

## SPECIALIZED LABOR AND EMPLOYMENT LAW INSTITUTIONS IN NEW ZEALAND AND THE UNITED STATES

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Legal specialization takes several forms: decision-makers and advocates can specialize in particular types of cases, specialized rules can govern particular types of disputes, facts may be found by experts, appeals heard by special courts, or some or all of these combined. The American and New Zealand employment and labor law regimes<sup>1</sup> make different use of specialized decision-makers, in part because of differences in their use of specialized legal rules for labor and employment law. These differences provide an opportunity to assess the appropriateness of specialization in legal decision-making.<sup>2</sup>

Specialization in the legal system is simply one form of the more general phenomenon of specialization of goods and services. When we examine products provided in the marketplace, we see a wide range in degree of specialization. Medical services, for example, are provided through networks of generalists and specialists—we visit an internist for a routine physical, but a surgeon for an appendectomy. On a more basic level, in a visit to the grocery store in the United States or New Zealand, I can find many varieties of

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1. Throughout the Article, “employment law” refers to the general rules governing the labor market and “labor law” refers to rules governing only the union sector.

2. I put aside the question of whether labor and/or employment law are “different” enough to justify specialization. A case can be made for special rules for labor and/or employment law that employees lack sufficient bargaining power to secure their “fair” share of the gains from trade or that there is something inherently collective about employment. Similarly, a case can be made that general contract principles are largely sufficient. I think the latter view is correct. See Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 *YALE L.J.* 1357 (1983) [hereinafter Epstein, *Common Law*], for the definitive statement of the case for the generalist law. See BERNARD ROBERTSON, *THE STATUS AND JURISDICTION OF THE NEW ZEALAND EMPLOYMENT COURT* (N.Z. Business Roundtable, Aug. 1996), and Maryan Street, *The Future of the Employment Court and Tribunal: The Labour Party’s View*, in *A SPECIALIST EMPLOYMENT LAW JURISDICTION: THE FUTURE OF THE COURT AND TRIBUNAL* 2-4 (1993), for a discussion of the argument in the New Zealand context. I proceed on the assumption that there will be some aspects of law and fact unique to labor and employment disputes.

jam but at most one variety of "Vegemite."<sup>3</sup>

As these examples suggest, the degree of specialization in the market is a response to factors such as consumer demand or a desire to preempt competitors.<sup>4</sup> In law, however, market forces play only a muted role around the edges.<sup>5</sup> Getting the degree of legal specialization "right" is thus more important than getting the degree of specialization in toppings for bread "right"—in the latter case, a manufacturer that produced "crunchy" Vegemite<sup>6</sup> may well go bankrupt; in the former, a government which opts for the wrong degree of specialization causes problems, but is unlikely to disappear.

The appropriateness of specialized legal institutions in a particular case rests on the balance between specialization's benefits and its dangers. Evaluating that balance is trickier than it first appears. Without market measures of success, we must fall back on hypothetical counterfactuals.<sup>7</sup> Nonetheless, a combination of theory and experience with specialist bodies in other areas provides some guidance.<sup>8</sup> Part I of this Article describes the use of specialized legal institutions in New Zealand and the United States, while Part II assesses the appropriateness of both countries' institutions in light of the theoretical literature on legal specialization.

3. To an American, Vegemite defies explanation. Popular in New Zealand and Australia, it is a yeasty spread used on bread.

4. See JEAN TIROLE, *THE THEORY OF INDUSTRIAL ORGANIZATION* 97-99 (1988) (discussing theories of product differentiation).

5. While a state legal system which significantly under-provided or over-provided specialization might find private competitors springing up on the margins, as they have in the United States where private courts are increasing, the state legal system retains significant advantages in crowding out competition.

6. My New Zealand friends assure me that such a product is unthinkable. Having chickened out when offered the chance to try a "smooth" Vegemite sandwich, I accept their judgment on this issue.

7. For example, what would judicial decisions interpreting the Employment Contracts Act [hereinafter ECA] be like if they were rendered in the first instance by a generalist court? Possibly, such a court would be less inclined to look to principles from pre-ECA labor jurisprudence than the specialist Employment Court, drawn from the pre-ECA Labour Court. However, it might not. American courts have freely innovated in employment law in the last thirty years, and the interpretation of the ECA might undergo a process similar to the Montana Supreme Court's 1980's decisions eviscerating that state's codified at-will rule. See Andrew P. Morriss, *"This State Will Soon Have Plenty of Laws"—Lessons From One Hundred Years of Codification in Montana*, 56 MONT. L. REV. 359, 433-42 (1995). On counterfactuals in legal reasoning, see Robert N. Strassfeld, *If . . . : Counterfactuals in the Law*, 60 GEO. WASH. L. REV. 339 (1992).

8. European countries make extensive use of specialist institutions in dealing with labor and employment law, although that may be related to their civil law systems. This Article deals only with the United States and New Zealand to keep the focus on common law systems. Other common law countries whose experience would be relevant, such as Britain, Canada, and Australia, are excluded to keep the length under control. See Benjamin Aaron, *Labour Courts and Organs of Arbitration*, 16 INT'L ENCYCLOPEDIA COMP. L. 16-1 (1985); Benjamin Aaron, *Settlement of Disputes over Rights in Comparative Labour Law and Industrial Relations*, INDUSTRIALIZED MARKET ECONOMIES 260 (R. Blanpain ed., 1990).

## I. SPECIALIZATION FOR LABOR AND EMPLOYMENT LAW

A. *New Zealand*

New Zealand began relying on specialist bodies to structure its labor market as part of a series of interventions into industrial relations in the 1890s.<sup>9</sup> Specialist legal institutions played an important role in implementing the statist system of labor relations that emerged from the 1890s through active involvement in wage setting, mediation, and arbitration. In the 1970s, however, the role of specialist bodies shifted away from wage-fixing to governing parts of the employment relationship previously dealt with through the common law, generalist courts.<sup>10</sup> Changes to the system in the Industrial Relations Act 1973 and continuing through the Industrial Relations (Amendments) Act 1984 introduced some new elements and changed the focus from interest disputes to rights disputes,<sup>11</sup> but did not significantly diminish the overall role of specialist institutions or the overwhelmingly collectivist nature of the labor law system.<sup>12</sup> Although the pre-ECA specialist institutions had jurisdiction over union sector issues only, the relatively large size of the union sector made them significant to the labor market as a whole.

