one thing, alleged sexual harassment perpetrators in union firms have no place to go to protect their jobs except arbitration. By contrast, alleged victims have the option under a venerable discrimination law precedent of pressing their Title VII claims in a judicial forum, thereby avoiding representation by a potentially less-than-enthusiastic union and at the same time earning a shot at punitive damages, which are seldom available in the arbitral forum.¹⁸

In the meantime, faced with the prospect of such liability, unionized employers, like their non-union counterparts, have exhibited an increasing tendency to focus their efforts on eradicating “sex” from the workplace rather than on fighting “harassment,” subtle or otherwise, intended to put working women in their place.¹⁹ Such efforts may result in discharge for rank-and-file employees who are guilty of little more than poor judgment or clueless romantic advances and who would in other circumstances receive warnings, training, and discipline other than banishment for a first offense; indeed, many “just cause” arbitrations present situations that appear to fall in this category.²⁰ Yet employment discrimination law plays a further complicating role here, furnishing the basis for “public policy” challenges to “perpetrator-friendly” arbitral decisions—challenges, as one scholar has demonstrated, that succeed with impressive frequency.²¹

It should nevertheless be noted that recent trends may well prompt labor unions to adopt a more even-handed approach to sexual harassment cases. American unions are increasingly representing bargaining units in which women are a substantial or even a majority presence—a development that will get more attention in Part III of the Article—and they are not achieving those gains by ignoring the concerns of this vital and growing constituency. It is thus increasingly common to find unions securing and

18. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (holding that union-represented employees may pursue discrimination claims in court and thus circumvent the arbitral forum). On the prospect of punitive damages in litigation versus arbitration, see Reginald Alleyne, *supra* note 17, at 5-6.

19. For an extremely perceptive account, see Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003).

20. See, e.g., *Westvaco Corp. v. United Paperworkers Int'l Union ex rel. Local Union 676*, 171 F.3d 971, 972-74 (4th Cir. 1999) (upholding arbitrator's decision to reduce discharge to nine month suspension without pay, where perpetrator had good work record and no prior instances of harassment during nearly twenty years of employment, and where employer had failed to follow usual course of progressive discipline, counseling, and supervision); *Weber Aircraft Inc. v. General Warehousemen Union Local 767*, 253 F.3d 821, 823 & n.1 (5th Cir. 2001) (upholding arbitrator's decision to reduce discharge to eleven-month suspension without pay, where perpetrator was twenty-five year employee with record of “valuable service” and whose only instance of prior discipline was reversed in arbitration).

21. Ann C. Hodges, *Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law*, 16 OHIO ST. J. ON DISP. RESOL. 91, 117 (2000) (collecting cases). For examples of cases where such challenges did not succeed, see *supra* note 20.

enforcing collective-bargaining provisions that explicitly prohibit sexual harassment, though any resulting increase in sexual harassment arbitrations may be offset by a reduction in the frequency of offensive conduct encountered in more heavily female workplaces.

Two legal developments—each once again with a source in employment discrimination rather than labor law—may contribute to this equalizing trend. First, unions increasingly face the prospect of Title VII liability for their failure to pursue the harassment claims of those victims who do attempt to invoke the arbitral process.²² Moreover, it is entirely possible that sexual harassment victims will soon be required to press their claims through arbitration rather than litigation—another topic I will address elsewhere²³—and this too is likely to bring the union representation of victims and perpetrators closer to equipoise.

2. *Employment Law and Sexual Harassment*

Turning, then, to employment law, here also employers face the prospect of liability from both victims and perpetrators. Cases involving allegations of sexual harassment were prominent among the first generation of decisions limiting the scope of the employment-at-will rule, providing victims with a vehicle for challenging harassment before such claims won authoritative recognition under discrimination law.²⁴ Today, harassment that leads to termination is actionable in many jurisdictions under “abusive discharge” theories.²⁵ Harassment—with or without discharge—may also be actionable under theories such as intentional infliction of emotional distress,²⁶ assault and battery,²⁷ false imprisonment,²⁸ defamation,²⁹ and invasion of privacy.³⁰ Given the relatively low caps on compensatory and punitive damages established by Title VII, and the difficulties of securing

22. See Hodges, *supra* note 17, at 205-06 (collecting cases).

23. See *infra* Part II.E.1.

24. See, e.g., *Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974) (discharge for declining supervisor's demand for a date); *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025 (Ariz. 1985) (en banc) (discharge for refusing to participate in public indecency). The Supreme Court did not put its imprimatur on sexual harassment liability under Title VII until *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

25. See, e.g., *Insignia Residential Corp. v. Ashton*, 755 A.2d 1080 (Md. 2000); *Collins v. Rizkana*, 652 N.E.2d 653 (Ohio 1995).

26. See, e.g., *Stockett v. Tolin*, 791 F. Supp. 1536, 1555-56 (S.D. Fla. 1992); *Rogers v. Lowes L'Enfant Plaza Hotel*, 526 F. Supp. 523, 529-31 (D.D.C. 1981); *O'Reilly v. Executone of Albany, Inc.*, 503 N.Y.S.2d 185 (N.Y. App. Div. 1986).

27. See, e.g., *Stockett*, 791 F. Supp. at 1555-56; *Rogers*, 526 F. Supp. at 529; *Priest v. Rotary*, 634 F. Supp. 571, 584 (N.D. Cal. 1986).

28. See, e.g., *Stockett*, 791 F. Supp. at 1555-56; *Priest*, 634 F. Supp. at 583-84.

29. See, e.g., *Godfrey v. Perkin-Elmer Corp.*, 794 F. Supp. 1179, 1190-92 (D.N.H. 1992); *Frederick v. Reed Smith Shaw & McClay*, No. 92-0592, 1994 U.S. Dist. LEXIS 1809, 1994 WL 57213 (E.D. Pa. 1994).

30. See, e.g., *Stockett*, 791 F. Supp. at 1555-56; *Rogers*, 526 F. Supp. at 528.

punitive damages under the governing case law, victims of harassment will frequently deploy common law theories such as these as pendent claims in their discrimination actions.³¹ Moreover, given Title VII's exclusion of small employers and its extremely short statute of limitations, recourse to the common law may be the only avenue available for aggrieved parties in a variety of circumstances.³² To complicate matters further, common law actions otherwise available to supplement federal discrimination claims may be pre-empted under the terms of *state* antidiscrimination statutes, providing yet another source of interplay between the two bodies of law.³³

At the same time, employer efforts to prevent or punish sexual harassment, whether undertaken simply to avoid liability or for other reasons, may likewise implicate employment law. Thus, allegations of sexual harassment may generate state common law claims for defamation, malicious prosecution, or intentional infliction of emotional distress based on accusations made in connection with investigation or discipline,³⁴ and adverse actions by the employer against alleged perpetrators may even draw breach of contract claims.³⁵

* * *

In sum, lawyers who handle sexual harassment cases in contemporary practice must be thoroughly familiar with both Title VII—still the principal source of sexual harassment law—and a confluence of doctrines from all three conventional subjects that can raise or change the stakes of a particular claim considerably.

B. The Law of Workplace Protests

The classic source of legal protection for workplace protests is Section 7 of the NLRA, which covers a host of “concerted activities”—such as

31. See 42 U.S.C. § 1981a(b)(3) (2000) (establishing limits on aggregated compensatory and punitive damages at \$50,000 for employers with 15 – 100 employees; \$100,000 for employers with 101 – 200 employees; \$200,000 for employers with 201-500 employees; and \$300,000 for employers with more than 500 employees). On the standard required for securing punitive damages, see *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 530 (1999) (limiting punitive damages “to cases in which the employer has engaged in intentional discrimination and has done so with ‘malice or with reckless indifference to the federally protected rights of an aggrieved individual’”) (citation omitted).

32. See 42 U.S.C. § 2000e(b) (defining covered employers as those regularly employing 15 or more employees); *id.* § 2000e-5(e) (imposing 180-day statute of limitations for filing charge under statute).

33. See ROBERT BELTON ET AL., *EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE* 472-74 (7th ed. 2004) (collecting cases).

34. See, e.g., *Meloff v. N.Y. Life Ins. Co.*, 240 F.3d 138 (2d Cir. 2001) (defamation); see generally Ruth A. Kennedy, *Insulating Sexual Harassment Grievance Procedures from the Chilling Effect of Defamation Litigation*, 69 WASH. L. REV. 235 (1994).

35. See, e.g., *Cotran v. Rollins Hudig Hall Int'l, Inc.*, 17 Cal. 4th 93 (1998) (challenging discharge for alleged sexual harassment by way of contract claim based on written assurances of job security made by employer during pre-hire negotiations).

strikes, picketing, petitioning, and the like—undertaken for the purpose of “mutual aid or protection.”³⁶ Most cases invoking Section 7 protection involve work actions that take place in the context of either a union-organizing campaign or collective bargaining. At least since the Supreme Court’s 1962 decision in *Washington Aluminum*, however, the provision has been construed to cover the concerted workplace protests of unrepresented employees as well.³⁷ Indeed, for a quarter century after *Washington Aluminum*, Section 7 was virtually the only source of protection for non-union protests because it was quite nearly the only exception to the employment-at-will rule that otherwise governed American work law.³⁸

Today, however, there are multiple sources of protection for workplace protests of various kinds. In employment discrimination law, Section 704(a) of Title VII prohibits employer retaliation against an employee for opposition to unlawful discriminatory practices by the employer or involvement in any legal challenge to those practices.³⁹ Although the provision itself dates back nearly to the time of *Washington Aluminum*, retaliation claims increased dramatically during the 1990s and today constitute over a quarter of the charges filed annually with the EEOC.⁴⁰

Employment law has also become a prolific source of protection for workplace protests. On the common law front, tort-based wrongful discharge claims are often available for employees who are dismissed for refusing to engage in unlawful conduct or for reporting such conduct to public officials. Wrongful discharge protection for internal protests (for reporting or objecting to unlawful conduct through channels *inside* the firm) is less common,⁴¹ though there are some notable instances of successful recovery in these circumstances as well.⁴²

36. 29 U.S.C. § 157 (2000).

37. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962) (§ 7 protects employees of nonunion employer who walked off job to protest bitter-cold conditions in plant).

38. For an illuminating account of *Washington Aluminum* and its relationship to employment at will, see Cynthia Estlund, *The Story of NLRB v. Washington Aluminum: Labor Law as Employment Law in EMPLOYMENT LAW STORIES* (Samuel Estreicher & Gillian Lester eds., 2007).

39. The text of § 704(a), 42 U.S.C. § 2000e-3(a), provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

40. EEOC, CHARGE STATISTICS, FY 1997 THROUGH FY 2006, <http://www.eeoc.gov/stats/charges.html>; see generally Richard A. Oppel, Jr., *Retaliation Lawsuits: A Treacherous Slope*, N.Y. TIMES, Sept. 29, 1999 at C8 (quoting discrimination lawyer detailing increased filings and high win rates in retaliation cases: “Retaliation resonates with the jury. They may not believe the employer terminated someone because they are black, but they will believe they terminated someone because they rocked the boat.”).

41. See, e.g., *Geary v. U.S. Steel Corp.*, 456 Pa. 171, 183-84 (1974) (finding no wrongful discharge where employee voiced misgivings to superiors about adequacy of testing for a product,

Whistleblower statutes covering private-sector employees are a second source of employment law protection for workplace protests.⁴³ In most cases, the legislation in question protects the same types of conduct most frequently protected by the courts—i.e., refusing to participate in unlawful workplace activities and reporting such activities to law enforcement officials—but many statutes also go where some courts have been reluctant to travel and extend legal protection to employees who “oppose” unlawful workplace conduct, which presumably covers employees who do so within the firm.⁴⁴

Under contemporary law, then, there are sources of protection for workplace protests available in discrimination law and employment law as well as in labor law. But is this indeed another instance of doctrinal integration, or is it simply a case of parallel protections available under laws that cover quite separate and distinct kinds of employee conduct? To be sure, there are important differences in emphasis and coverage among the laws in question. For one thing, Section 7 of the NLRA protects only group protests and mostly union protests at that, whereas the retaliation provisions of Title VII and the various protections available to whistleblowers under state law are commonly invoked by individuals. Moreover, Section 704(a) of Title VII and the typical whistleblower protection statute focus primarily on activities *outside* the firm—i.e., filing charges or otherwise reporting employer misconduct to public officials—rather than protests that take place *within*. Finally, each of these laws is designed primarily to protect opposition to a particular kind of employer conduct, with Section 704(a) of Title VII focused narrowly on unlawful workplace discrimination, whistleblower law typically focusing more broadly on all unlawful employer practices, and Section 7 of the NLRA reaching beyond the unlawful to any issue that involves the “mutual aid or protection” of working people.

There is nevertheless a great deal of overlap and interplay between and among these disparate sources of law. In some cases, the overlap affords aggrieved employees a choice among different legal theories. Thus, for example, so long as they meet the requirement of “concert”—that is, of participating in some form of group activity—employees who oppose discriminatory employer conduct may be able to secure legal protection under Section 7 of the NLRA, under Section 704(a) of Title VII, or under a

despite fact that employee’s efforts eventually resulted in re-evaluation and withdrawal of product from market).

42. See, e.g., *Sheets v. Teddy’s Frosted Foods, Inc.*, 179 Conn. 471, 480 (1980) (recognizing a claim for wrongful discharge where employee was fired for internal efforts to ensure that employer’s products would meet standards established by labeling and licensing laws).

43. See INDIVIDUAL EMPLOYMENT RIGHTS MANUAL 505:28-29 (BNA 1995) (identifying nineteen states with private-sector whistleblower protection statutes).

