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No Longer Just Company Men: The Flexible Workforce and Employment Discrimination, Review Essay on 'from Widgets to Digits Employment Regulation for the Changing Workplace', by Katherine V.W. Stone (2004)

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No Longer Just Company Men: The Flexible Workforce and Employment Discrimination

FROM WIDGETS TO DIGITS EMPLOYMENT REGULATION FOR THE
CHANGING WORKPLACE. KATHERINE V.W. STONE. NEW YORK:
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Miriam A. Cherry[†]

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I. INTRODUCTION

In her new book, *From Widgets to Digits*, Professor Katherine V.W. Stone¹ reviews and analyzes the dramatic changes, both technological and demographic, that have transformed work in America during the last thirty years.² The book broadly documents the shift from an economy that relied primarily on the production and consumption of goods to one in which learning and the transmittal of knowledge is central to the creation of wealth. Professor Stone describes how in the past, workers may have expected job security and long-term employment, but that recent economic, social, and technological change have led to a more temporary and transitory relationship between employers and workers. Today, workers face the challenges and risks of a “boundaryless career” in which they advance by moving laterally from employer to employer, acquiring skills

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1. Professor of Law, UCLA School of Law.

2. KATHERINE V.W. STONE, *FROM WIDGETS TO DIGITS EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* (2004).

and knowledge along the way.³ Meanwhile, Stone argues, the legal system remains mired in the industrial age, with serious consequences for post-employment restraints, anti-discrimination law, fringe benefits, and unionization, among other areas. The challenge, Stone contends, is for the legal system to respond to these changes creatively and effectively, advancing the needs of both employers and workers in a new age of flexible employment.

From Widgets to Digits presents an insightful analysis of the modern “psychological contract” between employers and workers and their understandings about their mutual obligations. Stone’s analysis of the increasing importance of “flexibility” and “employability” to both employers and workers is perceptive and accurate. Examining these workplace trends, she concludes that traditional models for regulating the employment relationship are outmoded, and proposes new theories around flexible work arrangements, acquisition of skills and knowledge, and lateral career mobility between firms. Perceptively, Stone concludes that the new goal of employment law should be to establish rules that assist workers with training opportunities, guarantee ownership of the intellectual capital that they develop at work, ensure benefits are easily transferred between jobs, and provide safety nets for those that are left behind by technological change.

If there is any area where the analysis is incomplete, it is in its treatment of employment discrimination issues, especially those that women workers must face. Stone contends that employment discrimination was part of the old life-cycle model of employment, and states that with the new boundaryless career, “there is reason to believe that discrimination might subside in the future.”⁴ For the more subtle forms of discrimination that remain, Stone advocates alternative dispute resolution (ADR) as the preferred solution.⁵

Perhaps I am more pessimistic than Professor Stone in regards to the persistence of gender discrimination in the modern workplace. It is an open question whether the structural changes in the workforce will benefit or harm women workers. Will women be able to capitalize on changes that result in more career mobility? Women’s advocacy groups have often called for flexible work schedules that will allow both women and men to balance family and work responsibilities.⁶ On the other hand, it is equally possible that women will find themselves shouldering the burdens of temporary arrangements, while their male counterparts develop increasing technological skills. Since in the past women have been viewed as

3. *Id.* at 92-94.

4. *Id.* at 165.

5. *Id.* at 188-89.

6. *See infra* Section II.

“temporary” workers (moving from the household of a father to that of a husband or other male breadwinner), and since this perception has led to their devaluation in the market, if every worker is now viewed as “temporary,” that perception could lead to a corresponding erosion of worker rights.

Further, I hesitate to prescribe alternative dispute resolution as the antidote for employment discrimination. One of the most prevalent features of ADR—as it is currently used in the workplace—is its involuntary nature.⁷ Pre-dispute mandatory arbitration is frequently imposed in a “take it or leave it” manner as part of a contract of adhesion, often foisted upon workers as a condition of employment. Despite the Supreme Court’s imprimatur of approval in *Circuit City v. Adams*⁸ there have been serious questions posed about whether pre-dispute mandatory arbitration contracts result in employer advantage.⁹ Stone herself has raised many of these concerns about the procedural fairness of mandatory arbitration in her earlier writings.¹⁰ In light of this, the solution that she proposes seems unrealistic, given the way that ADR is currently deployed in the workplace. Further, the debate over mandatory arbitration is part of a larger conversation that needs to be had within the ADR community, especially before ADR can be touted as the “one” solution to a complex problem.