After 1984, however, New Zealand embraced market economics in "one of the most notable episodes of liberalization that history has to offer."<sup>13</sup> New Zealand's post-1984 market reforms aimed at achieving, wherever possible, a competitive environment in which markets can operate

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9. The Industrial Conciliation and Arbitration Act of 1894 created the major specialist institutions. Rose Ryan & Pat Walsh, *Common Law versus Labour Law: The New Zealand Debate*, in DIVERGENT PATHS? INDUSTRIAL RELATIONS IN AUSTRALIA, NEW ZEALAND AND THE ASIA-PACIFIC REGION 297 (Nigel Haworth et al. eds., 1993). See HENRY BROADHEAD, STATE REGULATION OF LABOUR AND LABOUR DISPUTES IN NEW ZEALAND 17-30 (1908), for a description of the early specialist institutions under the ICA. Other interventions in the 1890s included mandatory minimum conditions of employment, restrictions on trading hours, and restrictions on the employment of women and minors. Kevin Hince, *From William Pember Reeves to William Francis Birch: From Conciliation to Contracts*, in EMPLOYMENT CONTRACTS: NEW ZEALAND EXPERIENCES 7 (Raymond Harbridge ed., 1993). Interventionism was not, of course, limited to the labor market, but part of a general program of state management of the economy. Indeed, until the 1980s, New Zealand had "more pervasive" government regulation than other similar OECD countries combined with widespread state ownership of entities in many sectors. Lewis Evans et al., *Economic Reform in New Zealand 1984-95: The Pursuit of Efficiency*, 34 J. ECON. LITERATURE 1856, 1860 (1996).

10. Ryan & Walsh, *supra* note 9, at 298; Gordon Anderson, *Specialist Employment Law and Specialist Institutions*, A SPECIALIST EMPLOYMENT LAW JURISDICTION: THE FUTURE OF THE COURT AND TRIBUNAL 2 (1993).

11. Anderson, *supra* note 10, at 2. These changes included the distinction between disputes of interest and disputes of right, a degree of voluntarism, Hince, *supra* note 9, at 8, and elimination of centralized wage determination, Evans et al., *supra* note 9, at 1878.

12. Ellen J. Dannin, *Labor Law Reform in New Zealand*, 13 N.Y.L.SCH. J. INT'L & COMP. L. 1, 1-2 (1992) ("[T]he only real changes prior to 1991 were essentially emendations of its seminal nineteenth-century legislation," the IC& A Act 1894.).

13. Evans et al., *supra* note 9, at 1856 (quoting David Henderson).

relatively free from subsequent intervention by government. For the private sector, great emphasis has been put on improving price signals through reducing import protection and other such barriers to competition, and attempting to reduce uncertainty through consistent, medium-term-oriented government policies.<sup>14</sup>

As part of the reform process, New Zealand reexamined its labor relations legislation, ultimately producing the ECA.<sup>15</sup> Because these reforms were initiated by a Labour government, however, the introduction of market principles to industrial relations lagged.<sup>16</sup>

Although the labor and employment law changes of the 1970s and 1980s were significant, they did not produce change fast enough to satisfy market-reform advocates, particularly in the business community.<sup>17</sup> With the National Party's 1990 victory came comprehensive labor relations reform. The debate over these reforms which ultimately resulted in the ECA finally included discussion of the role of specialist institutions.<sup>18</sup> As described

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14. *Id.* at 1863.

15. With the Labour Relations Act 1987 and the State Sector Act 1988, New Zealand experimented by introducing elements of a market-oriented, contractual model into its collectivist labor relations system. It also moved away from the tripartite model to a single judge structure. Ryan & Walsh, *supra* note 9, at 299. Perhaps the most significant change introduced by the 1980s debate was the discussion's shift to the issues articulated by the business community. Dannin, *supra* note 12, at 7. Despite these changes, and although the 1980s legislation introduced significant changes to the labor relations system, the issue of specialist institutions was postponed for later discussion. Ryan & Walsh, *supra* note 9, at 298.

16. Evans et al., *supra* note 9, at 1871 (“[A] Labour government could not realistically deregulate the labor market or reduce welfare spending as readily as a National government. Instead it started the deregulation process with the pro-reform financial sector.”).

17. Pat Walsh & Rose Ryan, *The Making of the Employment Contracts Act*, in EMPLOYMENT CONTRACTS 15 (1993); Anderson, *supra* note 10, at 4 (noting “much stronger assertion of the so-called “right to manage” as “a feature of the Rogernomics and post-Rogernomics era”). The pre-ECA legislation left important concepts to be fleshed out by the Labour Court. Gordon Anderson, *The Origins and Development of the Personal Grievance Jurisdiction in New Zealand*, 13 N.Z. J. IND. REL. 264 (1988); Ellen J. Dannin, *Three Years Out: The Labour Court's Treatment of Dispute Resolution Procedures*, 21 VICTORIA U. WELLINGTON L. REV. 259, 273 (The court is “given great and virtually unguided discretion to determine and institute creative and effective remedies.”). This left the Court room to act, as Professor Anderson phrased it in describing the court's actions under the 1973 law, in “a reasonably innovative fashion.” Anderson, *supra* note 10, at 264. The Labour Court relied “on developments in other jurisdictions to aid it in its decisions and . . . acknowledged the range of sources it draws on in several cases.” *Id.* For example, the Court reached the (to American eyes) extraordinary conclusion that “[t]he ultimate . . . test of justification [of dismissal] . . . is the opinion of the Court” in a 1983 decision, *Wellington etc. Drivers IUW v. Fletcher Construction*. *Id.* at 267 (quoting *Wellington etc. Drivers IUW v. Fletcher Construction*, A.C.J. 653, 666 (1983)).