44. See, e.g., Florida Whistleblowers Act, Fla. Stat. § 448.102(3) (1991).

typical state whistleblower statute. And employees who report violations of employment law to the appropriate public officials—e.g., safety claims to a state workplace safety agency—may likewise enjoy protection under either Section 7 or a state whistleblower statute.

In other cases, the overlap of sources results in a reduction rather than an expansion of legal protection. For one example, claims that might otherwise be available under the whistleblower provisions of Montana's wrongful discharge statute are barred if they can be brought under any other state or federal statute.⁴⁵ For another, activities that might otherwise be covered by Section 7 of the NLRA may lose their protection because of employment discrimination and/or employment law policies.⁴⁶ And for yet another, activities that might otherwise enjoy coverage under Section 704(a) of Title VII may lose their protection because of policies drawn from labor law.⁴⁷

More fundamentally, the apparent differences among these sources of law loom larger on paper than they do in the context of live workplace disputes. Oppositional activity may escalate quite seamlessly from voicing a concern to a colleague or supervisor; to discussing the matter with a group of similarly concerned colleagues; to seeking advice from unionized employees at a nearby firm; to resisting a supervisor's directive; to asking a local union for assistance; to calling or visiting law enforcement officials or the press; to filing a formal legal claim against the employer and/or attempting to organize a union.

As a result, the difference between union and non-union activities may be overstated, particularly in view of the fact that contemporary unions are increasingly pursuing organizing strategies that involve assisting individual employees in bringing workplace claims regarding safety, health, overtime pay, and similar concerns—a point to which we shall return in Part III. The distinction between group and individual protests may likewise be overstated since collective efforts more often than not begin with the initiative of an individual, and individual efforts are with great frequency supported in a variety of ways by the group.⁴⁸

45. See Montana Wrongful Discharge from Employment Act, Mont. Code Anno., § 39-2-912(1) (2005).

46. See, e.g., *IBM Corp.*, 341 N.L.R.B. 1288, 1292-93 (2004) (denying non-union employees the right to the "mutual aid or protection" of a co-worker at a disciplinary investigation, citing, *inter alia*, the need for unfettered and confidential investigations of actions that implicate employer obligations under antidiscrimination and workplace safety laws).

47. See, e.g., *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 71 n.25 (1975) (suggesting that § 704 (a) protection might not extend to protest activities that undermine union's status as exclusive representative of protesting employees). See generally Iglesias, *supra* note 10.

48. See Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOC. REV. 11, 26-28 (2005). See also Richard Michael Fischl, *Fear and Loathing on the Shop Floor: Labor Law and Social Dimension of Workplace Organizing* (forthcoming 2007) [hereinafter Fischl, *The Social Dimension of Workplace Organizing*].

Against this backdrop, the availability of different sorts of claims to vindicate particular protests is of great strategic importance to the employees who mount them. Pursuing the case through the NLRB, for example, is an attractive option for those with limited resources for legal representation, since the agency will foot the bill if it agrees to take the case. Tort actions and the handful of statutory actions in which punitive damages are available provide another avenue for funding representation. Whistleblower claims may well generate publicity that mere protests over working conditions might not, and filing a Title VII retaliation claim might be an effective way of buttressing a challenge to the discriminatory practices in question.

When we don't see protest cases until they are already in play within a particular legal regime, we risk the danger of ignoring the possibility that employees and their representatives may have engaged in careful strategic behavior either in characterizing the protest after the fact or in planning for it in the first place—strategic behavior that is enabled by the considerable doctrinal integration in the protections accorded workplace protests under contemporary work law.

C. Employment at Will

In what is now an exceedingly familiar story, the final quarter of the twentieth century brought dramatic changes to the employment-at-will doctrine, the classic version of which enabled employers and employees alike to part ways at any time “for good cause or for bad cause, or even for no cause.”⁴⁹ The trend began in the mid-1970s, when a handful of state courts began to conclude that there might, after all, be some reasons for discharge—like refusing a date with your supervisor—that were “bad” enough to warrant judicial intervention, and thus was born the modern law of wrongful discharge.⁵⁰

The challenge to employment at will was evidently an idea whose time had come, for state courts in the ensuing decade began condemning one “bad” reason after another, sustaining wrongful discharge claims on a variety of common law theories.⁵¹ The rule took a hit on a second front as courts during the same period began to advance the equally novel proposition that contract claims based on employer promises of job security—implicit and explicit—ought to be enforceable under the same rules that applied in other commercial settings.⁵² Within the space of a

49. *Payne v. Western & Atl. R.R.*, 81 Tenn. 507, 518 (1884), *overruled on other grounds*, *Hutton v. Watters*, 132 Tenn. 527, 544 (1915).

50. *See, e.g., Monge v. Beebe Rubber Co.*, 316 A.2d 549 (N.H. 1974).

51. *See* MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW* §§ 9.9-13 (3rd ed. 2005).

52. *See, e.g., Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880 (Mich. 1980) (enforcing contract claims based on language in personnel manual and oral representations by company

decade, two new reporter systems emerged, publishing thick bi-weekly packets of advance sheets and cataloguing the growing number of at-will “exceptions” (as we revealingly described them) carved out by courts in the vast majority of American jurisdictions.⁵³

It is difficult to say whether and to what extent these developments actually benefited employees. In the longer term, employers have not been shy about looking for ways to avoid making job-security promises—as well as ways to unmake promises already made—and the early enthusiasm for ferreting out all manner of “bad” reasons began to founder on the shoals of judicial second thoughts, restrictive legislative interventions, and the larger wave of tort reform. Yet the period certainly produced an amazing amount of workplace law, if not necessarily workplace justice, and lawyers and academics alike tend to think of the resulting body of doctrine as the centerpiece of contemporary individual employment law.⁵⁴

As a growing body of scholarship contends, however, the most important dimension of employment at will may lie less in what has changed than in what has stayed the same, and what has stayed the same is the rule’s role as the “baseline” not only in common law decisionmaking but also in the interpretation and application of statutes—specifically, Title VII of the Civil Rights Act of 1964 and the NLRA.⁵⁵ The statutes in question each prohibit discrimination in hiring, firing, promotion, compensation, and other terms and conditions of employment—Title VII where the discrimination is based on race, gender, or some other protected class, and the NLRA where discrimination is based on an employee’s union support or (as discussed in the previous section) her participation in workplace protests.⁵⁶ The lion’s share of claims under each statute, however, involve discharges, a phenomenon that is no doubt largely the result of an understandable reluctance to sue one’s current employer as well as the fact that discharge typically occasions a multitude of harms that may

officials); *Fortune v. Nat’l Cash Register Co.*, 373 Mass. 96, 101 (1977) (holding that discharge violated implied covenant of good faith and fair dealing).

53. See INDIVIDUAL EMPLOYMENT RIGHTS CASE (BNA 1986–current); EMPLOYMENT-AT-WILL REPORTER (1983–2000).

54. See, e.g., STEVEN L. WILLBORN ET AL., EMPLOYMENT LAW: CASES AND MATERIALS chs. 4–8 (3rd ed. 2002).

55. See Cynthia L. Estlund, Symposium, *The Changing Workplace: Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655 (1996); Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent Discharge Policy*, 57 OHIO ST. L.J. 1443 (1996); Fischl, *Workplace Justice*, *supra* note 16; Joseph E. Slater, The “American Rule” that Swallows the Exceptions (Sept. 4, 2006), available at <http://ssrn.com/abstract=930143>.

56. See Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2 (2006); National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3) (2006) (prohibiting discrimination on basis of union activities); *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962) (extending NLRA § 7 protection to activities of unrepresented employees).

make litigation cost-effective and in any event a tempting avenue for retribution.⁵⁷

In American work law, all discharge cases are litigated in the shadow of the employment-at-will rule, under which a dismissal is perfectly lawful unless some particular exception to the rule is established. But the shadow thus cast has a number of untoward consequences on the litigation of Title VII and NLRA claims—consequences that are all but invisible when we view discharge litigation through lenses that separate employment law (and thus employment at will) from employment discrimination and labor law. To summarize the aforementioned scholarly literature, the employment-at-will rule has significant adverse effects on party strategy and attitudes, on employer EEO practices, on the judicial treatment of wrongful discharge claims, and on the availability of in-kind remedies. I will address each of these points separately.

1. *Effects on Party Strategy and Attitudes*

Perhaps the most pronounced effect of employment at will on employment discrimination litigation is a phenomenon I have previously described as the “round hole/square peg” problem.⁵⁸ Employees who have discharge claims that are compelling as a matter of fairness, but which do not meet the requirements of proof under discrimination law, frequently attempt to squeeze their “square peg” of a case into the “round hole” of the applicable legal category, lest the employment-at-will rule bring their action to an abrupt halt. The challenge, of course, is getting past summary judgment, for a jury is more likely to focus on the unfairness of the discharge than on the match between legal theory and facts. Employers and their lawyers are likely to be less charitable in their response to this strategy and to view such efforts as dishonest at best, but the reality is far more complex.

As a number of prominent progressive critics have argued, there is a considerable gap between the lived experience of racism, sexism, and other forms of subordination (an experience of confronting unreflective habits, complex social structures, and entrenched institutional practices) and the legal categories through which discrimination claims must be litigated (which treat discrimination as the product of discrete and intentional acts by errant individuals).⁵⁹ Claimants who find themselves caught between the

57. See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 985 n.3, 1031 (1991) (analyzing data revealing that “plaintiffs in employment discrimination litigation rarely sue their current employers”).

58. See Fischl, *Workplace Justice*, *supra* note 16, at 261.

59. See, e.g., *id.* at 261 n.25 (citing Alan David Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Kimberle Crenshaw, *Demarginalizing the Intersection of Race*

rock of ill-fitting legal categories and the hard place of employment at will thus have considerable incentives to recharacterize the subtle or the unconscious as blatant and purposeful.⁶⁰

The results of this predicament are not pretty for anyone involved. As I have argued elsewhere:

To state the matter bluntly, the need to repackage unjust dismissal claims as discrimination claims needlessly racializes many employment disputes while at the same time trivializing the real but subtle and complex role of racial domination in the workplace. It leads employers and their lawyers to conclude that minorities and *their* lawyers are dishonest—a perception that is itself in large part the product of the same dominant cultural understandings that construct the law's ill-suited "round hole" in the first place. Thus, a charge of racial or gender discrimination is likely to be viewed by the one so charged as an accusation of intentional racism or sexism, and—especially in the rancorous context of the typical legal dispute—efforts to explain that the problem is more complicated are less likely to succeed in that endeavor than to convince the employer that the charge is an exaggeration and the claimant acting in bad faith. The prospect of such consequences would surely diminish were the employee to focus instead on the unfairness of the dismissal, but that focus is obviously precluded by employment-at-will.

These developments are obviously unlikely to promote a happy resolution to the case at hand, nor are they likely to further the cause of employment equity more generally. Indeed, as "square peg" claims proliferate, they shape the attitudes of employers and personnel managers, of their lawyers, and of the judges who hear these cases—judges who are, it is worth noting, infinitely more likely to be recruited from the ranks of the management bar than from the other side. The attitudes thus generated are likely to influence, and not in a good way, the views of these repeat players toward those in subordinated groups and toward employment equity issues in general, and those are decidedly not the attitudes with which we would like persons in positions of power over working people to operate.⁶¹

2. Other Consequences of Litigating Discharge Claims in the Shadow of Employment at Will

Further consequences of the employment-at-will rule on the litigation of unlawful discharge claims can be described with a bit more economy.

and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. CHI. LEGAL F. 139; Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995)).

60. See *id.* at 261-62.

61. *Id.* at 262-63.

a. *Effects on Employer EEO Practices*

A legal regime that prohibits employers from discriminating against employees, but—thanks in large measure to the employment-at-will rule—does not otherwise require them to treat their employees fairly, creates incentives for workplace practices that may ultimately undermine antidiscrimination goals and fairness norms alike. As Cindy Estlund has argued, employers may on the one hand attempt to minimize the prospect of EEO challenges by discriminating against minorities at the entry level, and yet at the same time “bend over backwards” in their treatment of minority incumbents, thus simultaneously depriving the latter of honest feedback and career-development incentives while generating resentment among their non-minority colleagues at perceived double standards.⁶²

b. *Effects on Judicial Treatment of Wrongful Discharge Claims*

Many contemporary judges seem to view the employment-at-will rule as granting employers a “license to be mean,” in Ann McGinley’s apt phrase⁶³—a license, in other words, to do just what the rule says they can do and fire employees for good reasons, if the occasion warrants, but otherwise for bad reasons or even for no reason at all. Of course, the at-will notion far more accurately captures teenage dating practices than it does anything remotely resembling the decisionmaking of a typical employer. But as a consequence of this judicial mindset, employees and their representatives frequently face an uphill battle in persuading judges that an unjust dismissal represents a significant departure from business norms and is therefore likely the result of a forbidden motive (e.g., race or labor organizing), rather than simply a privileged exercise in animosity, contrariness, or whimsy.⁶⁴

The at-will mindset has had a second, subtler effect, as courts and administrative agencies have developed the now familiar legal tests to guide parties in their presentation of proof and fact finders in adjudicating the claims, most notably the three-part *McDonnell Douglas* test for disparate treatment claims under Title VII⁶⁵ and the *Wright Line* burden-shifting test for mixed-motive discharges under the NLRA.⁶⁶ These tests rest on a series of highly contestable assumptions that are themselves profoundly

62. See Estlund, *supra* note 55, at 1678-82.

63. See McGinley, *supra* note 55, at 1459-62.

64. See *id.*; see also Fischl, *Workplace Justice*, *supra* note 16, at 263-65.

65. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-803 (1973) (establishing that once employee establishes *prima facie* case of discrimination, the employer must offer a legitimate reason for the challenged decision, and plaintiff may prevail by establishing that the reason offered was a pretext for discrimination).