This book review begins with a description of the major findings and policy suggestions that are detailed in *From Widgets to Digits*. Then, in the next section, the review turns to the issue of employment discrimination, raising questions about whether the new flexible workforce will assist in, or hinder, the quest for equal employment opportunities. Finally, I will conclude by discussing ADR in the workplace, trying to flesh out Stone’s solution and raising some critical questions that the ADR community will have to confront in the future.

7. Large numbers of employers are adopting ADR programs that are mostly comprised of mandatory pre-dispute arbitration systems. See, e.g., Cindy Richards, *A Raw Deal for Workers*, CHI. SUN-TIMES, May 23, 1997, at 35 (commenting on employers’ increasing use of mandatory arbitration contracts and noting that “half of the Fortune 500 companies already require future employees to waive their rights to sue or are considering instituting such a policy”); *Voluntary Arbitration in Worker Disputes Endorsed by 2 Groups*, WALL ST. J., June 20, 1997, at B2 (estimating that “more than 3.5 million employees are covered” by arbitration agreements with the American Arbitration Association alone).

8. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

9. See, e.g., Miriam A. Cherry, Note, *Not-So-Arbitrary Arbitration: Using Title VII Disparate Impact Analysis to Invalidate Employment Contracts that Discriminate*, 21 HARV. WOMEN’S L.J. 267, 276 n.12 (1998) [hereinafter Cherry, *Not-So-Arbitrary Arbitration*].

10. Katherine V.W. Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENVER U. L. REV. 1017, 1019 (1996) (arguing that “employers are using arbitration clauses as a new-found weapon to escape burdensome employment regulations”).

II.

THE CHANGING NATURE OF WORK
AND HOW THE LAW SHOULD RESPOND

From Widgets to Digits begins with a historical overview documenting the shift from artisanal to industrial to digital production in the American workplace.¹¹ At the founding of our country, work required the specialized knowledge of artisans. Work was often defined by status relationships and hierarchies—apprenticeship, indentured servitude, and, at its most extreme, slavery.¹² At the same time, individuals often sold the products that their skilled labor created, rather than selling their labor directly for wages.¹³ There was no sharp division between home and work, as many goods were actually produced in the household.

Entering the industrial age in the late nineteenth and early twentieth century, management was concerned that artisans had too much leverage and power, which derived from their knowledge of the processes of production and manufacture of goods. In response, management began the process of “deskilling”—reducing jobs to their basic components and treating workers not as skilled individuals, but almost as replaceable parts of the assembly line in factories.¹⁴ In part to ease this transition, as well as to encourage loyalty and keep a steady supply of labor available, management rewarded longevity and tended to promote from within.¹⁵

Stone spends considerable time discussing this industrial model of production and what became known as the “life cycle model” of employment. In this model, the dominant one for most of the twentieth century, a worker remains with one employer over the course of a career.¹⁶ Loyalty to the company (that is, being a “company man”) would be repaid with promotion, higher wages, pensions, and other fringe benefits. Although the at-will rule meant that employees could legally be fired at any time,¹⁷ companies often promised their workers job security to encourage longevity and stability within the workforce. A worker received salary increases by staying with the same firm and achieved promotions up hierarchically arranged “job ladders.” Under industrial modes of

11. STONE, *supra* note 2, at 1-116.

12. *Id.* at 13.

13. *Id.*

14. *Id.* at 63.

15. *Id.* at 47-48.

16. *Id.* at 53-60.

17. Development of the at-will doctrine is usually attributed to HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877). See PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 56-63 (1990), for a useful discussion of the rule, as well as its benefits and its drawbacks. See Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997), for an account of how employees perceive the at-will rule.

production, labor unions represent a long-term worker constituency, bargaining on behalf of a relatively stable group of workers.¹⁸

Analyzing labor statistics, Stone contends that the life-cycle model no longer addresses the experiences of many workers, especially those in “knowledge” areas.¹⁹ With the layoffs of the 1980s and the dotcom boom and bust cycle in the 1990s, workers no longer have the expectation of job security.²⁰ Workers are looking for better opportunities and statistically are more likely to move from firm to firm.²¹ Increasingly, Stone notes, opportunities for career advancement are no longer viewed as a result of loyalty to a particular company, but are instead the result of skills acquired at a variety of different jobs, the “boundaryless career.”²² Having given up on the illusory promise of job security, employees hope instead that they have enough skills to guarantee their “employability.” Flexibility in the employee-employer relationship is the touchstone of the workplace, and the new motto is “no long term.”²³