18. Four options were considered in Parliament: (1) retention of the existing LRA structure, (2) a combination of a specialist lower tribunal and the Labour Court, (3) a specialist lower tribunal with appeal rights to the High Court, and (4) abolition of specialist institutions. John Hughes, *The Employment Tribunal and the Employment Court*, 16 N.Z. J. IND. REL. 175 (1991); Walsh & Ryan, *supra* note 17, at 24. The Department of Labour supported the second option, arguing it provided for “continuity” at the higher level and an inexpensive, flexible means of addressing labor issues at the lower level. Hughes, *supra*, at 175

elsewhere in this *Symposium*, the ECA introduced far-reaching changes in the substantive law, eliminating significant numbers of specialist notes and shifting many areas of law from generalist courts to specialist bodies.<sup>19</sup> The ECA replaced the earlier specialist institutions with two new specialist bodies: the Employment Tribunal and the Employment Court. The Tribunal provides “speedy, fair, and just resolution of differences between parties to employment contracts, it being recognized that in some cases mutual resolution is either inappropriate or impossible.”<sup>20</sup> It provides both mediation and adjudication, although restricting (but not eliminating) the pre-ECA practice of involving the same individuals in both activities in particular cases.<sup>21</sup> In adjudication, the Employment Tribunal moved towards the judicial model and away from the Labour Relations Act (LRA) committee hearing form.<sup>22</sup>

The Employment Court, initially staffed by the members of the now-defunct Labour Court,<sup>23</sup> serves as both an appellate and supervisory body for the Employment Tribunal and is also a court with original jurisdiction. In the latter capacity, the Employment Court has broader jurisdiction than the preceding Labour Court, covering claims of breach of individual common law employment contracts.<sup>24</sup> Efficiency and flexibility were the primary rationales for retention of the specialist approach.<sup>25</sup> New Zealand’s specialist institutions have among the broadest jurisdictions internationally.<sup>26</sup>

The Employment Court’s record since 1991 is controversial. The New Zealand business community has been critical of the specialist structure for

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(quoting DEPARTMENT OF LABOUR, REPORT OF THE DEPARTMENT OF LABOUR TO THE LABOUR SELECT COMMITTEE (1991)). The Treasury supported abolition. Walsh & Ryan, *supra* note 17, at 21. The debate was less comprehensive than it might have been because the National government originally intended to deal with substantive law before dealing with institutions. ROBERTSON, *supra* note 2, at 18. Unlike the substantive issues, the government entered the debate with “no clear policy” and, according to Robertson, “no apparent grasp of the issues.” *Id.*

19. Anderson, *supra* note 10, at 3.

20. Employment Contracts Act § 76(c), 1991 (N.Z.) [ECA].

21. Hughes, *supra* note 18, at 177.

22. *Id.* at 178.

23. ECA § 188.

24. Hughes, *supra* note 18, at 179; ROBERTSON, *supra* note 2, at 21-22. The Employment Court also has additional jurisdiction over “harsh and oppressive” employment contracts. ECA § 57. The Employment Court’s powers are limited, however, by a provision requiring a heightened standard of proof before the court can cancel a contract or vary its terms. ECA § 104(2). Professor John Hughes summed up the cumulative impact of the various restrictions on the Employment Court: “Overall, then, the emphasis is on restricting the Court’s ability to intervene in the employment relationship to ensure a minimal level of fairness.” Hughes, *supra* note 18, at 181. Even with the significant limitations the ECA imposed on the Employment Court, such a role is well beyond the role a common law court would play in resolving contractual disputes.

25. Max Bradford, *The Future of the Employment Court and Tribunal: The Government View*, in A SPECIALIST EMPLOYMENT LAW JURISDICTION 6-7 (1993).

26. Anderson, *supra* note 10, at 8.

paying too much attention to contract content, being too willing to modify contracts by implying additional terms,<sup>27</sup> and being inconsistent with the ECA's overall market orientation.<sup>28</sup> Some have accused it of attempting to sabotage the market-oriented, contractual model of the ECA.<sup>29</sup> Labor advocates, on the other hand, have defended its interpretations as necessary to fill gaps or express underlying social values of New Zealand society, even while conceding that the Employment Court is not interpreting the ECA quite as written.<sup>30</sup>

The ECA introduced two related and significant changes into the role of specialist institutions. First, the ECA changed the character of employment disputes by reducing the number of employees covered by collective bargaining agreements and increasing the number covered by individual contracts of employment.<sup>31</sup> The ECA thus shifted the disputes which the Employment Court must resolve toward contracts more susceptible to interpretation under ordinary contract principles. Second, it created a single legal framework, tied to contractual principles, for determining disputes over labor and employment law. Both fundamentally changed the role of specialist institutions.<sup>32</sup>

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27. Nick Wailes, *The Case Against Specialist Jurisdiction for Labour Law: The Philosophical Assumptions of a Common Law for Labour Relations*, 19 N.Z. J. IND. REL. 1, 3 (1994) (describing criticisms).

28. Lorraine Skiffington, *The Role of Specialist Legal Institutions in Bargaining Under the Employment Contracts Act 1991: Saboteurs or Saviours?*, 21 N.Z. J. IND. REL. 49, 50 (1996) (describing criticisms); COLIN HOWARD, INTERPRETATION OF THE EMPLOYMENT CONTRACTS ACT 1991 23-24 (N.Z. Business Roundtable, 1995) ("The quite extraordinary resistance to implementation of the Act manifested by a section of the judiciary" is one of the two reasons the ECA is "not working as well as it could and should.").

29. HOWARD, *supra* note 28, at 14 (describing decisions "as illustrations of the manner in which a judiciary which is manifestly out of sympathy with the policy of a statute can blunt its effect and frustrate at least some of its purposes").

30. See, e.g., Ellen J. Dannin, *Bargaining Under New Zealand's Employment Contracts Act: The Problem of Coercion*, 17 COMP. LAB. L.J. 455, 491 (1996).

On the one hand, section 57 must offer protection to workers or it will offend New Zealanders' sense of morality and justice. On the other hand, if the court softens the impact of section 57, it usurps Parliament's allocation of power in the workplace. As it stands, social mores in New Zealand, along with the decision in *Culhane*, have prevented the courts from upholding the harshest uses of the ECA. . . . By refusing to permit the *Culhane* employer to contract with more willing sellers of labor, the Employment Court effectively subverted the will of Parliament.

*Id.* See also Street, *supra* note 2, at 1 (specialist institutions and contractarian approach "do not sit well with each other").

31. See Raymond Harbridge, *The Employment Contracts Act: An Assessment of the Impact of the Legislation on Bargaining Arrangements*, in DIVERGENT PATHS? INDUSTRIAL RELATIONS IN AUSTRALIA, NEW ZEALAND AND THE ASIA-PACIFIC REGION 214, 218 (Nigel Harworth et al. eds., 1993). Richard Whatman et al., *Labour Market Adjustment Under the Employment Contracts Act*, 19 N.Z. J. IND. REL. 53, 56-57 (1994).

32. Commenting on pre-ECA New Zealand institutions, Professor Gordon Anderson argued that the pre-1988 legal regime was marked by "a tendency to treat different areas of

In the past thirty years, New Zealand's labor relations system, and indeed its entire economy, have undergone massive changes. Two characteristics are present throughout. First is the reliance on specialist legal bodies. Given that these bodies' jurisdiction and roles have changed dramatically over time, particularly in recent years, their persistence is puzzling. At the least, one would expect that the arguments for specialization that justified such institutions in the collectivist past would no longer be valid in the contractual present. Second, although the basic philosophy of the industrial relations system has changed almost completely, both the prior collectivist system and the current contractual system are explicit attempts to create coherent systems to govern labor and employment law. These systems are themselves part of larger, coherent visions of New Zealand society.