66. *Wright Line*, 251 N.L.R.B. 1083 (1980), *upheld in* *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983) (holding that once the employee establishes that one of the reasons for the adverse action was employer opposition to union activities, the employer must prove that it would have reached the same decision even in the absence of the anti-union motive).

influenced by the employment-at-will rule—i.e., the assumptions that “employers” are individuals rather than institutions of various kinds (such as bureaucracies, committees, and networks); that concepts such as “intent” and “motive” can usefully capture the rich complex of considerations, reactions, and prejudices that prompt us to do the things we do, let alone the things we do collectively or institutionally rather than individually; and that these subjectivities can be neatly and usefully divided into dichotomous categories of “good” (or “legitimate” or “non-discriminatory”) reasons and “bad” reasons prohibited by law.⁶⁷

Each of these assumptions is in large measure the product of a mode of thinking that is organized by the dichotomous rule/exception relationship of discrete legal prohibitions operating against the backdrop of employment-at-will. And the structures of proof that those assumptions have spawned misapprehend the dynamics of the employment relationship in much the same way that they misapprehend the problems of racism and other forms of subordination and in turn drive the “square peg/round hole” dynamic described earlier.⁶⁸

c. Effects on the Availability of In-kind Remedies

When an employee working in a unionized firm is wrongfully discharged, the remedy available through grievance-arbitration is almost invariably an award of in-kind relief—i.e., reinstatement to the position from which she was unlawfully dismissed, together with any loss of pay and benefits accrued during the period of dismissal. By contrast, in-kind relief in the non-union setting, typically as a remedy for dismissal in violation of Title VII or the NLRA, is notoriously ineffective; most non-union employees are reluctant to return to their jobs for fear that their employer will make them “pay at the office” for their success in the courtroom, and the few who do return are likely to learn that those fears are not unfounded.⁶⁹

The principal difference between the two settings obviously lies in the fact that an employee in a union firm enjoys the protection of an institution well positioned to police the employer’s post-reinstatement conduct and to challenge acts of retribution, large and small. But there is a less obvious factor in the ineffectiveness of reinstatement in the non-union setting, and

67. See Fischl, *The Social Dimension of Workplace Protests*, *supra* note 48 (describing difficulty in distinguishing “insubordination” that is a legitimate basis for discharge from protected workplace organizing activity under NLRA, on the basis of either the behavior itself or the employer’s reaction to it); McGinley, *supra* note 55, at 1466-73 (so-called “good” reasons may be unconscious reactions to race, gender, or other protected status of claimant).

68. See Fischl, *Workplace Justice*, note 16, at 264-65.

69. See, e.g., PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 86 (1990).

once again it can be found in the background role of employment at will. As I have argued elsewhere:

[T]he employee who is reinstated in the union setting will almost invariably be the beneficiary of a provision in the underlying collective-bargaining agreement that prohibits discharge or discipline in the absence of “just cause.” As a consequence, any subsequent mistreatment—from blatant abuse at the hands of a supervisor embittered by the reversal of his discharge decision; to subtler slights (like lukewarm evaluations); to subconscious acts of petty retribution—will, if challenged, be evaluated on the basis of substantive fairness and procedural regularity. Indeed, since the employer is contractually obligated to ensure that all of its discharge and disciplinary decisions conform to the “just cause” standard—and typically bears the burden of establishing that the standard has been satisfied in a particular instance—it is likely to have policies and procedures in place that will, to some extent, constrain the impulse for vengeance and, in any event, establish a track record that will make deviant treatment stick out like a sore thumb.

The contrast to reinstatement in the absence of a “just cause” guarantee could scarcely be starker, for in that context the returning employee enters hostile territory to confront an employer who is armed with the employment-at-will rule. She will already be in a more precarious position than the employee reinstated in the union setting, for she will have secured her return through agency and/or court proceedings, thus visiting on the employer a more protracted, more expensive, and more public reversal of fortune than would have occurred in the arbitration context. But her ability to challenge adverse action by the employer . . . will depend not on the fairness or the regularity of the employer’s conduct, but entirely on whether a retaliatory motive can be established, . . . a mighty thin reed on which to hang one’s hopes for a successful return to a job from which one was unlawfully dismissed.⁷⁰

* * *

These effects of the employment-at-will rule—on party strategy and attitudes, on employer EEO practices, on the judicial treatment of wrongful discharge claims, and on the availability of in-kind relief—are far less obvious and visible than the role of employment at will in the more familiar setting of tort and contract claims in the employment law context, but they loom large indeed in the day-to-day enforcement of Title VII, of the NLRA, and indeed of the many other statutes that regulate discharge in the contemporary workplace.

70. Fischl, *Workplace Justice*, *supra* note 16, at 267-68.

D. Proof of Motive in Unlawful Discharge Cases

If what remains of the employment-at-will rule complicates employee efforts to contest discharges under Title VII and the NLRA, the proliferating exceptions to the rule present some daunting challenges for American employers, who face a long and growing list of “bad” reasons for which they are no longer free to fire at will. Indeed, the proliferating exceptions may well appear to employers like a case of “water, water everywhere,” even if there is “nary a drop to drink” from the perspective of most discharged employees.

1. Evidentiary Overlap: Negotiating the Terrain of Employment-at-Will's Proliferating Exceptions

We have already discussed the exceptions to the employment-at-will rule established by employment discrimination law (the prohibitions against discharge based on race, gender, and other forms of “status” discrimination, as well as the protection afforded employees who “oppose” an employer’s discriminatory practices or bring legal challenges against them) and by labor law (the prohibitions against discharge for participation in union as well as concerted non-union activities).

We have also noted the protection that employment law affords whistleblowing and various forms of workplace protest, but that is just the tip of the iceberg in contemporary employment law. Additional at-will exceptions are available under various federal statutes (protecting *inter alia* the right to refuse a work assignment “because of a reasonable apprehension of death or serious injury”;⁷¹ to refuse to submit to a polygraph examination;⁷² to take a leave of absence to attend to a family member’s illness;⁷³ and to miss work in order to serve on a federal jury);⁷⁴ under state statutes (protecting *inter alia* the right to file a workers’ compensation claim;⁷⁵ to file a claim with the employer’s group health insurer;⁷⁶ and to use tobacco products);⁷⁷ and even, in a handful of cases, under state constitutional law (protecting the right to refuse to participate in political activities).⁷⁸ There are also important restrictions on discharge arising from common law contract (which may support claims based on

71. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 3-4 (1980) (interpreting § 11(c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (2002)).

72. Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001-2009 (2002).

73. Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2611-2654 (2002).

74. Jury System Improvements Act of 1978, 28 U.S.C. § 1875 (2002).

75. *See, e.g.*, FLA. STAT. § 440.205 (2006).

76. *See, e.g.*, Health Insurance Claim Filing Act, 820 ILL. COMP. STAT. 45/2 (2005).

77. *See, e.g.*, ME. REV. STAT. ANN. tit. 26, § 597 (2005).

78. *See, e.g.*, *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894 (3d Cir. 1983) (Pennsylvania law); *Chavez v. Manville Prods. Corp.*, 777 P.2d 371 (N.M. 1989).

job-security assurances⁷⁹ or on the implied covenant of good faith and fair dealing⁸⁰ as well as tort law (which may support claims of intentional infliction of emotional distress,⁸¹ fraud,⁸² or intentional interference with contractual relations).⁸³

Negotiating the resulting terrain is no simple task, and perhaps the greatest nightmare faced by management-side attorneys is that a client will call for advice *after* discharging an employee rather than before. Among other things, there is always the danger that the untutored client will reveal to an unlawfully discharged employee or the latter's colleagues the truth about the dismissal, thus considerably strengthening the employee's hand in any ensuing dispute.⁸⁴

But because of the interplay among the multitude of at-will exceptions in contemporary work law, efforts to *hide* the truth—damning or not—can be equally hazardous to an employer's attempts to avoid liability. Thus, assigning a reason for the discharge that turns out to be false may enable the discharged employee (a) to establish “pretext” in either a Title VII or an NLRA discharge case and thereby raise an inference of discriminatory or anti-union motive on the part of the employer;⁸⁵ (b) to bring suit against the employer for defamation based on the false statement;⁸⁶ or (c) to provide direct evidence of motive, if the employer unwittingly cites an unlawful basis for discharge in an effort to explain away the adverse action.⁸⁷ Nor can the problem be avoided by the simple expedient of *not* providing a

79. See, e.g., *Woolley v. Hoffman-LaRoche, Inc.*, 491 A.2d 1257 (N.J. 1985) (contract claim based on language in personnel manual); *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880 (Mich. 1980) (separate claims based respectively on personnel manual and oral representations).

80. See, e.g., *Fortune v. Nat'l Cash Register Co.*, 373 Mass. 96, 101 (1977).

81. See, e.g., *Agis v. Howard Johnson Co.*, 371 Mass. 140 (1976).

82. See, e.g., *Sea-Land Service, Inc. v. O'Neal*, 224 Va. 343 (1982).

83. See, e.g., *Cappiello v. Ragen Precision Indus., Inc.*, 192 N.J. Super. 523 (1984).

84. To be sure, contemporary employers have multiple sources of information about potential discharge liability—including reports in the media and especially the business press, trade association newsletters and programs, and human resource professionals who are far more focused on legal issues than they were two decades ago—and studies suggest that employers are far more likely to overestimate than underestimate the prospect of liability for discharge. See, e.g., Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & SOC. REV. 47 (1992). But there is an awful lot of law to know—much of it difficult for a lay person to understand without a bit of work—and “avoiding legal problems” is only one of the concerns that animate the actions taken by employers, albeit an important one. Moreover, lower-level managers and front-line supervisors might well be oblivious to many such considerations, however well-tutored their principals may be. So the occasions for unwitting admissions of unlawful conduct may well be more frequent than those of us immersed in the legal dimensions of employment might expect, and for obvious reasons such cases are not likely to show up as reported appellate decisions.

85. See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) (employer's reliance on false reason for adverse action provides sufficient evidence to permit a jury to find unlawful discrimination); *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 404-05 (1983) (employer's reliance on false reason for adverse action supports NLRB's finding of anti-union motivation in discharge).

86. See, e.g., *Lewis v. Equitable Life Assurance Soc'y*, 389 N.W.2d 876 (Minn. 1986).

87. See *supra* note 84 and accompanying text.

reason for the discharge—notwithstanding the lure of employment-at-will's famous door number three (“no reason at all”)—since that too may support an inference of an illicit motive (what are you hiding?) and/or undermine employer efforts to establish that a subsequently stated reason was in fact the contemporaneous reason for the discharge (why didn't you say so in the first place?).

We might describe this dimension of doctrinal integration as “evidentiary overlap,” where employer statements and actions have potential evidentiary significance under more than one legal theory and where the sources of liability as often as not lie in two or more of the conventional work law fields. This is yet another reason why practitioners must be conversant with legal doctrine in and across multiple subjects in order to represent either party in a discharge case.

2. *The Mixed-Motive Case*

Wrongful discharge litigation has given rise to a second form of doctrinal integration, this one in the case law dealing with the so-called “mixed-motive” dismissal, where an employer is found to have lawful reasons (e.g., absenteeism) as well as unlawful reasons (e.g., race, union activities, whistleblowing) for the challenged discharge. The contemporary rules governing the disposition of such cases in labor law and employment discrimination, and increasingly in employment law as well, all find their source in a single precedent, *Mt. Healthy Board of Education v. Doyle*.⁸⁸

Mt. Healthy involved a claim by a teacher in a public high school that the school board had refused to renew his contract in retaliation for activities protected by the First Amendment. In support of that claim, the teacher pointed to an employer admission—in the form of a written non-renewal notice—that the refusal to renew was based on two of the teacher's actions: making “obscene gestures” to students in the school cafeteria and leaking to a local radio station an embarrassing official memo about an upcoming bond issue.⁸⁹

The Court assumed that the leak was constitutionally protected and that the obscene gestures were not and thus faced the question of how to determine the legality of an adverse action motivated by lawful as well as unlawful considerations.⁹⁰ (For economy of expression, I'll refer to the adverse action as a “discharge” rather than a “refusal to renew the contract”; since the test applies in principle to *any* adverse action—discharge, refusal to renew, layoff, demotion, cut in pay, etc.—this change should make no difference to the analysis.) The Court resolved the matter in Solomonic fashion, holding that a discharged employee could establish a constitutional

88. 429 U.S. 274 (1977).

89. *Id.* at 282-83.

90. *Id.* at 284.

violation upon a showing that retaliation against legally protected conduct (here, the leaked memo) was a “motivating factor” in a discharge decision, but that an employer might nevertheless escape liability with proof that it would have reached the same decision even in the absence of the protected conduct—i.e., on the basis of lawful reasons (here, the teacher’s obscene gestures) standing alone.⁹¹

Mt. Healthy began its migration from constitutional law to contemporary work law in the early 1980s, when the NLRB was in the midst of a protracted battle with the First Circuit over the proper test for analyzing anti-union discharge claims. In *Wright Line*, the agency sought refuge in a higher authority and adopted the *Mt. Healthy* test for use in NLRA cases.⁹² The First Circuit was not satisfied, but the authors of *Mt. Healthy* defended their handiwork and upheld the agency’s position in *NLRB v. Transportation Management Corp.*⁹³ The *Mt. Healthy* test—known to NLRB lawyers as *Wright Line* and to the rest of us as *Transportation Management*—remains to this day the law of retaliatory discharges under the NLRA.