Some readers may question why Professor Stone has opted for an approach focused on changes in production rather than concentrating on the more well-known historical moments in the American labor movement. However, after a complete reading of the book, I more fully understood that the author was analyzing how work was performed, rather than focusing on specific unions, actors, or political events. Stone’s overriding point in recounting this history is to emphasize that the way that work “happens” is itself a social, economic, and political construct. There is nothing inherent or essential in the nature of work or in its regulation; workplace norms can and do change over time.

In fact, it is this focus on the ways in which work is performed that seem to lead Stone to title the book *From Widgets to Digits*. Until the last part of the twentieth century, the manufacturing of goods (widgets) was the backbone of the American economy. Today, however, knowledge work and computer skills (digits) are powering economic expansion. Stone is primarily concerned with the transition to a new type of work that requires different skills and entails different expectations, and her title reflects this transition. Her subtitle, *Employment Regulation for the Changing Workplace*, indicates that it will become increasingly important to think about the ways that work should be regulated in an era of technological production.

18. STONE, *supra* note 2, at 62-63.

19. *Id.* at 1-116.

20. *Id.* at 74-83.

21. *Id.*

22. *Id.* at 92-94.

23. *Id.* at 83.

Throughout the book, Stone proposes that courts adopt interpretations that accurately reflect the new understandings of employees and employers in the increasingly flexible modern workplace, which no longer uses the long-term life-cycle model of employment. Essentially, since workers now value training and employability, Stone advocates protections for workers from overreaching non-competition clauses and non-disclosure agreements.²⁴ Further, she supports changes in the law that would make it easier for employees to move to new jobs, without having to worry about the “job lock” that makes it difficult to keep health insurance or pension benefits when employees switch companies.²⁵

Finally, Stone analyzes the increasing dichotomy between “traditional” industrial and low-paying service jobs and the new, more flexible and dynamic jobs available to knowledge workers. She reviews several options that would provide safety nets so those workers who remain a part of the “traditional” model are not left behind.²⁶ Some of these include the idea of a broad-based citizen worker’s union that would not be industry-specific or employer-specific,²⁷ and the idea of giving each citizen a certain cash “stake” to invest in training, caretaking, housing, or pension upon the age of majority.²⁸ Although far from becoming a political reality, these are interesting policy options to contemplate.

The ability to take broad labor trends and to break them down into a cogent agenda for legal change is one of the strengths of the book. Stone’s proposal for making pensions and other benefits more portable and eliminating post-employment restraints is sound and well-reasoned. If access to training and knowledge is being promised in order to motivate workers in lieu of job security, then it makes sense to fashion a legal regime that protects employee investments in training and job skills. Ultimately, Stone deconstructs this workplace “psychological contract” to discern the parts of the “deal” that should be given effect in employment law doctrine. Although Stone’s policy suggestions are generally excellent ones, her discussion of employment discrimination in the flexible workplace raises a host of additional questions and complex problems.

24. *Id.* at 127-56.

25. *Id.* at 243-57.

26. *Id.* at 196-216.

27. *Id.* at 227-39.

28. *Id.* at 278-79 (citing BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* (1999)).

III.
THE NEW WORKPLACE
AND EMPLOYMENT DISCRIMINATION

In the past, the worker who loyally devoted a career to one firm was popularly known as a “company man.” Although this was used as a generic term, the gendered implication was literally accurate, for the life cycle model of employment was never really descriptive of women workers’ experiences. The more typical model of employment for women involved exclusion from most well-paying long-term jobs, and instead temporary or part-time jobs in lower-paying “women’s work.” In part, both the remnants of separate spheres ideology as well as the view that women were only “temporary” participants in the labor force—that is, moving from the economic support of a father to a husband—limited their career options.²⁹ Despite these gendered and vastly different work experiences, throughout most of the book workers are treated as a class.³⁰

In chapter eight, Professor Stone begins to address some of these concerns about equality in the workplace through her discussion of employment discrimination doctrine. She argues that a “great deal of contemporary employment discrimination has its roots in the internal labor market job structures of the past.”³¹ Excluded for decades from careers that required a “company man” instead of someone viewed as a short-term employee, Stone notes that even when women began to be hired for the better jobs, they had to begin at the bottom rung of the hierarchical job ladders.³² It is these hierarchical job ladders, posits Stone, that have presented the most significant problem for women workers. Thus, she reasons, the breakdown of these hierarchies will benefit women and minority workers.