### *B. United States*

American legal institutions for labor and employment law are quite different from those in New Zealand. In part these differences reflect the difference between federal and unified national legal systems and the larger geographic scope of the United States. As the National Labor Relations Act (NLRA) and National Labor Relations Board (NLRB) and the various civil rights acts and the Equal Employment Opportunities Commission (EEOC) demonstrate, however, there is no constitutional impediment to creating either specialist legal rules or national specialist decision-makers to govern aspects of employment and labor law. The continued reliance on state and generalist institutions in the United States therefore represents at least some degree of policy choice.

Because the residual set of rules and institutions for handling employment (but not labor) law matters remains state contract law, federal legal institutions and rules in this area are the result of ad hoc interventions into the labor market. Because many of these interventions take place through administrative agencies, the dominant form of federal specialist institution is not a court but an administrative agency, often combining executive, legislative, and judicial functions within a single entity.

At the federal level, the NLRB and EEOC are the most visible specialist institutions. The Social Security Administration's disability insurance programs, complete with an extensive array of specialist bodies and generalist court review, provide the greatest volume of decisions concerning the labor market. Numerous other specialist institutions, from the Occupational Safety and Health Review Commission (OSHRC) to the Federal Labor Relations Authority, exist as well, with varying degrees of impact on the labor market.

The federal generalist courts play two important roles in labor and em-

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employment security as different issues rather than to regard them as a single, if multifaceted problem." Anderson, *supra* note 10, at 258.

ployment law. First, even where primary adjudicatory responsibility is assigned to specialist decision-makers, appellate authority often remains in the generalist courts.<sup>33</sup> Second, the federal generalist courts act as inferior state courts under the *Erie* doctrine in diversity cases. In some instances, federal courts have addressed state law questions far in advance of the state courts and played a significant role in at least temporarily altering state law.<sup>34</sup>

At the state level, the most important institutions are the generalist courts, since a significant portion of employment law is state contract law. Even where specialized rules apply, and there are a significant number of state laws regulating particular aspects of the labor market,<sup>35</sup> enforcement is often left to actions in state courts (brought by either state officials or private actors). There are important state specialist institutions as well. Social insurance programs such as unemployment insurance and workers compensation insurance generally include a specialist body as the initial decision-maker and sometimes as the first level of appellate review. State labor departments have authority to render decisions in particular areas, although often limited by a requirement of enforcement through the generalist courts. Finally, states have many specialist institutions and rules which parallel federal institutions and rules—state civil rights, occupational safety and health, and wage and hour enforcement agencies, for example.

In sharp contrast to New Zealand, specialist institutions for labor and employment law in the United States are thus primarily ad hoc intrusions into a labor market at least nominally based upon general contract rules.<sup>36</sup> While these underlying generalist legal rules have been significantly eroded, particularly by federal interventions in labor relations and civil rights, the generalist heritage has left generalist courts with a significant role even with respect to specialist rules. Moreover, it has been left largely to the generalist courts to formulate legal doctrines to harmonize the ad hoc statutory regulations with the underlying contract-based legal rules. Thus, generalist courts have been called upon to determine what effect to give to unemployment

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33. For example, the decisions of the OSHRC can be appealed to the federal courts. Moreover, in some cases the specialist body is assigned only limited authority to enforce its decisions, requiring resort to the generalist courts for enforcement. Thus, the NLRB must seek to enforce its orders through the federal courts.

34. See Andrew P. Morriss, *Developing a Framework for Empirical Research on the Common Law: General Principles and Case Studies of the Decline of Employment-at-Will*, 45 CASE W. RES. L. REV. 999, 1033-38 (1995); Mark R. Kramer, Comment, *The Role of Federal Courts in Changing State Law: The Employment At Will Doctrine in Pennsylvania*, 133 U. PA. L. REV. 227 (1984).

35. See JAMES O. CASTEGNERA ET AL., *TERMINATION OF EMPLOYMENT: EMPLOYER AND EMPLOYEE RIGHTS* (1997) (summarizing state employment laws relating to discharge).

36. See, e.g., *Soderlun v. Public Serv. Co. of Colo.*, 1997 WL 45279, \*3 (Colo. App. Feb. 6, 1997) (“Aside from the specific principles adopted by the [Colorado] supreme court in this prior jurisprudence, its significance lies in that court’s consideration of the employment relationship pursuant to concepts developed by traditional approaches to the common law of contracts. The supreme court has not purported to create any special rules to deal with employee claims of contract breaches.”).



insurance commission decisions on the existence of cause for discharge or an individual's claim of disability in a social insurance application in a suit by an employee alleging wrongful discharge.<sup>37</sup> Moreover, compared to New Zealand, the United States has not undergone a rethinking of the system of laws governing industrial relations.<sup>38</sup> The United States' use of specialist institutions is thus doubly ad hoc: the specialist institutions themselves are the results of ad hoc interventions, and the general system in which they are embedded is unmarred by attempts at consistency.

## II. ASSESSING THE USE OF SPECIALIST LEGAL INSTITUTIONS

New Zealand's reliance on specialist legal institutions appears to rest largely on a conviction that labor and employment laws are different from other types of law.<sup>39</sup> Much of the debate over the continuation of the specialist institutions under the ECA, for example, builds on the Epstein/Getman-Kohler<sup>40</sup> debate over the need for specialized labor law.<sup>41</sup>

37. See *infra* note 75.

38. Evidence of this lack of debate is the broad, bipartisan support for even highly interventionist employment legislation in the U.S. For example, despite the debate over affirmative action today, we are still only a few years past a conservative, Republican president comparing the Americans With Disabilities Act to the fall of the Berlin Wall, George Bush, *Statement on Signing the Americans with Disabilities Act of 1990*, available in WL A&P 101-336 Mat'1 (July 26, 1990), and a conservative, Republican presidential candidate labeling its signing a "second Independence Day." Jake Thompson, *Dole and Bush Commemorate Law*, KANSAS CITY STAR, July 27, 1996, available in 1996 WL 2436074. When the major political party nominally identified with market principles trumpets the most far-reaching, interventionist law in decades as a triumph, it is clear that there is little real public debate over the subject.