The test made its way into employment discrimination law in *Price Waterhouse v. Hopkins*,⁹⁴ where the Court relied on both *Mt. Healthy* and *Transportation Management* to resolve the mixed-motive problem under Title VII.⁹⁵ Congress had its say on the matter in the Civil Rights Act of 1991, which left the *Mt. Healthy* test intact but altered the effect of a successful employer defense. Thus—consistent with *Mt. Healthy*—an employee makes out her case by proving that discrimination was a “motivating factor” in an adverse action, and an employer may defend by proving it would have done the “same thing anyway.” But a successful defense does not defeat the statutory violation altogether and instead cuts the remedy loaf in half, limiting an employee’s recovery to attorney’s fees, costs, and declaratory relief, and excluding reinstatement, backpay, and other individual remedies.⁹⁶

91. *Id.* at 287.

92. *See Wright Line*, 251 N.L.R.B. 1083 (1980), *enfd on other grounds*, 662 F.2d 899 (1st Cir. 1981).

93. 462 U.S. 393 (1983).

94. 490 U.S. 228 (1989).

95. *Id.* at 248-49.

96. *See* 42 U.S.C. § 2000e-2(m) (statutory violation established where discrimination was “motivating factor” in adverse employment action); 42 U.S.C. § 2000e-5(g)(2)(B)(i) (authorizing attorneys’ fees, costs, declaratory relief, and some forms of injunctive relief upon violation of 42 U.S.C. § 2000e-2(m)); 42 U.S.C. § 2000e-5(g)(2)(A)-(B) (prohibiting specific relief and damages where employer establishes that it would have taken the same action without the impermissible motivating factor). *See generally* *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (discussing proof and remedies in Title VII mixed-motive cases).

In the meantime, lower court decisions have applied *Price Waterhouse* to mixed-motive cases arising in other discrimination contexts,⁹⁷ and state courts have in turn relied on *Price Waterhouse* and *Mt. Healthy* in addressing the mixed-motive problem in whistleblower and other employment law contexts.⁹⁸

Viewed in retrospect, these developments suggest a certain inevitability to the spread of *Mt. Healthy*, and it is easy to forget the active role that lawyers played in arguing across the doctrinal borders in the first place. As it happens, in the early 1980s I was one of the NLRB attorneys who developed the agency's strategy in the *Wright Line/Transportation Management* litigation. Labor law was then still very much an insular field, and accordingly we were all surprised to find ourselves focusing as much as we did on out-of-area law. Although I did not realize it at the time, it was my first exposure to the doctrinal integration under examination here.⁹⁹

E. Mandatory Individual Arbitration

Nowhere in contemporary work law is the phenomenon of doctrinal integration more evident than in the case law governing the validity of pre-dispute agreements requiring employees to submit statutory claims to binding arbitration. The revolution here began with *Gilmer* and *Circuit City*, a pair of Supreme Court decisions holding that such agreements are enforceable under the Federal Arbitration Act.¹⁰⁰ Responding to those decisions, a rapidly growing number of American employers are insisting that their employees enter them as a condition of hire or continued employment.¹⁰¹ Although both *Gilmer* and *Circuit City* involved

97. See generally Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 MERCER L. REV. 651, 665-66 (2000) (discussing use of mixed-motive analysis in ADA context); Michael J. Zimmer, *Chaos or Coherence: Individual Disparate Treatment and the ADEA*, 51 MERCER L. REV. 693 (2000) (discussing use of mixed-motive analysis in ADEA context).

98. See, e.g., *In re Montplaisir*, 787 A.2d 178, 182 (N.H. 2001) (applying mixed-motive analysis developed in *Price Waterhouse* to state whistleblower claim).

99. An account of our strategy and a critique of the body of doctrine that has grown out of *Transportation Management* appears in Fischl, *The Social Dimension of Workplace Organizing*, *supra* note 48.

100. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). *Gilmer* involved the standard form arbitration agreement used in the brokerage industry to resolve disputes between brokers and firms regarding commissions and the like, but the language on the form purported to cover "any dispute, claim, or controversy" arising between a broker and his firm. See 500 U.S. at 21-22. The Court upheld the application of that agreement to an age discrimination claim, but ducked the question of whether its decision applied to employment contracts more generally. *Id.* at 25 n.2. *Circuit City* answered that question in the affirmative. See 532 U.S. at 124.

101. See KATHERINE V. W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 189 (2004) (reporting that, as of 2004, as many American employees were covered by such agreements as were covered by union contracts).

employment discrimination claims¹⁰²—as have the vast majority of the many cases arising in their wake—this development has also had significant consequences for labor law and employment law. But in a twist that ought to remind employers everywhere to be careful what they wish for, an array of employment law doctrines threaten to halt this development in its tracks.

1. *What Gilmer Hath Wrought: Labor Law and Mandatory Arbitration*

In the union workplace, mandatory arbitration has long been standard practice for resolving most employee grievances. Indeed, the advantages of grievance arbitration in protecting worker rights—including the expeditious resolution of claims, experienced representation with costs spread across the bargaining unit, and the prospect of prompt and effective in-kind relief—are among the most significant benefits afforded employees by union representation. Even so, in *Alexander v. Gardner-Denver Co.*,¹⁰³ a 1974 case that was one of the earliest to straddle the boundary between labor law and what was then the newly developing field of employment discrimination, the Supreme Court held that access to the judicial forum was a critical feature of American civil rights law and accordingly that employees in union firms were free to litigate rather than arbitrate their discrimination claims.

There the matter quietly stood until the *Gilmer* decision in 1991, and in the interim most academics and practitioners would have readily assumed that if arbitration could not be forced on employees who enjoy all the benefits of union representation then surely it could not be forced on a lone employee working in a non-union shop. Indeed, in reaching the opposite conclusion, the *Gilmer* Court was forced to devote no small amount of ingenuity to explaining (albeit not in an entirely convincing way) how *Gardner-Denver* might be distinguished.¹⁰⁴ Aficionados of the common law method will no doubt be able to guess what happened next, for sure enough more recent pronouncements on the topic have called the continuing vitality of *Gardner-Denver* into question in light of *Gilmer* and its burgeoning progeny.¹⁰⁵

If *Gardner-Denver* is indeed ultimately laid to rest, some fairly significant changes are likely to ensue in American collective bargaining.

102. See *Gilmer*, 500 U.S. at 23-24 (claim under Age Discrimination in Employment Act); *Circuit City*, 532 U.S. at 110 (employment discrimination claims under state law).

103. 415 U.S. 36 (1974).

104. See *Gilmer*, 500 U.S. at 33.

105. See *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998) (declining to reach the question whether *Gilmer* overruled *Gardner-Denver* but assuming for purposes of the decision that union employees could be bound to arbitrate discrimination claims); *Pryner v. Tractor Supply*, 109 F.3d 354, 365 (7th Cir. 1997) (acknowledging that *Gilmer* may have so distinguished *Gardner-Denver* as to deprive it of any authoritative force but deciding to follow *Gardner-Denver* until the Supreme Court says otherwise).

For one thing, the sexual harassment claimants in union firms we were discussing earlier¹⁰⁶—not to mention union employees alleging any other kind of discrimination claim—may for the first time be required to pursue their claims through grievance arbitration.

But some challenging contract interpretation questions will have to be resolved first, foremost among them whether a grievance arbitration provision that never before covered discrimination claims has suddenly expanded its scope without any action—let alone agreement—by the parties. In a post-*Gilmer* decision treating *Gardner-Denver* more or less like a dirty sock, the Supreme Court reasoned that the latter case “at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver” and thus concluded that such waivers must be “clear and unmistakable” to be effective, if indeed they are effective at all.¹⁰⁷ At least one circuit has held that arbitration agreements that purport to cover “all disputes” meet the “clear and unmistakable” test,¹⁰⁸ never mind that for a quarter century “all disputes” did *not* include discrimination disputes and that the parties to a particular collective-bargaining agreement may therefore have had no occasion to address the issue in the latest round of bargaining.¹⁰⁹

While this is mostly a transition problem, it will be an issue for nearly every collective-bargaining agreement in the United States, since virtually all of them contain grievance-arbitration provisions that purport to cover “all disputes.”¹¹⁰ In the longer term, though, labor unions may be on the verge of gaining an entitlement (i.e., the right to waive their members’ access to the judicial forum for discrimination claims) for which employers may be willing to pay a bundle and—given the changing demographics of union representation in the United States, a topic to which we shall return in Part III—it may be an entitlement with which the rank-and-file are increasingly comfortable parting.¹¹¹

Gilmer and *Circuit City* have likewise stirred the pot on the question of the effect of mandatory arbitration agreements on proceedings brought before and by the EEOC and the NLRB. In *Waffle House v. EEOC*, the

106. See *supra* Part II.A.1.

107. *Wright*, 525 U.S. at 80.

108. *Carson v. Giant Food*, 175 F.3d 325 (4th Cir. 1999).

109. *Cf. Indianapolis Power & Light Co. v. NLRB*, 898 F.2d 524 (7th Cir. 1990) (despite intervening change in the law, a no-strike agreement covering “any strike” does not constitute a “clear and unmistakable” waiver of the right to engage in sympathy strikes absent evidence that the parties agreed to such interpretation).

110. See BASIC PATTERNS IN UNION CONTRACTS, *supra* note 14.

111. *But see ALPA v. Northwest Airlines, Inc.*, 199 F.3d 477 (D.C. Cir. 1999), *judgment reinstated on reh’g en banc*, 211 F.3d 1312 (2000) (reading *Gardner-Denver* and *Gilmer* to permit employer to circumvent union and bargain with individual employees over the submission of statutory claims to arbitration).

Supreme Court held that individual arbitration agreements cannot preclude employees from bringing discrimination charges before the EEOC nor the EEOC from going to court on those charges on behalf of that individual—held, in other words, that the EEOC’s law enforcement powers cannot be diminished by an agreement to which it was not a party.¹¹² The NLRB’s aversion to individual arbitration agreements runs deeper still. Thus, in *Bentley’s Luggage*, the Board’s General Counsel under President Clinton found not only that such agreements could not and did not bind the NLRB but also that requiring employees to sign such an agreement as a condition of hire or continued employment was itself an unfair labor practice¹¹³—a position recently reaffirmed by the Bush Board.¹¹⁴

2. *Payback Time: Employment Law and Mandatory Arbitration*

The arbitration agreements that contemporary employers are visiting on their workers have imperial ambitions, once again typically committing to the arbitral forum “all disputes.” Indeed, that is precisely what got employers into trouble with the EEOC in *Waffle House* and with the NLRB in *Bentley’s Luggage*. But quite apart from discrimination and labor law claims, such agreements potentially cover a whole range of disputes associated with employment law—disputes arising under contract (e.g., job security claims based on the terms of an employee manual);¹¹⁵ tort (e.g., defamation claims based on employer statements made in connection with discharge or discipline);¹¹⁶ and statute (e.g., whistleblower protection claims).¹¹⁷ The application of arbitration agreements to the last of these—specifically, to the context of whistleblower claims and particularly to those that involve a refusal to violate the law or a communication with public officials¹¹⁸—may be seen to implicate the law enforcement powers of an individual state in much the same manner that *Bentley’s Luggage* and *Waffle House* raised the issue under federal law, and the validity of such displacement is likely to be influenced by those decisions.

It is on a second front, however, that the employment law dimension of this topic has already had an explosive effect on the developments initiated by *Gilmer*. The central holding of that case is that the Federal Arbitration Act puts arbitration agreements—including employment arbitration

112. *Waffle House v. EEOC*, 534 U.S. 279 (2002).

113. See NLRB, Advice Memorandum on *Bentley’s Luggage Corp.*, 12-CA-16658, (Aug. 21, 1995) available at http://www.nlr.gov/nlr/shared_files/admemo/admemo/i082195_bentley.asp.

114. *U-Haul Co.*, 347 N.L.R.B. No. 34 (June 8, 2006), slip op. at 3–4.

115. See, e.g., *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880 (Mich. 1980).

116. See, e.g., *Lewis v. Equitable Life Assurance Soc’y*, 389 N.W.2d 876 (Minn. 1986).

117. See, e.g., Florida Whistleblowers Act, FLA. STAT. § 448.101–105 (2005).

118. See *id.* at § 448.102(1)–(3) (protecting employees who report unlawful employer practices to public officials, who cooperate in investigations of such practices conducted by public agencies, and who refuse to participate in unlawful practices).

agreements—“on the same footing” as other kinds of contracts and accordingly that such agreements are enforceable under generally applicable common law contract principles.¹¹⁹ In reaching that holding, the Court may well have forgotten that the last time judges started applying generally applicable common law contract principles to the employment setting—in that case, to promises of job security that had been all but unenforceable under the venerable employment-at-will rule—the result was to generate enough litigation to spawn two new court reporter systems, a three-credit law school course, and about a million CLE classes and law review articles.¹²⁰

It turns out that once again it ain't your grandfather's common law out there, whether we are applying it to assurances of job security or to arbitration agreements. Accordingly, an agreement (a) that is imposed on employees under threat of discharge and/or refusal to hire; (b) that prescribes terms on a non-negotiable, “take-it-or-leave-it” basis; (c) that enables the employer but not the employee to revise the terms at will; (d) that requires the employee but not the employer to arbitrate all claims arising out of the employment relationship; (e) that requires the employee to pay a hefty filing fee and/or a substantial portion of the arbitrator's fee; (f) that is seldom read let alone fully understood by the employees who sign it; and (g) that eliminates or sharply restricts rights and remedies that would be available to the employee in litigation—in other words, the typical contemporary pre-dispute arbitration agreement—may well be vulnerable on grounds such as want of consideration, absence of mutual assent, breach of the obligation of good faith, adhesion contract principles, and unconscionability doctrine. As a result, scarcely a month has gone by in the past few years without a new decision involving a challenge to the enforceability of a particular employment arbitration agreement on state common law grounds, and the challenges are succeeding in a surprising percentage of the cases.¹²¹

119. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991).