In my view, the story is more complex than the one the book tells. It is unclear whether the new flexible work arrangements will assist in reaching the goal of equal employment opportunity. Perhaps, as Stone suggests, women will fill in the vacuum created by the breakdown of hierarchies based on seniority. However, I would argue that not all work is going to

29. Separate spheres ideology delineated a certain private realm of the home for women reserved for unpaid household work as well as a public sphere where men would participate in politics as well as in the paid labor force. See, for example, Barbara Welter, *The Cult of True Womanhood: 1820-1860*, 18 AM. Q. 151, 151-52 (1966), for a discussion of the separate spheres ideology. On the history of women workers in the United States, see for example, ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE EARNING WOMEN IN THE UNITED STATES* (1982).

30. This review largely focuses on the experiences of women workers, but labor force participation discrimination and differential rates of compensation are salient issues for both members of minorities and immigrants. Further, “women workers” is a broad categorization. African American and immigrant women have a different labor history than do White women.

31. STONE, *supra* note 2, at 161.

32. *Id.* at 160-61.

become contingent, and not all “temporary” work is created equal. Entire categories of work are still stratified and segregated by gender,³³ and the unfortunate fact is that this trend, while weakening, shows no immediate sign of disappearing. Men may take over high-paying technology jobs that require specialized skills, while women could be left behind in the pink-collar ghetto. I make this point to emphasize that advocates for women’s equality need to be critically aware of what groups might benefit by a contingent workforce, and which groups could be marginalized.

One commentator has argued that the new flexible work structure is a negative development for those who value social justice, because these changes in the workplace will lead to a more racially segregated society.³⁴ Professor Cynthia Estlund argues that at work, people from diverse backgrounds learn from each other, develop trust in the course of achieving common goals, and make long-term friendships.³⁵ This integration does not happen in other venues because of continuing patterns of residential segregation. Equal opportunity employment laws, however, have opened up additional opportunities for minority workers. If these long-term working relationships are replaced with short-term interactions then opportunities for integration may also diminish.³⁶

It could be argued that additional temporary work could be helpful to women’s careers, if that temporary work mirrors the current patterns of work that women would choose anyway. Many feminists have called for flex-time or part-time work as a part of the solution to the work-family conundrum.³⁷ If more options for part-time work were created, so the argument goes, both women and men could take the time that they need in order to fulfill their dual roles as paid labor force participants and family caregivers. Further, if in the process of allowing more flextime or part-time careers, status hierarchies were flattened, that might also help women workers as a class.

Existing efforts to make work more flexible, however, have had only mixed results. For example, some large law firms allow workers with child care or other care-giving obligations to work part-time. Although this direction was hailed as the sign of a progressive work environment, anecdotally it appears that it is mostly female associates who are taking the

33. See, e.g., Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 293 tbl.3 (2000) (listing many occupational fields that were over 95% male, including many mechanical and blue collar jobs, and seven occupational fields, including receptionists, secretaries, and childcare workers that were over 95% female).

34. Cynthia L. Estlund, *The Changing Workplace as a Locus of Integration in a Diverse Society*, 2000 COLUM. BUS. L. REV. 331 (2000).

35. *Id.* at 337-38.

36. *Id.*

37. See, e.g., Nancy E. Dowd, *Bringing the Margin to the Center: Comprehensive Strategies for Work/Family Policies*, 73 U. CIN. L. REV. 433 (2004).

part-time work option. Indeed, male associates would rarely even take minimal leave after the birth of a child.³⁸ In addition, studies have shown that female associates often sacrificed pay while still working forty hours a week and, at the same time, were viewed as not being serious about making partner.³⁹ If the experience of women attorneys at law firms is any indication, part-time work could be as much of a problem as it is a solution.

Further, women's "temporary" status has, in the past, led to their devaluation in the labor market.⁴⁰ It is possible that if every worker is now viewed as "temporary," that perception could also lead to an overall erosion of worker's rights. If all workers are now treated as women workers have been in the past, that is, as disposable and replaceable, perhaps that will lead to further problems for workers as a class.