39. See, e.g., Gordon Anderson & Pat Walsh, *Reshaping Labour Law: An Alternative Industrial Relations Future*, in DIVERGENT PATHS? INDUSTRIAL RELATIONS IN AUSTRALIA, NEW ZEALAND AND THE ASIA-PACIFIC REGION 19 (Nagel Haworth et al. eds., 1993). ("[T]he neo-classical contract model inadequately describes the employment relationship. The classical model is based on discrete transactions and takes insufficient account of long-term relational contracts. The employment relationship is constructed over time by the actions of the parties and any analysis of the employment relationship must adequately address these internal dynamics."); Anderson, *supra* note 10, at 9 (Labor and employment law "clearly is" a specialist area.). As Robertson points out, this argument fails to distinguish between employment relationships and employment disputes before the court. In the latter, "[m]any of the cases between individuals (as opposed to unions) and employers concern relationships which have already ended." ROBERTSON, *supra* note 2, at 19.

40. Epstein, *supra* note 2; Richard A. Epstein, *Common Law, Labor Law, and Reality: A Rejoinder to Professors Getman and Kohler*, 92 YALE L.J. 1435 (1983); Julius G. Getman & Thomas C. Kohler, *The Common Law, Labor Law and Reality: A response to Professor Epstein*, 92 YALE L.J. 1415 (1983). While there are arguments that labor and employment law require rules which differ from ordinary contract law, arguments I believe are largely mistaken, they are arguments about the need for different rules to solve problems caused by characteristics of the labor market. Thus, for example, some argue that employees have too weak a bargaining position relative to employers to effectively bargain for job security. See Skiffington, *supra* note 28, at 50 (summarizing arguments). Proponents of specialist institutions in New Zealand argue that the common law is too individualistic to govern industrial relations effectively, because industrial relations possess a collective nature. Wailes, *supra*

Many of the employer organizations' complaints about the Employment Court's decisions relate to their perception of that body's continued insistence on the application of collectivist legal principles in what the employers' associations view, with some justification, as a market-based, contractual framework.<sup>42</sup>

New Zealand's debate over whether specialist institutions are appropriate to labor and employment law sets it apart from the United States. In the United States, specialist tribunals in labor and employment law are almost entirely justified in terms of efficient processing of claims in mass programs like workers' compensation and unemployment insurance. Because so much of American employment and labor law is not based on principle, the appropriateness of institutional choice is a largely unasked question. I turn now to examining the two countries' institutions in light of the general specialization literature.

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note 27, at 8. The flaw, according to the pro-specialist camp, was in the ECA, not the institutions: the Act "failed to acknowledge the inherent disparity of bargaining power between employer and employee." Skiffington, *supra* note 28, at 49. Whatever else such a rule may be, however, it is not legally complex, and the facts of the labor market are more likely to be oversimplified by proponents of special rules than the reverse. Even if one accepts the argument that special rules are needed, they are not rules which require special decision-makers in the same way patent law might, as the facts in employment cases are no more difficult as a group than the facts in commercial contract cases. Moreover, the group of judges initially appointed to the Employment Court lacked any significant expertise in labor relations. ROBERTSON, *supra* note 2, at 21 (two former family court judges, two employment lawyers, two general practice lawyers, and a defamation expert). The technical expertise of the decision-maker is thus an unconvincing rationale for specialization. There is more of an argument to be made in favor of allowing the parties to designate decision-makers to resolve disputes which arise under contracts: Someone familiar with the history of a workplace and of disputes under a contract might be more efficient at resolving new disputes than a wholly new decision-maker.

41. See, e.g., Ryan & Walsh, *supra* note 9, at 300-02; Nick Wailes, *A Critique of R.A. Epstein's Common Law for Labour Relations*, in *DIVERGENT PATHS? INDUSTRIAL RELATIONS IN AUSTRALIA, NEW ZEALAND AND THE ASIA-PACIFIC REGION* (Nigel Haworth et al. eds., 1993); Wailes, *supra* note 27. Epstein's influence is significant with respect to other areas of the New Zealand debate. Professor Dannin, for example, concludes that "[t]he main intellectual source for the ECA can be traced directly back to the United States and almost exclusively to one article by Richard Epstein, *In Defense of the Contract at Will*." Ellen J. Dannin, *Consummating Market-Based Labor Law Reform in New Zealand: Context and Reconfiguration*, 14 B.U. INT'L. L.J. 267, 303 (1996) (notes omitted). Professor Wailes takes a similar view. Wailes, *supra* note 27, at 1 ("[I]t is generally acknowledged that Epstein's ideas have had a significant influence in shaping the 'abolitionist' case.").

42. See Skiffington, *supra* note 28, at 50 (summarizing criticisms). Some employee and union advocates have taken a similar view, arguing that the "extension of the Act to all employment contracts represents a major extension of specialized labour law and thus the basis for the future development of an autonomous system of labour law." Anderson & Walsh, *supra* note 39. In addition to the "employment is different" rationale, efficiency concerns surface with some regularity as justifications. Ryan & Walsh, *supra* note 9, at 306 (citing trade union arguments based on cost and time).

### A. Technical Competence

Specialized review functions are more appropriate to deal with “the most technically difficult, the most novel and uncertain, and the most time-consuming cases in order to maximize the reduction of poor understanding, disuniformity and overburden.”<sup>43</sup> While the technical competence argument is frequently made with regard to science-based fact and patent law issues,<sup>44</sup> they apply outside science-based factual complexity as well. The U.S. doctrine of deference to labor arbitration set forth in the *Steelworkers’ Trilogy*,<sup>45</sup> for example, ultimately rests upon the idea that understanding the nuances of a collective bargaining contract is enhanced by a combination of specialized knowledge concerning industrial relations and the particulars of each contract.<sup>46</sup> Similarly, where a statute is particularly complex, a specialized decision-maker may be better able to interpret it.<sup>47</sup> The record of specialist institutions in providing technical expertise is difficult to assess.<sup>48</sup>

Even if special labor and employment law rules are to be applied, there is little reason to suspect that a generalist court would be incapable of doing so. Technical expertise in the labor and employment law context is mostly familiarity with the statutes, not specific training in industrial relations.

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43. David P. Currie & Frank I. Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1, 78 (1975).

44. Ellen R. Jordan, *Specialized Courts: A Choice?* 76 N.W. U. L. REV. 745 (1981); Currie & Goodman, *supra* note 43, at 67; Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 B.Y.U. L. REV. 377, 409. This argument was made in the U.S. in patent cases as early as 1901 by Judge Learned Hand. See LEARNED HAND, HISTORICAL AND PRACTICAL CONSIDERATIONS REGARDING EXPERT TESTIMONY 15, HARV. L. REV. 40 (1901).