120. *See supra* notes 50-54 and accompanying text.

121. Cases involving unconscionability challenges to the arbitration agreement forms used by the beleaguered folks at Circuit City could alone fill a volume of Fed Third; *see, e.g.*, *Al-Safin v. Circuit City Stores Inc.*, 394 F.3d 1254 (9th Cir. 2005); *Ingle v. Circuit City Stores Inc.*, 328 F.3d 1165 (9th Cir. 2003); *Circuit City Stores Inc. v. Mantor*, 335 F.3d 1101 (9th Cir. 2003). *See also* *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370 (6th Cir. 2005) (want of consideration); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999) (breach of good faith). *See generally* Richard A. Bales, *Contract Formation Issues in Employment Arbitration*, 44 *BRANDEIS L.J.* 415 (2006); Michael L. DeMichele & Richard A. Bales, *Unilateral-Modification Provisions in Employment Arbitration Agreements*, 24 *HOFSTRA LAB. & EMP. L. J.* 63 (2006).

* * *

In sum, *Gilmer* and *Circuit City* let loose a virus that has already spread beyond employment discrimination law and appears poised to upend three decades of law governing American collective bargaining. At the same time, employment law principles are providing an increasingly promising antidote, though whether it will kill the disease or the patient remains to be seen. What is clear now, though, is that lawyers attempting to understand these developments—let alone to predict where they are headed—will need to be intimately familiar with the interplay of developments emerging from all three conventional work law fields.

F. Employee Handbooks

As an astute work law practitioner has observed, “Ground zero in any sexual harassment or discrimination case involving a large company will be the no tolerance sexual harassment and/or discrimination policies located in almost every employee handbook.”¹²² But he might have added that handbooks are also “ground zero” for many labor law cases, since handbooks today typically include a firm’s solicitation, distribution, and internet use policies, the facial validity and application of which are frequently an issue in contemporary union organizing campaigns.¹²³ Likewise, handbooks are ordinarily full to the brim with policies governing various employment law issues; indeed, there is even an exception to the employment-at-will rule named in their honor, reflecting the fact that courts in most states treat job-security assurances contained in personnel manuals and similar documents as contractually binding against the employer.¹²⁴

When the so-called “employee handbook” exception to employment at will took hold in the 1980s, many employers reacted by attempting to rewrite their materials to opt back into the employment-at-will rule via disclaimers of job security. And although state courts are virtually unanimous in their willingness in principle to enforce such disclaimers when clear and conspicuous, there is considerable controversy as to the reach of that principle in particular contexts. Thus, for example, courts are divided over whether to enforce disclaimers as midterm contractual modifications against incumbent employees who have already been

122. John Douglas Winer, *Use of Employee Handbooks/Personnel Manuals When Litigating Sexual Harassment, Discrimination and Contract Claims*, 650 PLI/LIT 175, 180 (2001).

123. See generally Nancy J. King, *Labor Law for Managers of Non-Union Employees in Traditional and Cyber Workplaces*, 40 AM. BUS. L.J. 827 (2003). In this connection, the NLRB has recently ordered argument in a case raising a broad range of issues involving employer internet-use policies under the NLRA. See Notice of Oral Argument and Invitation to File Briefs, *The Guardian Publishing Co.*, 36-CA-8743-1 (NLRB Jan. 10, 2007), available at http://www.nlrb.gov/nlrb/about/foia/documents/notice_of_argument.pdf.

124. See, e.g., *Woolley v. Hoffman-LaRoche, Inc.*, 491 A.2d 1257 (N.J. 1985); *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880 (Mich. 1980).

working under the protection of enforceable handbook promises,¹²⁵ and over whether to enforce disclaimers that conflict with competing sources of contractual obligation, such as other statements in the handbook, oral assurances by employer representatives, and longstanding employer practices with respect to job security.¹²⁶

The making and unmaking of enforceable job-security promises is conventionally understood as an employment law topic, but there are related issues that cut across the boundaries of other work law subjects. Foremost among these is the tension between employer efforts to render their handbooks merely aspirational with respect to their own promises (through disclaimers, careful wording, and the like) and at the same time to use handbooks as the vehicle for imposing binding legal obligations on employees. Thus, for example, employers who use the employee handbook to announce a mandatory individual arbitration policy—a policy, as discussed in the previous section, that typically purports to apply to “all” work law claims—may find it difficult to enforce if they indicate elsewhere in the handbook that its provisions are not “binding”¹²⁷ or are subject to unilateral modification.¹²⁸

A similar double bind may arise for the many employers who use their handbooks to announce the procedures for reporting and handling sexual harassment claims within the firm. Current law offers great incentives for establishing such procedures—and for bringing them to the attention of the workforce—since by doing so an employer may limit legal liability for subsequent instances of harassment.¹²⁹ The provisions in question frequently include assurances that there will be no adverse consequences for bringing—or offering evidence with respect to—a harassment claim, and indeed without such assurances the employer’s policies may lose their prophylactic effect.¹³⁰

125. *Compare* *Bankay v. Storer Broad. Co.*, 432 Mich. 438, 456-58 (1989) (upholding midterm modification) *with* *Torosyan v. Boehringer Ingelheim Pharmacy*, 234 Conn. 1, 13-17 (1995) (rejecting modification).

126. *Compare* *Rowe v. Montgomery Ward & Co.*, 437 Mich. 627, 650-51 (1991) (enforcing disclaimer) *with* *McGinnis v. Honeywell, Inc.*, 110 N.M. 1 (1990) (effectiveness of disclaimer is a jury question); *McDonald v. Mobil Coal Producing, Inc.*, 789 P.2d 866 (Wyo. 1990) (same); and *Russell v. Bd. of County Comm’rs*, 952 P.2d 492 (Okla. 1997) (same).

127. *See, e.g.,* *Ex parte Beasley*, 712 So. 2d 338 (Ala. 1998) (arbitration provision in employee handbook unenforceable where handbook acknowledgment form stated that terms of handbook were not legally binding).

128. *See, e.g.,* *Salazar v. Citadel Commc’ns Corp.*, 90 P.3d 466 (N.M. 2004) (arbitration agreement in employee handbook was unenforceable because handbook provision retaining unilateral right to modify handbook terms rendered employer’s promise to arbitrate illusory).

129. *See* *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998) (establishing a two-prong affirmative defense against hostile work environment claims based on supervisory conduct where employer establishes such procedures and employee fails to use them, but holding that employer lost the defense because, among other things, it “entirely failed to disseminate its policy” to the workforce).

130. *See* Elinor P. Schroeder, *Handbooks, Disclaimers, and Harassment Policies: Another Look at Clark County School District v. Breeden*, 42 BRANDEIS L.J. 581 (2004).

How should the “mixed messages” be sorted out when such assurances conflict with job-security disclaimers that appear with equal frequency in contemporary employee handbooks? Does a broad disclaimer apply to assurances against retaliation for bringing or providing evidence in connection with sexual harassment claims? If so, does that undermine the employer’s claim that it maintains an effective policy against sexual harassment? If the assurances *are* enforceable, however—because ambiguity ought to be construed against the drafter and/or resolved in a manner that furthers national antidiscrimination policy—what is left of the disclaimer?

The case law on the effectiveness of disclaimers that are in tension with other handbook provisions is, as previously noted, in a state of disarray, with some courts enforcing disclaimers in spite of such ambiguities and others leaving the question of enforcement to the jury.¹³¹ But where those “other handbook provisions” are policies that govern sexual harassment, the resolution of the conflict obviously implicates both employment law and discrimination law principles,¹³² offering yet another example of an important topic in contemporary work law that straddles the conventional disciplinary boundaries.

III.

LOOK, MA, NO BORDERS (CONT’D):

THE FUNCTIONAL INTEGRATION OF AMERICAN WORK LAW

It’s not just legal doctrine that’s operating across the conventional subject-matter boundaries these days. The functions conventionally associated with the individual subjects themselves are increasingly traversing those boundaries as well. We will explore that phenomenon in this part of the Article, and I will offer some observations about the ways in which many of the instances of doctrinal integration we examined in Part II are symptoms of the functional integration we are looking at here.

Perhaps the most important illustration of functional integration is what might be described as the “cross-migration” of employment discrimination law and labor law, as the institutions historically associated with each—discrimination litigation and labor unions, respectively—have increasingly assumed the roles traditionally performed by the other. Specifically, the workplace dispute resolution functions once performed for a substantial portion of the American workforce by labor unions and collective bargaining have in large measure been displaced by a system in which discrimination litigation—and efforts by employers to avoid it—predominates. At the same time, the role of restructuring the American

131. See cases cited *supra* note 126.

132. See Schroeder, *supra* note 130, at 588-89.

workplace in the name of equality and antisubordination principles, a role historically associated with discrimination law, is increasingly played today by labor unions that are energetically organizing and championing women, people of color, immigrants, and the working poor. And in each case, employment law is playing a critical subsidiary role in this transformative cross-migration.

A. *Workplace Dispute Resolution*

1. *From Collective Bargaining to Discrimination Law*

In the post–World War II era, labor unions represented nearly 40% of the private-sector workforce, and collective bargaining provided the dominant model of dispute resolution in the American workplace. Challenges to employer decisions regarding pay, promotions, seniority, and a host of other issues were governed by the terms of a collective bargaining agreement negotiated between the employer and the union representing its employees, and such challenges were almost invariably resolved through an internal grievance-arbitration process that was likewise a creature of the parties' contract. Historically as well as today, the overwhelming majority of collective agreements have contained a provision prohibiting discharge or discipline in the absence of "just cause," and a majority of the labor-management disputes that eventuate in arbitration involve "just cause" challenges to discharge or disciplinary actions against individual employees.¹³³

As union density in the United States declined precipitously between the 1970s and the 1990s, another body of law emerged that has, in effect, assumed for non-union employees the dispute-resolution role played by collective bargaining—and in particular by "just cause" grievance arbitration—in an earlier era. The centerpiece of the contemporary approach is employment discrimination law, and its effect on dispute resolution in the American workplace is largely the result of a confluence of developments that occurred during the same period as the union decline.

Thus, the 1970s and 1980s witnessed "spectacula[r]" growth in the number of employment discrimination claims filed in federal court¹³⁴ as well as a marked shift from class actions, which had dominated the docket during the early years under Title VII, to individual cases alleging disparate treatment.¹³⁵ The latter shift was partly the result of a one-two punch from

133. See LAURA J. COOPER ET AL., *ADR IN THE WORKPLACE: A COURSEBOOK* 249, 258 (2000) (reporting that 92% of collective-bargaining agreements contain a "just cause" provision and that in a recent sample year 56% of all labor arbitrations involved discharge or discipline disputes).

134. Donohue & Siegelman, *supra* note 57, at 985 (reporting a 2166% increase in employment discrimination filings during that period).

135. See *id.* at 1019 (reporting a 96% decline in discrimination class actions between the mid-1970s and the end of the 1980s).

the Supreme Court via decisions that made disparate impact claims more difficult to mount¹³⁶ and that sharply limited the availability of class actions in employment discrimination cases,¹³⁷ but it was every bit as much the result of a steep numerical increase in the filing of individual suits.¹³⁸

At the same time, the *target* of discrimination suits shifted dramatically—from hiring discrimination, which had been the principal target of most class action litigation, to the discriminatory discharge, the principal target of the lion's share of individual suits.¹³⁹ Likewise, the nature of the discrimination challenged by these proliferating individual actions revealed a sharp shift from what was originally a high exclusive focus on race discrimination toward actions alleging age discrimination and reverse discrimination.¹⁴⁰ With the Supreme Court's imprimatur in 1986, sexual harassment claims exploded as well,¹⁴¹ and, as the 1990s began, claims under the Americans with Disabilities Act of 1990 began to add to the mix.

These trends were further accelerated by the passage of the Civil Rights Act of 1991, which amended Title VII by providing the right to a jury trial and the prospect of punitive damages in individual discrimination actions, thus making such claims far more attractive to the plaintiffs' bar.¹⁴² In the half decade following the enactment of that statute, employment discrimination filings in the federal courts doubled, with the largest increases registered in sex and disability claims, offsetting a decrease in racial claims.¹⁴³ Indeed, by the current decade, fully 40% of the EEOC's

136. *Ward's Cove Packing v. Atonio*, 490 U.S. 642 (1989).

137. *E. Texas Motor Freight v. Rodriguez*, 431 U.S. 395 (1977); *Gen. Tel. Co. v. Falcon*, 457 U.S. 147 (1982).

138. See Donohue & Siegelman, *supra* note 57. The blow to disparate impact was partially remedied by the Civil Rights Act of 1991, 42 U.S.C. § 2000e, but the disparate impact case has never recovered from the *Ward's Cove* death blow. See *id.* at 998 n.57.

139. See *id.* at 1015 (reporting that hiring challenges outstripped discharge challenges by a ratio of 2:1 in the mid-60s, but discharge challenges outstripped hiring challenges 6:1 two decades later).

140. See *id.* at 989 (Table 2) (finding that age discrimination cases accounted for over 11% of the increase in discrimination filings between 1970 and 1989 and that reverse discrimination claims were part of a cohort that accounted for nearly 10% of the total increase).

141. In 1985, nine sexual harassment claims were filed with the EEOC. In 1986, the year the Court decided *Meritor Savings Bank v. Vinson*, 477 U.S. 57, the number rose to 624; to over 1600 in 1987; and to approximately 2000 in 1988, where it remained for the following three years. See EEOC, TRENDS IN HARASSMENT CHARGES FILED WITH THE EEOC, <http://www.eeoc.gov/stats/harassment.html>.