Stone acknowledges that employment discrimination will still exist to some extent in the new workplace, but contends that the "new employment relationship makes discrimination hard to identify and difficult to challenge."⁴¹ In other words, she argues, discrimination in the workplace is more subtle, the decision makers more diffuse, and bias more unconscious than it was in the past. Part of the problem, she notes, is the presence of workplace cliques and glass ceilings that create invisible obstacles for women vying for career advancement. She argues that Title VII is not a particularly effective tool for combating these new forms of subtle discrimination. Pointing to a study by the Federal Judicial Center, Stone notes that while employment discrimination filings in federal court increased, success rates for plaintiffs on dispositive motions decreased. She cites this decrease as evidence "that the changing workplace is making it increasingly difficult for plaintiffs to prevail on the merits on their discrimination claims."⁴²

By now, the description of employment discrimination as increasingly subtle is—perhaps ironically—becoming a much more salient feature of the

38. See Deborah L. Rhode, *The Difference "Difference" Makes*, 55 ME. L. REV. 15, 19 (2003) ("As a male lawyer explained to a Boston Bar Association work/family task force, it may be 'okay to say that they would like to spend more time with the kids, but it is not okay to do it, except once in a while.' In short, many workplace structures leave both men and women feeling unfairly treated. Men cannot readily get on the 'mommy track.' Women cannot readily get off it.").

39. See Belinda M. Smith, *Time Norms in the Workplace: Their Exclusionary Effect and Potential for Change*, 11 COLUM. J. GENDER & L. 271, 285 (2002) (describing how the "norm of full-time work is reinforced by the lack of legitimacy or rewards of the part-time alternative" in law firms as well as other workplaces); see also Joan Chalmers Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARVARD WOMEN'S L. REV. 77 (2003).

40. Miriam A. Cherry, *How to Succeed in Business Without Really Trying (Cases): Gender Stereotypes and Sexual Harassment Since the Passage of Title VII*, 22 HOFSTRA LAB. & EMP. L.J. 533 (2005) (detailing myths and stereotypes surrounding women workers and their temporary status in the labor force).

41. STONE, *supra* note 2, at 165.

42. *Id.* at 174.

legal literature. According to Professor Susan Sturm, we have entered a “second generation” of employment discrimination, where differences in treatment are due to informal workplace norms and exclusion from networking opportunities.⁴³ Recent empirical studies have documented the negative treatment given to job seekers with African-American sounding names⁴⁴ and lower tipping of African-American taxi drivers.⁴⁵ Professors Angela Onwuachi-Willig and Mario Barnes have written about discrimination by proxy and how African-Americans are often categorized as “good” or “bad” blacks at work based on factors such as dress and hairstyle.⁴⁶ These stereotypes and forms of unconscious bias are the new frontier of employment discrimination claims.

All this is to say that while current anti-discrimination remedies are by no means perfect, they seem to have worked, at least to some extent. Simply because some of the discrimination women workers face is changing and becoming more subtle, that is no reason for those who care about equal employment opportunity to throw up their hands in despair, or abandon the courts completely. Might litigation still offer opportunities? Might state courts or human rights commissions be the place to search for these solutions? Could laws that protect whistleblowers assist plaintiffs in gathering information that might bolster their cases? Keeping this in mind, I turn to Stone’s proposed solution of ADR in the workplace.

IV.

THE TWO SIDES OF ALTERNATIVE DISPUTE RESOLUTION

The remedy for employment discrimination, Stone argues, is the increased use of ADR.⁴⁷ She suggests that voluntary mediation and the institution of a problem-solving ombuds office would assist in resolving many of the more subtle issues, such as workplace cliques, that obliquely create obstacles to the advancement of women and minorities. As she phrases it, a “well-designed workplace-specific alternative dispute system might provide better redress and promote more restructuring than the existing adversarial procedures available under Title VII.”⁴⁸

43. See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460-61 (2001).

44. See Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* (Nat’l Bureau of Econ. Research, Working Paper No. 9873, 2003), available at <http://www.nber.org/papers/w9873>.

45. Ian Ayres et al., *To Insure Prejudice: Racial Disparities in Taxicab Tipping*, 114 YALE L.J. 1613 (2005).

46. Angela Onwuachi-Willig & Mario L. Barnes, *On Being Regarded as Black: Why Title VII Should Apply Even If Lakisha and Jamal Are White*, 2005 WISC. L. REV. 1283 (2005).