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

46. The validity of this assumption is questionable in many circumstances. For example, most collective bargaining agreements in the United States provide simply that covered employees may not be discharged except for just cause. Interpreting such a straightforward phrase appears to be well within the abilities of any competent judge.

47. Ellen Jordan makes this argument in terms of doctrinal stability. See Jordan, *supra* note 44, at 747. The *Chevron* doctrine in American administrative law reflects this view: in reviewing federal administrative agencies’ interpretations of regulatory statutes, the courts must defer to the agencies’ interpretation if the interpretation is a “permissible” one. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984). *Chevron* illustrates the rationale for leaving such determinations to specialists: not only did interpretation require familiarity with the extraordinarily complex U.S. Clean Air Act, something presumably within the capability of judges, but required resolution of ambiguities in the statute that turned on policy judgments. *Id.* at 865-66. The Courts’ application of the *Chevron* doctrine is controversial and inconsistent. See ALFRED C. AMAN AND WILLIAM T. MAYTON, ADMINISTRATIVE LAW 471-77 (1993).

48. With the U.S. Court of Appeals for the Federal Circuit and patent law, for example, Professor Rochelle Dreyfuss’s review found that the median decision time had not declined and the number of cases had not decreased. Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 76-77 (1989). She concluded that the quality of decisions may have been improved, although quality is hard to measure. *Id.* at 76-77. In instances where the technical competence required is not drawn from another discipline, the technical competence argument is even more difficult to evaluate.

Judge Posner's observation that even generalist judges tend to be knowledgeable about various areas of the law because of their specialization in decision-making is particularly apt in this context.<sup>49</sup> Since employment issues are likely to arise frequently in the generalist courts (or at least more frequently than, for example, patent disputes), generalist judges will have extensive opportunities to learn the statutes.

### B. Doctrinal Stability

Specialized legal institutions may be better able to provide doctrinal stability than generalist institutions under some circumstances. Where a legal system divides decision-makers on non-doctrinal grounds (e.g., geographically defined courts), differences in interpretation of legal rules may arise across the courts.<sup>50</sup> Such differences may persist over time, either because the final decision-maker leaves conflicts unresolved (as the U.S. Supreme Court often does with inter-circuit conflicts) or because there is no final decision-maker (as with conflicts of law among the states in the U.S.). Where differences persist, the outcome of disputes may depend on chance or forum shopping, introducing uncertainty about the applicable rule, reducing the ability to rely upon the law, and causing inequities.<sup>51</sup>

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49. See *infra* note 55.

50. Currie & Goodman, *supra* note 43, at 65. Specialization at the appellate level is most important where uniformity is sought. Dreyfuss, *supra* note 44, at 429. Inconsistency is more likely as the number of jurisdictions increases, where focal points for the appropriate rule are absent, and where the application of the different rules imposes significant costs on the parties. Thus, if some jurisdictions imposed a rule requiring employers to pay redundant employees two weeks of severance pay while others required four weeks of severance pay, the difference would prompt less forum shopping than if one jurisdiction followed the employment-at-will rule and the other followed a broad interpretation of the implied covenant of good faith and fair dealing which effectively granted employees "just cause" protection. Except in cases where specialization is justified by the complexity of the legal rules, doctrinal stability is derived from replacing a geographically defined decision-maker with a monopoly decision-maker. While gaining the benefits of specialization is easier where the specialist institution has exclusive jurisdiction, several scholars have endorsed the concept of allowing litigants a choice between specialist and generalist fora as a means to avoid some of the problems of specialization. Dreyfuss, *supra* note 44, at 435; Jordan, *supra* note 44, at 765-67. This approach is used in the United States with the federal Tax Court, where litigants can choose either the generalist courts or the specialized court. Allowing such a choice, however, reintroduces forum shopping and consistency issues which specialization was intended to eliminate. Specialization is thus justifiable on these grounds only where the rules to be interpreted are significantly more complex than the typical legal rule or where the expected costs of inconsistency in rules are great.

51. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, 67 F.R.D. 195, 217-20 (1975). The benefits of doctrinal stability require creating a specialist institution not itself subject to swings in doctrine. To the extent that it occurs, see *infra* section D, capture could undercut the uniformity of law over time as the specialized body swings from camp to camp. RICHARD A. POSNER, THE FEDERAL COURTS 152 (1985). At the same time, successfully gaining these benefits may produce undesirable effects: where specialization leads to geographic concentration of a court (compared to geographically dispersed generalist courts), specializa-

The doctrinal stability argument is simply inapplicable to a country the size of New Zealand which lacks multiple geographically based jurisdictions. In the case of the United States, a more convincing rationale can be constructed by recounting the multiple jurisdictions to which a particular employer (or employee who is frequently transferred) might be subject. The problem, however, is more easily solved by enforcing choice of law clauses in contracts (and perhaps encouraging their inclusion with a penalty default rule<sup>52</sup> where they are absent) than by creating a separate decision-making body. Moreover, because of the capture problems discussed above, assigning national authority to any agency or court would set off a fierce, continuing struggle for control of the agency, potentially creating doctrinal cycles that would make the NLRB appear stable.

### C. Administrative Efficiency

Specialization avoids the potential for creating additional inconsistencies among or within existing generalist courts caused by expanding either the number or size of such courts to meet increased demand.<sup>53</sup> Meshing the efficient specialist body with the generalist court system can introduce new problems, however, that must be considered as part of the costs of any efficiency gain at the lower level.<sup>54</sup> Specialist decision-makers may be more efficient because they see more of the same kind of cases, although this depends on a somewhat Fordist view of the judicial process.<sup>55</sup> Deciding cases, even deciding similar cases, is not assembly line work.<sup>56</sup> To the extent that

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tion favors those who can afford to litigate in the specialist court's location and enhances the opportunities for capture. Dreyfuss, *supra* note 44, at 422-23. The problem of expense may be mitigated by the existence of a specialized bar, although such a bar may contribute further to the problem of capture. *Id.*

52. See Ian Ayes & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989) (explaining penalty default concept).

53. It is an argument for creation of some specialization, although not necessarily for creation of particular specialist institutions. See Currie & Goodman, *supra* note 43, at 64-65.

54. Appeals to the generalist courts can be limited, of course, although the experience with severely limited appeals in the U.S. veterans benefits area suggests that such a course raises important fairness issues. See *infra* note 57.