142. See 42 U.S.C. § 1981a-(a), (b) (punitive damages); § 1981a-(c) (jury trials).

143. See John J. Donohue III & Peter Siegelman, *The Evolution of Employment Discrimination Law in the 1990s: A Preliminary Empirical Investigation*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES 261-62, 272 (Laura Beth Nielsen & Robert L. Nelson eds., 2005). On the sexual harassment front, in 1992—the year following passage of the new Civil Rights Act as well as the confirmation hearings for Justice Clarence Thomas—the number of sexual harassment filings rose to nearly 3000, an increase of 50% over the prior year. Filings rose further to approximately 3500 in 1993 and to between 4000 and 6000 claims in every year since. See TRENDS IN HARASSMENT CHARGES FILED WITH THE EEOC, *supra* note 142.

caseload consisted of age and disability discrimination claims and thirty percent were sex discrimination claims.¹⁴⁴

Thus, by the late 1990s, individual challenges to employer discharge decisions were being litigated in quite literally thousands of discrimination suits before American courts. The nature of the discrimination under challenge—a declining number based on race and a greatly increased share of sex, age, disability, and reverse discrimination claims—confirms a great deal of anecdotal evidence that the plaintiff cohort has been increasingly populated by white folks and not a few white men. Now I do not contend that these discrimination suits were in any sense a “simple substitute” for grievance arbitration under a union contract, for there are many discharge claims that would be likely to succeed under a “just cause” standard but which discrimination law would not reach—e.g., a case involving a personal grudge by a supervisor or a punishment too harsh for the misconduct at issue. Moreover, although a substantial share of labor arbitrations involve discharge claims, there are also many cases where discipline falls short of discharge, as well as many cases dealing with pay, promotion, and other terms of employment.¹⁴⁵ Individual discrimination suits, by contrast, focus overwhelmingly on discharge—and those that do not will typically focus on hiring discrimination—a difference no doubt born of the fact that it is a lot scarier for an incumbent employee (as opposed to a prospective or former employee) to sue her employer than to bring a grievance against it.¹⁴⁶

But these points of difference should not be overstated. For one thing, one of the fundamental precepts of “just cause” is a commitment to treating like cases alike, which is why “past practice” has always played such a prominent role in labor arbitration. And by the time you finish counting all of the bases on which contemporary discrimination law prohibits employers from “distinguishing” other discharge cases—race, color, gender, pregnancy, national origin, religion, age, and disability under federal law alone—you have obviously covered an awful lot of “just cause” ground. Furthermore, there is the “square peg/round hole” phenomenon I described earlier—i.e., the not infrequent occasions on which discharged workers who do not enjoy the protection of a “just cause” provision are forced by current law to recharacterize an “unjust” discharge as a “discriminatory” one if they want their claim heard.¹⁴⁷ So the overlap between potential “just cause”

144. EEOC, CHARGE STATISTICS, FY 1992 THROUGH FY 2005, <http://www.eeoc.gov/stats/charges.html>.

145. See COOPER ET AL., *supra* note 133, at 249 (reporting that in a recent sample year 56% of labor arbitrations involved discharge or discipline disputes, 19% involved wages and hours, 10% seniority, and 3% fringe benefits).

146. See Donohue & Siegelman, *supra* note 57, at 985 n.3, 1031.

147. See *supra* notes 58–61 and accompanying text.

cases and actual discrimination filings may be far greater than first supposed.

Indeed, the fact that these individual discrimination suits were proliferating just as union membership in the United States was steeply declining is surely no coincidence.¹⁴⁸ But my argument here is not about causation but about the development of a marked functional shift *whatever* its causes—i.e., the displacement of collective bargaining by discrimination litigation as the dominant model of dispute resolution in the American workplace, a displacement that is the “backstory” to many of the illustrations of doctrinal integration we witnessed in Part II.

2. *The Relationship Between Functional and Doctrinal Integration*

a. *Discrimination Law and Employment at Will*

In a world of work in which discharge is governed by “just cause” (i.e., under the typical collective-bargaining agreement), the employment-at-will rule is entirely displaced and thus quite nearly without consequence for a worker challenging discipline or dismissal. But in a world of work in which antidiscrimination law governs and “just cause” protection has largely vanished (i.e., the world most employees live in now), the role of employment at will assumes critical importance. Indeed, as we saw in Part II, the interplay between discrimination law and at-will doctrine is a principal source of multiple pathologies in the contemporary practice of American work law, fostering unsalutary effects on litigation strategy (the “square peg/round hole” problem), on employer EEO practices, on judicial understandings of the stakes in discharge cases, and on the availability of reinstatement as an effective remedy for wrongfully discharged employees.¹⁴⁹

b. *The Role of Employment Law Claims in Discrimination Litigation*

In Part II, we also saw the increasing use of employment law and particularly tort theories (e.g., intentional infliction of emotional distress and defamation) in a variety of discrimination contexts: as the basis for pendent claims in Title VII actions; as independent vehicles for such claims where a Title VII action is precluded (e.g., by the statute of limitations or employer size) or where punitive damages are unavailable or subject to low caps under Title VII; and as a complicating factor in a number of settings and particularly in sexual harassment cases, where alleged perpetrators may deploy them to fend off employer-imposed discipline.

148. See Donohue & Siegelman, *supra* note 57, at 1019 (observing that decline in unionization “undoubtedly” contributed to the increase in discrimination filings).

149. See *supra* Part II.C.

The last of these developments—recourse to the common law among alleged perpetrators of sexual harassment—is of course yet another product of the fact that we are living in an “at-will” rather than “just cause” world. Employees disciplined or discharged for alleged sexual harassment are in no position to protect their jobs—by challenging the accuracy of the charges against them; the fairness of the procedures employed; and/or the proportionality of the punishment received—*except* through deployment of such theories.

As for the rise of tort claims as pendent and independent vehicles in pursuing discrimination challenges, here too the rise of workplace dispute resolution via employment discrimination litigation—and the corresponding eclipse of the collective-bargaining model—provides a robust account. The key lies in the difference between both remedies and representation under the respective models. In a nutshell, we have replaced a dispute resolution system in which the injuries of discharge are almost invariably remedied via in-kind relief and in which the costs of representation are spread throughout the workforce with a system in which money damages secured through litigation must be large enough to cover both victim compensation and the cost of representation. An unrelenting quest for damages-enhancing claims has thus become a central feature of the latter system.

Under collective bargaining, representation by union staff in grievance-arbitration is one of the benefits of union membership, and the costs of that benefit are spread throughout the bargaining unit via union dues and fees. There are upsides and downsides to this form of representation. On the one hand, the grievant typically has the benefit of representation by a repeat-player thoroughly familiar with the employer’s shop floor practices and with past arbitral decisions—once again, vital factors in “just cause” cases—not to mention a representative who can bring pressure to bear on a reluctant employer that extends far beyond the grievance at hand. On the other hand, the “cause of action” belongs to the union rather than to the individual employee, for the question whether to press the grievance at all—and, if so, how to pursue it (on what theory, with what evidence, etc.)—is up to the union, not the individual grievant.¹⁵⁰

150. In the ordinary course, this is a problem mostly for employees with marginal claims, but the representational structure can present a serious problem for the odd man out, particularly when the odd man out is a woman working in a traditionally male workplace or a member of a subordinated racial minority. This dimension of the predicament was in no small measure the animating concern behind the Supreme Court’s decision in *Gardner-Denver*, enabling union-represented employees to end-run the grievance arbitration process and pursue their discrimination claims in court. It also accounts for the development of “duty of fair representation” law, which offers employees recourse against the union when the latter refuses to process or otherwise mishandles a grievance on account of the grievant’s race or some other discriminatory basis. *Gardner-Denver* and the duty of fair representation are thus arguably early instances of doctrinal integration, since each represents a mix of labor law and employment discrimination law. More plausibly, I think, the two doctrines can be viewed as an important part of the dynamic that maintained distinct and separate categories for those two work law subjects, for each had the effect of segregating discrimination issues from the main body of labor law.

Whatever its virtues and vices, though, collective representation means that the individual grievance need not be self-funding. By contrast, representation in discrimination litigation is almost invariably provided by a private attorney, whose services are typically secured through a large retainer (\$10,000 to \$15,000 in most locales) and the promise of a substantial contingency fee (33% or even 40% of the damage award).¹⁵¹ There are obviously virtues and vices here as well. Representation is beholden only to the client's interests, yet it may not be available at all to employees who lack substantial financial resources as well as a claim that will justify high damages. But my point is a structural one: In contrast to the cost-spreading device of collective bargaining, representation in dispute resolution via litigation must as a practical matter be funded by the proceeds from—or the prospect of proceeds from—that litigation.

On the remedies side, the singular feature of grievance arbitration in collective bargaining is the availability and effectiveness of in-kind relief. In the typical case, the remedy for a wrongful discharge is reinstatement, and, apart from backpay for any losses accrued during the pendency of the grievance (typically a period of weeks or a couple of months at the most), money damages are not required to make the employee whole for the various losses that typically attend dismissal in the non-union setting (e.g., reputational, resume, and career-development effects; emotional consequences; losses due to absence of income; etc.).

By contrast, for a host of reasons in-kind relief is all but out of the question in discrimination litigation. First and perhaps foremost, you cannot live very long on a third of a reinstatement order, so plaintiffs' lawyers operating on a contingency basis—which is to say virtually all of them—do not have much incentive to figure out how that device might be made to work, and a reinstated employee faces the unhappy prospect of returning to work as an "at will" employee with neither "just cause" protection nor a union around to police it.¹⁵² Moreover, the incentives present in collective bargaining for both sides to negotiate an expeditious and amicable resolution of a claim because of their stakes in the larger, ongoing relationship are all but absent in discrimination litigation. Indeed, with one representative paid a percentage of the money damages award and the other typically paid by the hour to oppose her, there is very little structural incentive to lower the costs of dispute resolution.

As a result, then, money damages are as a practical matter the only game in town, and if both the attorney and claimant are to be compensated enough to make pursuit of the claim worthwhile, then they will have to be relatively high. Thus, then, is another of our instances of doctrinal

151. See generally Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457 (1992).

152. See *supra* notes 69-70 and accompanying text.

integration accounted for: The search for damage-enhancing legal theories is in large measure an artifact of the need to fund representation and to compensate for losses where “free” representation and in-kind relief are as a practical matter simply unavailable.

c. The Employee Handbook and the “Legalist” Revolution in Human Resource Management

The account I have given thus far of the increasing role of employment discrimination litigation in workplace dispute resolution has been missing a critical dimension, for American employers did not sit idly by as these developments took place. Indeed, the reaction among American employers was as dramatic as the trends to which they were responding, as many undertook aggressive discrimination law compliance programs in the late 1980s and the 1990s. A “legalist” approach began to encroach on traditional managerial/motivational values in human resource (HR) practices more generally, partly as a result of a substantial increase in reliance on legal professionals for guidance in employee relations matters and partly as a result of an increasing focus on the legal constraints on employer decisionmaking by HR professionals themselves.¹⁵³

Nowhere was this reaction more evident than in personnel manuals and employee handbooks, which were recrafted in the name of discrimination law compliance and as a result quickly became—in the apt expression quoted earlier—“ground zero” for discrimination and sexual harassment policies and claims.¹⁵⁴ This trend was no doubt reinforced by the unwitting role HR professionals played in a second massive rewriting of employee manuals that occurred during the same period—this one the result of the fact that state courts in the early 1980s had suddenly begun enforcing all of those assurances of job security and procedural justice that had for many years been included in employee handbooks at the HR professionals’ insistence. In their original effort they had presumably been guided by a desire to mimic the perceived benefits of union employment and thus to reduce the prospect of a pesky union campaign. But imagine everyone’s surprise when it turned out that employers had to actually *do* what the handbooks *said* they would do or else begin promising a rather different kind of employment relationship in the documents they circulated to employees.

The former course evidently did not occur to many American employers, for the road almost invariably taken was a massive “unpromising,” as virtually every HR conference—and not a few conferences for employment lawyers—in the mid- and late-1980s focused like a laser beam on how to rewrite all those manuals and handbooks in

153. See generally Edelman et al., *supra* note 84.

154. Winer, *supra* note 122, at 180.

order to render them promise-free or at least free of any promises that courts were likely to enforce. Thus had legal concerns triumphed over the traditional mix of managerial/motivational values, as HR professionals were either downsized or deputized—replaced by the folks in the General Counsel’s office or enlisted to assist them in the legal colonization of workplace governance.¹⁵⁵

The net result—manuals with all sorts of strong statements and seemingly serious policies about discrimination and sexual harassment, accompanied somewhat confusingly by scary bold-print legalese designed to convince employees that nothing in the manual created any legally binding promises at all—bore a not altogether coincidental resemblance to the emerging regulatory regime and all of its internal tension: i.e., discrimination law operating in the looming shadow of employment at will. And since the product of this mad flurry of revision plays a central role in multiple areas of work law—handbooks are a central feature in litigation over employee contract claims, over employer defenses in discrimination and particularly sexual harassment cases, and, increasingly, over the validity of mandatory individual arbitration procedures—it is no surprise that this tension reflects itself in the doctrinal integration we explored in Part II.¹⁵⁶

d. Mandatory Individual Arbitration

The considerable costs—financial, time, and otherwise—of the shift from dispute resolution via collective bargaining to employment discrimination litigation have fallen on employers as well as on employees,

155. A project that will have to await another day is a study of the ways in which American HR professionals have displayed an uncanny knack for remaining one step behind the antics of their corporate colleagues and pretty much clueless about the law. Thus, in the 1970s, they were busy drafting personnel manuals with promises of job security that their principals would often violate willy-nilly, *see, e.g.*, *Woolley v. Hoffman-LaRoche, Inc.*, 491 A.2d 1257 (N.J. 1985) (rejecting employer’s contention that Simon didn’t say the firm would actually *keep* its job security promises). In the mid-1980s, they were busy rewriting those manuals—no doubt with a bit of help from General Counsel—to remove those promises of job security even as their principals were busy sending a different set of messages altogether to the rank-and-file, *see supra* notes 124-26 and accompanying text. In the late-1980s, they were busily inflating the threat of common law wrongful discharge actions to their firms at a point in time when the threat, never great to begin with, was actually beginning to abate, *see Edelman et al., supra* note 84. In the 1990s, and again with the help of General Counsel, they were busy drafting sexual harassment policies that were long on abolishing “sex,” short on regulating “harassment,” and in any event once again inflating the actual legal requirements, *see Schultz, supra* note 19. And then, in the early part of the current decade, they were promoting a whole new set of promises—this time about the firm’s commitment to career mobility and professional development—even as the General Counsel’s office was doing its level best to thwart mobility by drafting non-compete and trade secret protection agreements, requiring entry-level and incumbent employees to sign them, and attempting to enforce them in the courts, *see STONE, supra* note 101. For a nuanced view of some of the competing professional constraints in play here, *see Lauren B. Edelman et al., Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC. REV. 497 (1993) (describing effect of managerial values of HR professionals on processing of civil rights disputes at the end of the 1980s).