47. STONE, *supra* note 2, at 188-89.

48. *Id.* at 195.

It may be the organization of this section of the book or the limited amount of space devoted to the topic, but Stone seems to conclude that workplace ADR is a panacea far too quickly. Unfortunately, almost as soon as the ADR solution is put on the table, the chapter abruptly ends. The proposed policy changes do not seem to be particularly well-defined. One guesses that an ombuds office would allow workers a space where they could resolve observed problems, such as exclusion of certain groups of workers from networking opportunities, without having to invoke the courts. However, the types of voluntary dispute resolution that Stone proposes will not suddenly “fix” employment discrimination. The reader is left feeling that voluntary forms of ADR could be helpful to workers, but puzzled as to how ADR will provide the “silver bullet” that will end discrimination. That is because ADR only deals with the consequences of discrimination, rather than addressing the causes of employment discrimination.

Perhaps my skepticism about this proposed solution has deeper roots that reach into divisions within the ADR community. While some employers have instituted voluntary ADR systems of the type that Stone proposes, a large number have opted for mandatory arbitration. A 1995 GAO study estimated that nearly ten percent of employers who responded have a policy to use arbitration as a method to resolve discrimination complaints brought by members of their non-unionized workforce.⁴⁹ One suspects that the percentage has increased since that time. I have argued elsewhere, at greater length, that pre-dispute mandatory arbitration is often stacked against the employee, may have a disparate impact on women and minority workers,⁵⁰ and may function to undermine protections granted to workers by statute.⁵¹

Therefore, I believe that Stone is right to emphasize that in order to be effective, ADR must be voluntarily entered into by both employers and employees. In short, she comes out against the mandatory pre-dispute arbitration systems that the Supreme Court approved in its decision in *Circuit City v. Adams*.⁵² While I believe Professor Stone is right to differentiate between “voluntary” and “involuntary” forms of ADR, I would like to have seen that analysis expanded and discussed further. Those who support ADR in the workplace need to engage in this dialogue in a significant way, because ADR advocates too often lump voluntary and

49. GEN. ACCOUNTING OFFICE, EMPLOYMENT DISCRIMINATION: MOST PRIVATE SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION, GAO/HEHS-95-150, app. II at 28 (1995), available at <http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPAddress=162.140.64.21&filename=he95150.pdf&directory=/diskb/wais/data/gao>.

50. See Cherry, *Not-So-Arbitrary Arbitration*, *supra* note 9.

51. See Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1075-83 (2004).

52. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001).

mandatory ADR into the same category and praise both regardless of differences between them.

For Stone is being somewhat unrealistic. Pre-dispute mandatory arbitration has become widespread in the workplace.⁵³ One commentator has argued against mandatory arbitration on the grounds that it undermines democracy and employee voice.⁵⁴ Realistically, how many employers will change a policy to curb liability in the hopes of promoting abstract values such as workplace democracy? Viewing the question from a purely economic perspective, employers will do what is best for the bottom line. And in a legal regime that not only tolerates, but these days lauds mandatory arbitration (as a way of ridding the courts of their backload of discrimination cases), which form are employers most likely to choose?

ADR advocates cannot have it both ways: they cannot advocate ADR across the board without acknowledging that in practice employers more often institute mandatory arbitration, which has serious flaws.⁵⁵ Imposing mandatory pre-dispute arbitration contracts on employees violates other principles of ADR. By principles of ADR, I refer to an analysis based on the leading model of negotiation theory, the paradigmatic model explored in the classic *Getting to YES*.⁵⁶ The negotiation model focuses on improving both procedural and substantive outcomes, emphasizing the importance of the maximization of joint gains and the use of objective standards to obtain fair results for both parties. A significant part of this theory is also dedicated to helping negotiators deal with difficult negotiating tactics, such as attacks, stonewalling, or tricks.⁵⁷ Overall, the literature emphasizes the importance of relationships, and explores how negotiators can improve communications for more productive interactions.

Following this analysis, it becomes clear that the process surrounding the formation of most pre-dispute arbitration contracts at work are the equivalent of a “take it or leave it” negotiating offer. After all, the contract is typically presented as a condition of employment. If an employee refuses to sign the contract, or requests that the portion of the contract containing the arbitration clause be excised from the contract, many firms would simply fire, or refuse to hire, the worker.⁵⁸ The literature teaches that a “take

53. GEN. ACCOUNTING OFFICE, *supra* note 49.

54. Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 HARV. NEGOT. L. REV. 11, 13-14 (2005) (arguing that employers should implement more democratic forms of ADR at work).