55. In thinking about specialization, we need to remember that even generalist courts are a type of specialized institution; they are simply specialized by function rather than by subject matter. POSNER, *supra* note 51, at 149-50. Appeals courts, for example, "specialize" in deciding appeals; trial courts in holding trials. This focus allows generalist decision-makers not only to develop the skills necessary to resolve matters efficiently (e.g., appellate judges have greater skills at analyzing trial records; trial judges have greater skills in making on-the-spot evidentiary rulings and determining witness credibility), but also exposes them to a wide range of issues in the law. Thus, for example, Richard Posner argues that generalist appellate judges have greater knowledge of particular areas of the law than do lawyers or legal academics who focus on those areas because the latter must spend a considerable portion of their time doing things besides thinking about the law in the specific area. *Id.* To the extent that judging is an intellectual process of reasoning, rather than akin to assembly line work, Posner's view seems more persuasive.

56. For an extensive survey of the literature on judicial decision-making, see Gregory C.

judicial decision-making does not resemble assembly line production, efficiency gains from specialization are likely to be small.

Moreover, even when the efficiency gains are real, the efficiency of specialized bodies is not always an advantage. After examining the U.S. experience with specialized decision-makers, Professor Jordan argued that where a national consensus on the goals of the laws is lacking, the far-reaching and irreversible nature of the choices to be made demands that decisions be reached deliberately and carefully. In those areas, the speed and efficiency of the specialist may be exactly the wrong prescription, since it is wisdom and deliberation, combined with a full hearing from all affected interests, which is needed.<sup>57</sup> Efficiency is thus a double-edged sword. It allows quicker processing of mass numbers of claims, but at the cost of a loss of individualized justice.<sup>58</sup>

The relative efficiency of different forms of decision-making body is an empirical question whose resolution would require far more data than are now available, although the initial experience in New Zealand suggests caution in claiming such gains.<sup>59</sup> If we compare the American social security program with the judicial process, however, the outlines of potential problems with specialized administrative bodies become clear. New Zealand's experience mingling adjudication and mediation responsibilities also suggests reasons why care in this area is necessary. Based on sheer numbers, employment and labor law rank well behind other candidates for easing the burden on generalist courts, such as criminal law and family law. Moreover, efficiency requires more than simply deciding mass numbers of cases—efficient rules can often reduce the number of disputes that require decision more effectively than increased processing speed can clear dockets.

#### D. Capture

The potential for capture of a specialist decision-maker by proponents of a particular position is one of the most significant problems with such bodies.<sup>60</sup> Capture is often *why* a specialist court is set up. An interest group

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Sisk, Michael Heise & Andrew P. Morriss, Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning (unpublished manuscript, on file with author).

57. Jordan, *supra* note 44, at 765.

58. Programs like the U.S. social security disability insurance program would likely be impossible without such a tradeoff. The requirement of the use of specialized bodies and mass claims which receive only "bureaucratic justice" for such programs ought to provoke a reexamination of the programs, not the unquestioning acceptance of the tradeoff, however.

59. See T.C. Goddard, *The Rule of the Employment Court*, in A SPECIALIST EMPLOYMENT LAW JURISDICTION: THE FUTURE OF THE COURT AND TRIBUNAL 16 (1993).

60. While the problem of capture is more serious where views of the law are already polarized, creating bodies capable of being captured can prompt the formation of interest groups which then attempt capture. The expected net benefits of creating a lobbying group, for example, are increased when an institution capable of being captured exists, since the probability of successful capture is enhanced and the cost of organization reduced. Thus, it may not be worthwhile to lobby for the creation of a capture-prone body, given that the lob-

does not like the way ordinary courts decide an issue. It employs a politician to lead an attempt in the legislature to get the issue out of the hands of "old fashioned" judges and into the hands of "progressive" specialists.<sup>61</sup>

Even if not set up to facilitate rent-seeking, specialized bodies are more likely than generalist decision-makers to be captured by a particular ideological camp.<sup>62</sup> Specializing by subject matter, the benefits of sympathetic decision-makers are significantly increased by concentrating particular types of disputes in one body.<sup>63</sup> The potential for capture is also increased because appointments to specialist bodies are more likely to be drawn from the population of experts on the subject matter, who "are more sensitive to swings in professional opinion than an outsider, a generalist, would be."<sup>64</sup>

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bying may fail. But once the body is created, the existence of the capture prone body itself will create interest groups. For example, once a specialized court is created, a specialized bar is likely to arise, providing both the pool of talent for use in capturing and the bar associations to conduct the lobbying efforts to capture the court. The problem of capture is thus not limited to instances where interest groups already exist.

61. Charles W. Baird, *The Employment Contracts Act: Almost a Model for the World*, 3 THE SOCIAL CRITIC 22-27 (1996) (visited June 18, 1997). See also ROBERTSON, *supra* note 2, at 15 ("Specialist Courts are created when some interest group does not believe that equal application of the laws by judges applying the traditional canons of statutory interpretation and the traditional values of the common law will result in decisions that favour its own ideology and interests.").

62. POSNER, *supra* note 51, at 152; Richard A. Epstein, *Employment Law: Courts and Contracts* (N.Z. Business Roundtable 1996); Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 331 (1991); Jordan, *supra* note 44, at 748; Currie & Goodman, *supra* note 43, at 70-71. The 1988 creation in the United States of the Court of Veterans Appeals (CVA) illustrates the problem of capture. Prior to the creation of the CVA, veterans had limited rights of appeal from Veterans Administration decisions regarding benefits. The CVA was created as part of the creation of an appeal process for veterans. Despite the obvious benefits of appellate rights to veterans, several veterans advocacy groups opposed the creation of the CVA, in part because they feared a loss of member loyalty if lawyers began to play a role in the process. (The veterans groups in question provided assistance with the pre-existing administrative appeals process.) Another group of veterans advocates favored allowing appeals in the generalist courts because their members had experienced difficulties with Agent Orange claims in the VA administrative process. In a political compromise that appears to have more to do with satisfying the veterans groups' professional staffs than substantive concern for veterans, the CVA was created with strict controls on attorneys' fees, centralized appeals to the Court of Appeals for the Federal Circuit in Washington, and provisions allowing non-attorney veterans advocates to represent claimants. See Laurence R. Helfer, *The Politics of Judicial Structure: Creating the United States Court of Veterans Appeals*, 25 CONN. L. REV. 155, 161, 169-70 (1992).