156. *See supra* Part II.F.

so it is no surprise that the former have developed a number of strategies designed to reduce those costs. (The most effective cost-reduction strategy for employees is, of course, union representation in dispute resolution, but that's an alternative that is not widely available to employees at non-union firms.)

Some of the employer strategies focus on the "supply side" of legal services, as management has increasingly moved litigation work in-house and has also taken advantage of a market for legal services that is considerably more competitive now than it was two decades ago. But the principal employer cost-cutting strategy has been on the "demand side"—i.e., taking the "law" out of dispute resolution by requiring employees to move their employment claims in-house too and thus to arbitrate rather than litigate them. As we saw in Part II of this Article, litigation challenging the validity of that practice has resulted in perhaps the most dramatic instance of doctrinal integration in American work law, spawning a body of doctrine that is governed on the one hand by the tension between labor law (the Supreme Court's *Gardner-Denver* decision prohibiting unions and employers from requiring employees to take their discrimination claims to grievance arbitration) and employment discrimination law (the Court's *Gilmer* decision permitting employers to require unrepresented employees to arbitrate such claims) and is governed on the other hand by the tension between employment discrimination law (*Gilmer*'s holding that employment arbitration contracts ought to be enforced just like any other kind of commercial contract) and employment law (the common rules that actually govern the enforcement of employment contracts outside the mandatory arbitration setting).¹⁵⁷

The resulting integration of doctrine governing the validity of mandatory individual arbitration is yet one more consequence of the displacement of collective bargaining by employment discrimination litigation as the principal model for contemporary workplace dispute resolution. As employers have moved to cut costs—and, perhaps, also the risk of loss—by attempting to "contract out" of the court system and into mechanisms of their own making, the courts have responded by adding new layers of regulation in the name of contractual fairness.

B. The Pursuit of Workplace Equality: From Discrimination Law to Union Representation

If the big story in American work law in the waning years of the last century was the displacement of collective bargaining by employment discrimination litigation as the principal vehicle for dispute resolution in the American workplace, the big story in the current decade is the increasing

157. See *supra* Part II.E.

role of labor unions in a struggle for workplace equality that was at one time the nigh exclusive province of discrimination law.

1. Organizing Low-Wage Workers

During the past decade and a half, the American labor movement has attempted through a variety of strategies to reverse the decline in union membership described in the previous section. By some distance its most dramatic and promising gains have occurred through organizing efforts in low-wage industries such as custodial and landscaping work; health care (including non-professional hospital work, elder care, child care, and home health care); secretarial, clerical, and other support work in higher education; industrial laundry work; poultry and meat processing; and hospitality and tourism. These industries have three features in common, each of them presenting the labor movement with an opportunity for success in a world of work that has otherwise become more intensely hostile to unions—and to union organizing—than in any period in U.S. history since the 1930s.

First and foremost, work in these industries cannot, as a practical matter, be “exported,” and accordingly the ability of American employers to use—and, perhaps more to the point, to threaten to use—their most effective anti-union tool is virtually eliminated.

Second, many of the jobs in these low-wage industries are performed by workers employed by independent contractors rather than directly by the firms for whom the work in question is done. In an ironic twist, this contracting structure—originally developed in the 1970s and 1980s by American employers trying to reduce labor costs and to avoid or eliminate unions—has afforded contemporary unions an opportunity to undertake industry-wide organizing drives of the sort not seen since the 1930s and enabled it to bring secondary pressures to bear on both contractors and user firms that would be far more difficult to deploy in more traditional union campaigns.¹⁵⁸

The third and final feature that makes these industries a promising target for labor organizing—and the feature that is the source of the instance of functional integration under examination here—is that the workforces in question are heavily female and largely comprised of people of color and recent immigrants. These populations are typically in a poor position to better their economic lot through individual labor market strategies because of structural impediments such as racial and/or language discrimination, educational and skills training disadvantages, and (particularly in the case

158. See, e.g., David Moberg, *Hung Out to Dry: Unions Fight Back Against Antilabor Laundry Giant Cintas*, IN THESE TIMES, Sept. 1, 2003 (describing union organizing workers of large industrial laundry firm that provides linen service for the Starbucks coffee chain mobilized a rally outside Starbucks outlet in tony urban setting to pressure laundry firm into ceasing antiunion activities).

of women in these demographics) the competing responsibilities of care work. Legal strategies are likewise typically foreclosed for this population, given the decline of the employee class action and disparate impact theory, and the prospect of individual disparate treatment litigation—a chimera at best for most American workers—isn't even on the screen for a demographic heavily populated by individuals with neither the funds to front a retainer nor the salary to offer the possibility of a substantial backpay award.

Among these groups, then, collective economic action is as a practical matter the only recourse, and it is accordingly no coincidence that organizing efforts among them have in substance and strategy resembled civil rights drives as much as they have traditional union campaigns. From the “one-on-one” recruiting strategy that drew heavily on insights drawn from feminist theory in the successful campaign among the predominantly female support staff at Harvard¹⁵⁹ to the “identity-based” organizing tactics among Latin immigrant communities in the famous L.A. Justice for Janitors campaign,¹⁶⁰ a focus on the needs, interests, and cultures of these subordinated groups—and in particular on the prospect of enabling them to achieve a measure of dignity and equality in the workplace—has characterized the efforts of the labor movement to rally them to labor's cause.¹⁶¹ Thus has contemporary union organizing and representation come to be known as “the new civil rights movement,” assuming for a large and growing segment of the American labor market the role originally envisioned for employment discrimination law.

2. *The Strategic Deployment of Law*

In a second and related development, labor unions are using traditional labor law—as well as discrimination and employment law—in novel ways to achieve their organizing and representational ends. To be sure, the most widely publicized element of contemporary organizing is a law-avoidance strategy, for the most active unions on the organizing front are steering clear of the NLRB's traditional representation procedures—i.e., an agency-conducted secret-ballot election and post-election appeals for resolving election disputes—having concluded on the basis of years of experience that those procedures are terribly slow and virtually ineffective against the

159. See JOHN HOERR, WE CAN'T EAT PRESTIGE: THE WOMEN WHO ORGANIZED HARVARD (1997).

160. See Maria L. Ontiveros, *A New Course for Labour Unions: Identity-Based Organizing as a Response to Globalization*, in LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES 417 (Joanne Conaghan et al. eds., 2002).

161. See generally ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA (Ruth Milkman ed., 2000); ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES (Kate Bronfenbrenner et al. eds., 1998).

unlawful employer resistance that is typically encountered in a union campaign, both historically and today.¹⁶²

Contemporary unions are instead engaging in a variety of “self-help” strategies designed to secure employer recognition without direct governmental intervention. The most familiar elements of such efforts include the so-called “corporate campaign” (in which the organizers orchestrate an escalating barrage of publicity, appeals to the public, and protest activities aimed at firms and prominent individuals doing business with the target employer); the “neutrality agreement” (whereby the employer agrees not to oppose the organizing campaign); and the “card-check recognition agreement” (whereby the employer agrees to recognize and bargain with the union upon presentation of authorization cards or petitions signed by a majority of employees and authenticated by a mutually agreed upon third party).

These tactics are much in the news¹⁶³ and have generated no little controversy among labor law scholars, union and employer organizations, and members of Congress.¹⁶⁴ But it would be a mistake to conclude that

162. The most famous study of unlawful employer interference with NLRB elections is discussed and defended in Paul C. Weiler, *Hard Times for Unions: Challenging Times for Scholars*, 58 U. CHI. L. REV. 1015, 1019-24 (1991) (estimating that an employee was unlawfully discharged in one of every three representation elections conducted by the NLRB during the 1980s). In that connection, see Robert J. LaLonde & Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. CHI. L. REV. 953, 990-91, 994 (1991) (criticizing Weiler’s study and putting the figure for 1980 at one in five elections, but conceding that the ratio was close to one-in-three by the latter half of that decade). For more recent surveys, see KATE BRONFENBRENNER, *UNEASY TERRAIN: THE IMPACT OF CAPITAL MOBILITY ON WORKERS, WAGES, AND UNION ORGANIZING* 43 (2000), <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1002&context=reports> (analyzing data from 400 NLRB-conducted election campaigns from 1998 to 1999 and finding that employers fired union supporters in one out of four campaigns); CHIRAG MEHTA & NIK THEODORE, *UNDERMINING THE RIGHT TO ORGANIZE: EMPLOYER BEHAVIOR DURING UNION REPRESENTATION CAMPAIGNS* 5 (2005), <http://www.americanrightsatwork.org/docUploads/UROCUEdcompressedfullreport%2Epdf> (analyzing data from sixty-two NLRB-conducted election campaigns in Chicago during 2002 and finding that 30% of the employers fired workers for engaging in union activity). For a recent and all-too-typical account of an unlawful antiunion campaign—and the NLRB’s ineffectiveness in dealing with it—see Steven Greenhouse, *Union Takes New Tack in Organizing Effort at Pork-Processing Plant*, N.Y. TIMES, Feb. 13, 2006 at A16 (describing how union lost NLRB-conducted election in 1997 and secured reversal of the result by the agency seven years later on the basis of employer’s unlawful discharges and threats against union supporters).

163. See, e.g., Greenhouse, *supra* note 162 (reporting that after unsatisfactory experience with NLRB election procedures, union commenced campaign with support of local clergy, civil rights groups, and students to pressure employer into entering a “neutrality” agreement); Steven Greenhouse, *Union Claims Texas Victory with Janitors*, N.Y. TIMES, Nov. 28, 2005 at A1 (using card-check recognition agreement, SEIU organized 5000 janitors working for various building services companies in Houston).

164. On March 1, 2007, shortly before this Article went to press, the U.S. House of Representatives passed the Employee Free Choice Act, which would among other things require employers to recognize and bargain with unions on the basis of signed authorizations. See Steven Greenhouse, *House Passes Bill That Helps Unions Organize*, N.Y. TIMES, Mar. 2, 2007, at A14 (noting bill’s uncertain prospects in the Senate and in the face of a likely Presidential veto). On the debate among union and employer organizations, see, e.g., Steven Greenhouse, *Employers Sharply Criticize Shift in Unionizing Method to*

contemporary labor unions are therefore avoiding recourse to the law altogether. In fact, they are deploying not just labor law but also employment discrimination and especially employment law in a variety of ways designed to buttress their novel organizing strategies. I will refer to this emerging phenomenon as “the strategic deployment of law,” and it is yet another source of the functional integration of work law we are exploring in this part of the Article.

Thus, while unions are avoiding the NLRB’s *election* processes, they are nevertheless continuing to use the agency’s *unfair labor practice* procedures, filing charges against employers who fire union supporters and/or engage in other anti-union conduct that violates the NLRA. The point of such filings is not, however, primarily to secure a legal remedy for the misconduct in question—a remedy that will, after all, typically require a three-year wait and is likely to consist almost entirely of an agency or court order instructing the employer to behave better next time—but instead to aid the current organizing effort in at least three ways.

First, while NLRB remedies take years to secure, an unfair labor practice *complaint*—the labor law equivalent of an indictment issued after investigation of the charges by one of the agency’s regional offices—will ordinarily issue in a matter of weeks or months, and the attendant publicity is a public relations boon to the organizers, eliminating the “he said/she said” quality of public debate about the campaign and placing the federal agency charged with protecting the organizing rights of U.S. workers squarely on the side of the union. As a tool for mobilizing public sentiment—and for moving local public officials and business leaders either to neutrality or even to a union-sympathetic stance—the complaint is second only to the prospect of an unfair labor practice hearing that will enable the employees in question to tell their stories of employer intimidation and retaliation in a public forum, often to the attentive ears of the local press.

Second, labor organizers file unfair labor practice charges to establish a predicate for mounting strikes and/or picketing that enjoy considerable immunity against employer countermeasures ordinarily available to thwart them. Unlike recognitional picketing—which can only be conducted for a 30-day period unless the union files an election petition, lest the union face the threat of an immediate injunction bringing it to a halt—unfair labor practice picketing can proceed virtually without limit.¹⁶⁵ And unlike

Cards From Elections, N.Y. TIMES, Mar. 11, 2006 at A9. For an excellent overview of the scholarly debate and an analysis supporting the card check device, see James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819 (2005).