55. I have developed this argument in earlier work. See Miriam A. Cherry, Comment, *A Negotiation Analysis of Mandatory Arbitration Contracts*, 4 HARV. NEGOT. L. REV. 269, 277-80 (1999).

56. ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1991).

57. See, e.g., WILLIAM URY, *GETTING PAST NO: DEALING WITH DIFFICULT PEOPLE* (1991).

58. See Stephanie Rosen, *NASD Under Pressure To Fix U-4 Form*, BANK INV. MKT., July 1, 1997 (describing how securities worker Susan Desiderio attempted to modify the U-4 form so that she could

it or leave it" offer is a difficult tactic that must be overcome in order to reach an optimal solution and maintain a healthy relationship between the parties. Many employees, if fully informed of their options, might prefer to have their day in court should a dispute arise with their employer. Others might consider alternative dispute resolution, but would prefer to defer their decision until the legal issue has arisen and they have had the opportunity to consult with an attorney. Others might prefer mandatory arbitration of claims. Negotiation theory leads to the conclusion that employees, just like every other party to a negotiation, deserve an opportunity to bargain, in an informed manner, for the option that best reflects their individual interests.

By imposing arbitration in a unilateral way, pre-dispute arbitration contracts are the equivalent of difficult negotiating tactics that leave no room for movement, change, or bargaining in response to legitimate employee interests. A straightforward negotiation analysis compels that there be more meaningful, principled negotiation around these contracts, as does basic consistency between the various forms of ADR. Ultimately, the legal regime the ADR community should support is one in which freely and fairly negotiated contracts are enforced, and those that are foisted on employees in a "take it or leave it" fashion are not.

I would contend that the wholesale shunting of employment discrimination cases into alternative dispute resolution (via mandatory arbitration clauses) sells employment plaintiffs short and fails to respond to serious and more nuanced problems. Employers and supervisors are more likely to change behavior in response to potential liabilities—i.e. the financial bottom line. Without the proper incentives, there will be no reason to work to eliminate discrimination in the workplace. For example, in the *Farragher-Ellerth* decisions,⁵⁹ the Supreme Court allowed employers an affirmative defense for sexual harassment if the employer has instituted effective education and training for workers and properly investigated complaints. Although this approach may tend to elevate form over substance⁶⁰ and could result in women of color having their claims dismissed at a disproportionate rate,⁶¹ at the very least employers now have

receive her day in court if a dispute with her employer occurred. Although her direct employer, SunTrust Securities, agreed to the change in the form, the NASD rejected the form, and as a result SunTrust had to fire her. Desiderio was quoted in the article as saying: "I didn't want to sign my rights away, and now I can't work in my chosen profession.")

59. *Farragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762 (1998).

60. See Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 4-5 (2003).

61. Tanya Katerí Hernández, *A Critical Race Feminism Empirical Research Project: Sexual Harassment & the Internal Complaints Black Box*, 39 U.C. DAVIS L. REV. 1023 (unpublished draft on file with author) (researching differential reporting of sexual harassment claims to human resources departments and determining that women of color tend to report their claims to human and quit less often than do white women).

a monetary incentive to reduce the amount of harassment that occurs at the workplace.

V.

CONCLUSION

From Widgets to Digits is highly recommended for its meta-analysis of labor trends and the interaction of those trends with employment law. Professor Stone has pulled together a broad-based set of policy proposals to address the changes that will only continue to accelerate as the economy moves from a local, production-based industrial model to a technological, global, knowledge-based one.

It is this broad approach that is at once the book's greatest strength and its weakness. On the one hand, the book's wide scope helps the reader connect employment regulation to recent demographic and technological changes. It provides an excellent theoretical framework for doing so. However, because of the broad approach, the book does not spend enough time discussing the ramifications of a diverse workforce and equal employment opportunities in the changing workplace, nor is enough time dedicated to exploring the possibilities and pitfalls of ADR. Of course, Professor Stone cannot hope to tease out all of the issues facing women and minority workers in the changing workplace in one chapter, but she has definitely sparked that discussion. Ultimately, *From Widgets to Digits* is an excellent and highly recommended legal analysis of the modern workplace.