165. See National Labor Relations Act § 8(b)(7)(C), 10(l), 29 U.S.C. § 158(b)(7)(C), 160(l) (2005) (establishing thirty day limit on recognitional picketing and providing for immediate injunctive relief in the event of a violation). On the inapplicability of those provisions to unfair labor practice picketing, see ABA, THE DEVELOPING LABOR LAW ch. 21 § III.B (Pat Hardin & John Higgins eds., 4th ed. 2001 & Supp. 2003).

employees engaged in most other kinds of strikes, who can be “permanently replaced” by the employer during the course of the strike, unfair labor practice strikers are entitled to return to their jobs the moment the strike is over.¹⁶⁶

To be sure, the tactic is not without its risks. The employer can play “chicken” and refuse to reinstate the strikers, and, at the end of the day, the adjudicatory arm of the NLRB may dismiss the complaint, and the strike—together with the picketing—will lose the protections afforded by unfair labor practice status retroactively. But that strategy holds considerable risks for the employer as well—risks of adverse publicity over its refusal to rehire a mass of returning strikers as well as the possibility of having to provide backpay for all of them—and in any event the adjudicatory results are extremely likely to arrive far too late to be of any use to the employer in the midst of the strike and picketing.

The third and final effect of filing unfair labor practice charges has a rather different audience: the workers whom the union is attempting to organize. Although the NLRB does everything institutionally possible to facilitate the filing of unfair labor practice charges by the untutored (including designating an “officer of the day” in each of its regional offices whose job it is to assist “walk-ins” with filling out the necessary paperwork in a proper manner and providing multilingual assistance for those who require it), it can be a surprisingly daunting task to undertake this effort on one’s own, since it requires (a) knowledge that an employer’s antiunion conduct actually violates the law and that the NLRB is the agency responsible for dealing with such violations; (b) access to information about the location of the nearest NLRB office, an easy thing for employees with access to the Internet or if you know where to look in what passes for a phone book these days, but may be surprisingly difficult if you try to secure this information by dialing 411¹⁶⁷; (c) comfort with the prospect of passing through a multitude of armed guards and an airport-style screening process in the lobby of the local federal services building; and (d) secure enough about your own immigration status (no small thing even for legal immigrants in post-9/11 America) to seek out government assistance in the first place. In this setting, ready access to a union representative who can assist you in negotiating this unfamiliar terrain—and who indeed can advise you of your rights to do so in the first place—provides a powerful first-hand demonstration of the utility of union representation in enforcing rights and protections for U.S. employees that otherwise exist mostly on paper.

Although I have focused thus far on the strategic deployment of unfair labor practice charges—a product of American labor law—contemporary

166. See THE DEVELOPING LABOR LAW, *supra* note 165, at ch. 19 § II.B.

167. As it happens, I had the occasion to try to make that call on two occasions during the spring of 2006, and in each case the operator was unable to locate a number for the Miami office of the NLRB.

unions are increasingly using non-labor law claims to much the same effect, simultaneously generating additional pressures on the employer through publicity and threatened liability while demonstrating the utility of union representation to the employees in question. Such efforts have focused on discrimination claims (a development obviously tailored to the demographics of the groups principally targeted by contemporary organizing campaigns) and with increasing frequency on wage and hour,¹⁶⁸ health and safety,¹⁶⁹ and other employment law claims that address some of the most pressing needs and interests of low-wage workers.¹⁷⁰

To be sure, the labor movement has long played an important role in securing and defending employment law reform legislation, and that role continues to this day.¹⁷¹ Moreover, in the past decade or so, unions have increasingly sought recourse to employment law rights in their representation efforts.¹⁷² But the strategic use of non-labor law claims as an organizing tool has intensified the interaction of unions and employment law, providing one more example of the functional integration of work law we are exploring here.

168. See, e.g., *Employers Facing 'Huge Upsurge' in Plaintiffs' Wage-Hour Class Actions*, DAILY LAB. REP. (BNA), Apr. 2, 2001, at C-1 (reporting that FLSA enforcement actions had become a "major component" of organizing strategies by United Food and Commercial Workers Union); Steven Greenhouse, *Among Janitors, Labor Violations Go with the Job*, N.Y. TIMES, July 13, 2005, at A1 (reporting \$22.4 million settlement between California's three largest supermarket chains and a class of 2,000 janitors; Service Employees International Union had assisted the workers in bringing the suit "as part of a strategy to pressure contractors to improve wages, to publicize bad working conditions, and to advance its efforts to unionize tens of thousands of janitors"); Steven Greenhouse, *In Modern Rarity, Workers Form Union at Small Chain*, N.Y. TIMES, Feb. 5, 2006, § 1 at 29 (reporting that retail shoe chain signed neutrality agreement after multiple wage and hour violations were used to garner public support for a threatened boycott and to persuade state attorney general to threaten legal proceedings).

169. See, e.g., Karin Rives, *Safety Snags at Pork Plant*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 24, 2005, at D1 (describing a union helping workers to file unfair labor practice charges challenging retaliation against workers who complained about safety issues in the plant); Kristin Collins, *Meat Plant in Bladen Criticized*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 26, 2005, at B1 (reporting that union organizing plant secured report from Human Rights Watch condemning employer for unsafe practices and resulting injuries).

170. See, e.g., *DOL to Provide \$6.5 Million in Training Funds to Settle Claims Brought by Texas Workers*, DAILY LAB. REP. (BNA), Jan. 5, 2006 (describing settlement of suit brought by worker advocacy group challenging failure of DOL to provide proper training for Spanish-speaking workers who lost their jobs because of increased inter-American trade); see generally Catherine L. Fisk, *Union Lawyers and Employment Law*, 23 BERKELEY J. EMP. & LAB. L. 57 (2002).

171. See, e.g., Michael Barbaro, *Maryland Sets a Health Cost for Wal-Mart*, N.Y. TIMES, Jan. 13, 2006, at A1 (under new state law, employers with 10,000 or more employees required to spend at least 8% of payroll costs on health insurance or pay difference into state Medicaid fund; enactment "underscored the success of the union campaign to turn Wal-Mart into a symbol of what is wrong in the American health care system"); *Retail Industry Leaders Ass'n v. Fielder*, 2007 U.S. App. Lexis 920 (4th Cir. Jan. 17, 2007) (2-1 decision holding statute pre-empted under ERISA).

172. See, e.g., Charles B. Craver, *Why Labor Unions Must (and Can) Survive*, 1 U. PA. J. LAB. & EMP. L. 15 (1998); Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U.S.F. L. REV. 169 (1991).

3. *A Case Study*

As it happens, in 2005–06 the Service Employees International Union (SEIU)—one of the five “Change to Win” unions that recently broke away from the AFL-CIO to pursue a more aggressive organizing strategy—conducted a successful union campaign among the janitors and groundskeepers working at the University of Miami (UM), my home institution until this past summer.¹⁷³ The workers in question are technically employed by Unicco, a facility services contractor of national prominence hired by the University to provide custodial and landscaping services on its campuses, and the campaign shared all of the characteristics of contemporary organizing, from an escalating corporate campaign mounted against the University to the SEIU’s quest for card check recognition instead of an NLRB election.

Two features of the campaign are of particular relevance to my claims about functional integration and thus deserve mention here. First, the employees in question are overwhelmingly Hispanic (and especially Cuban-American), Caribbean, and African-American—and predominantly female—and the organizing strategies the union used reflected characteristics associated with the cultures in question. Rallies featured a cacophony of salsa, steel drums, and simultaneous translation that give them the flavor of a street fair on Calle Ocho or in Miami’s Little Haiti. And in a nod to the strong religious sentiments of many of these employees, local clergy played a crucial role in the campaign—holding services for the employees; holding press conferences and placing ads in local papers; opening a chapel to the workers for use as a “strike sanctuary” on the UM campus; and, most dramatically, participating in acts of civil disobedience (including a takeover of the University’s admissions office and a human chain blocking traffic near campus) in support of the workers’ cause.

Moreover, in the course of the campaign the SEIU deployed law—labor law as well as non-labor law—in the strategic manner described in the previous section. Thus, in widely publicized moves, the union assisted several workers on the UM medical campus in filing charges with OSHA challenging the adequacy of precautions and training for dealing with hazardous materials in UM’s medical facilities, and likewise filed charges alleging that the workers on that campus were receiving less than the pay and benefits required by the county’s living wage ordinance.¹⁷⁴ And the

173. For the record, I was actively involved in campus efforts to support the campaign, and I describe that involvement in some detail in Richard Michael Fischl, *The Other Side of the Picket Line: Contract, Democracy, and Power in a Law School Classroom*, N.Y.U. REV. OF LAW & SOC. CHANGE (forthcoming 2007). See also Richard Michael Fischl, *The Right of Self-Organization and the Strategic Deployment of Law* (forthcoming 2007) (analyzing SEIU’s legal strategies at greater length).

174. See Niala Boodhoo, *Janitors Complain of Toxic Exposure*, MIAMI HERALD, Dec. 23, 2005, at 1C; *Union Accuses UNICCO of Violating Wage Rules*, S. FLA. BUS. J., Mar. 21, 2006, available at <http://southflorida.bizjournals.com/southflorida/stories/2006/03/20/daily15.html>.

NLRB's decision to issue an unfair labor practice complaint in late January—accusing Unico of spying on a union meeting, interrogating workers, and making various threats against the union supporters—enabled the union to ramp up its publicity campaign and at the same time to commence a strike and picketing that brought considerable pressure on the University and Unico alike. By early May, Unico had agreed to recognize the SEIU on the janitors' terms—i.e., on the basis of the workers' signatures rather than an NLRB-conducted election—long before either the NLRB or the other agencies had even had the chance to commence hearings on the various charges.¹⁷⁵

4. *Implications for the Accelerating Integration of Work Law*

The assumption of a central civil rights role for the American labor movement and the increasing deployment of law from outside the labor area in support of its organizing efforts accounts in no small measure for some of the instances of doctrinal integration we saw in Part II of this Article. For one thing, with American unions engaged in organizing with an aggressiveness not seen in decades—and with American employers more willing than ever to fire union supporters—the incidence of unlawful retaliatory discharge has increased substantially and is likely to continue to do so for the foreseeable future. The principal recourse for the discharged organizers is via an unfair labor practice proceeding before the NLRB, and in that setting—where there is no union contract to provide “just cause” protection—the employment-at-will rule plays much the same role as it does in discrimination cases, and it's not a pretty one.¹⁷⁶ Moreover, the potential availability of multiple sources of protection for protest activities—sources from labor law as well as employment discrimination and employment law—enables organizers and workers to make strategic decisions about how to shape and characterize protest activities, an important factor in the increasing doctrinal integration of workplace protest law.¹⁷⁷ Indeed, surely the most important implication of these developments for the integration of American work law is the increasing role played by unions in the strategic deployment of laws *exogenous* to the NLRA; it simply ain't your grandfather's labor law out there anymore either.

175. See Steven Greenhouse, *Walkout Ends at U. of Miami as Janitors' Pact is Reached*, N.Y. TIMES, May 2, 2006, at A15.

176. See Fischl, *Workplace Justice*, *supra* note 16, at 261-69.

177. See *supra* Part II.B.

IV.

CONCLUSION: RETHINKING THE TRIPARTITE DIVISION
OF AMERICAN WORK LAW

So what happens when we continue to view an increasingly integrating world of work law through the discrete lenses of employment discrimination, labor law, and employment law?

For one thing, we limit ourselves to a partial picture of a growing number of significant work law topics, from sexual harassment to mandatory individual arbitration. Simply put, no lawyer would be adequately prepared for a case involving any of those topics if she limited herself to materials from only one of the conventional subjects, and a full grasp is not likely to be facilitated simply by cobbling together multiple partial understandings. Indeed, we saw many cases in which it is the interaction and interplay of the different bodies of law—such as employment-at-will and employment discrimination law, or sexual harassment and tort law—that governs the field.

Likewise, one cannot fully grasp the role of contemporary employment discrimination law without taking into account the part it plays in resolving workplace disputes over individual discharges; one cannot fully grasp the role of contemporary labor unions without taking a hard look at whom they are organizing and what strategies they are deploying in doing so; and one cannot fully grasp the contemporary functions of either employment discrimination litigation or labor unions without exploring the important role that employment law doctrines play in connection with each.

Other salient features of the contemporary world of work are likely to be obscured as well. Some of those features are of relatively recent vintage, notably the multitude of changes we associate with the concept of “globalization”—developments with respect to labor markets, production practices, and the regulatory capacity of the nation-state.¹⁷⁸ Some of those features have been intensified by globalization but have been with us for some time, notably the daunting challenges faced by those whose participation in the paid labor market must by force of circumstance compete with “care work” obligations (child care, elder care, housework, and the like).¹⁷⁹ To be sure, these features have particular implications for employment discrimination, labor law, and employment law respectively, but when we attempt to examine them via the individual disciplinary categories we run the risk of missing the bigger picture in the manner of the blindfolded man who mistakes the elephant’s tail for a snake. Indeed, against the backdrop of the accelerating integration of those previously discrete fields, we run the risk of getting the snake wrong too.

178. See generally STONE, *supra* note 101.

179. See generally LABOUR LAW, WORK, AND FAMILY, *supra* note 5.

But it seems to me that the greatest danger lies in the messages unwittingly conveyed by the conventional separation of employment discrimination from labor law—i.e., that workers can organize or sue but not both, and that the struggle for workplace equality has little to do with the struggle for workplace democracy. Important recent developments suggest that the opposite is increasingly the case, and we ought to treat that as the starting point for the project of rethinking American work law in a new century.