63. Compare the benefits to either side from the appointment of a sympathetic individual to the National Labor Relations Board in the U.S. with the benefits of a similar appointment to a U.S. federal court of appeal. The latter position is likely to produce the opportunity for a small number of decisions concerning labor and employment law; the former will provide one of five votes on critical labor law issues on a regular basis.

64. POSNER *supra* note 51, at 152. The judges themselves may also "capture" a specialist court. Judges might come to substitute their judgment for that of the parties because of the judges' greater expertise, where an uninitiated generalist judge might be more reluctant to interfere in others' decisions. Currie & Goodman, *supra* note 43, at 71. Assigning jurisdiction to a specialist institution may thus itself make the institution more activist. To the extent that preserving private arrangements is important, this is a disadvantage. See also HOWARD, *supra*

The perception of capture is a problem even where a specialized court escapes actual capture.<sup>65</sup> Professor Rochelle Dreyfuss argues that specialization can create the perception of capture when there is no public consensus on the law in its area.<sup>66</sup> This perception could thus undercut the advantages specialist decision-makers might have in promoting uniformity.<sup>67</sup>

Specialist institutions are also more easily dominated by the other branches of government because "it is easier to predict how someone will decide cases in his specialty than how he will decide cases across the board."<sup>68</sup> Thus, even without attempts by the parties to disputes to gain sympathetic decision-makers, the executive and legislative branches of government may use this predictability to erode judicial independence in the substantive area.

Labor and employment law are particularly likely to produce capture problems for specialist bodies for several reasons. First, there are clearly identified "sides" to disputes. Second, outcomes are also easy to identify—either the employer or the employee wins, making score keeping by interest groups straightforward.<sup>69</sup> Third, ideologically screening candidates before their appointment is straightforward, since "litmus tests" are readily available on labor and employment issues.<sup>70</sup> In the United States, for example, positions or replacement workers and the minimum wage can be used to "score" candidates as pro-labor or pro-employer. Finally, there is a great deal of money at stake.<sup>71</sup>

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note 28, at 15 (noting "clubby atmosphere" surrounding appointment to specialist bodies).

65. Currie & Goodman, *supra* note 43, at 72.

66. Dreyfuss, *supra* note 44, at 415 ("The heterogeneity of [a new generalist court's] docket makes it likely that there will be some issues that it can handle in a manner that validates the bench; indeed the court need only receive and follow precedent to gain a measure of public acceptance. . . . In contrast, when a specialized court is established in an area where there is no consensus, there is nothing for the public, practitioners, or other courts to measure its rulings against, and it becomes an easy target for those who disagree with its decisions.").

67. The potential for capture can be reduced if the specialist institution is designed carefully. Professor Dreyfuss suggests, for example, that placing a specialist body within an agency (in the United States, making it an Article I court) "would remind reviewing courts to be vigilant for signs of capture" and "diminish public suspicion of an institution called a 'court,' which is structured differently" from the traditional generalist courts. Dreyfuss, *supra* note 44, at 431. Unfortunately, many of the steps which reduce the problem of capture do so by diluting the gains from specialization. Thus, providing a mix of unrelated business, which Professor Bruff labels "semispecialization," reduces the gains from capture, but also dilutes the potential gain from technical expertise. *Id.* at 340-41.

68. POSNER, *supra* note 51, at 154; Epstein, *supra* note 2.

69. See ROBERTSON, *supra* note 2, at 31 (describing how decisions will be interpreted). Of course, legal rules and decisions are often sufficiently subtle that counting victories by one side or the other may be an inadequate measure of a judge's sympathies, but the ease of such counts encourages them.

70. See ROBERTSON, *supra* note 2, at 31 (discussing politicization of a vacancy on the Employment Court).

71. Unionization, to take an obvious example, is often expensive for the firm—most estimates put the union wage premium at about 15 percent, although opinions differ on whether there are compensating gains for the employer. Wrongful discharge law in the U.S. appears



The experience of both countries demonstrates the reality of capture in labor and employment law. In the United States the NLRB is subject to periodic swings, as the Board majority shifts between Democratic and Republican appointees. (These shifts are magnified by the NLRB's practice of generally eschewing rulemaking in favor of a case-by-case approach, which rewards those able to read the subtle signs in decisions about future doctrine shifts.) In New Zealand, the staffing of the Employment Court with the judges of the former Labour Court creates at least the perception of capture by opponents of the ECA. Pledges by the Labour Party to "review the functions of the Employment Court"<sup>72</sup> suggest that the politicization of the Court is an accomplished fact.<sup>73</sup>

### *E. Boundary Problems*

Specialization is easier to envision in the abstract than to implement: "Real-life conflicts may spill over many 'fields' of law, and result in fragmented judicial consideration of closely linked problems."<sup>74</sup> Gaining the benefits of specialization requires assigning appropriate disputes, and only those disputes, to the specialist institution. Where a case touches across multiple fields, specialized and generalist decision-makers must determine which portions of a dispute belong in each. For example, social insurance matters are often intertwined with employment law issues, as where a person with a disability is potentially eligible for coverage under laws requiring employers to accommodate disabilities and for social insurance payments for his disability.<sup>75</sup> Avoiding boundary issues is an important part of suc-

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also to impose significant costs. See JAMES A. DERTOUZOS & LYNN A. KAROLY, LABOR MARKET RESPONSES TO EMPLOYER LIABILITY 62-63 (RAND Corp. Inst. for Civil Justice Paper R-3989-ICJ, 1992) (estimating aggregate employment losses of 2-5 percent from wrongful discharge law).

72. Maryan Street, *The Future of the Employment Court and Tribunal: The Labour Party's View*, in A SPECIALIST EMPLOYER LAW JURISDICTION 6 (1993).

73. As Robertson notes,

The Labour Party thus explicitly states that the future jurisdiction and status of the Employment Court is dependent upon how well it fits into Labour's scheme of things. The precedent of a specialist Court having been set, the government could obviously sideline any judge who did not make the 'right' decisions by reshuffling the specialist Courts and reassigning the judges. . . .

ROBERTSON, *supra* note 2, at 30.

74. Jordan, *supra* note 44, at 748.

75. The Third Circuit recently determined that assertion of inconsistent positions in any type of proceedings can result in estoppel. *Ryan Operations, G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 360 (3d Cir. 1996). It applied the doctrine to bar an employee who had made sworn statements that he was disabled in a disability insurance proceeding from claiming that he was capable of performing his job in a wrongful discharge suit under the Americans with Disabilities Act. Similarly, the Ninth Circuit applied the doctrine to bar an employee who had obtained a favorable settlement of a workers' compensation claim (which assumed she was disabled) from making a civil rights claim. *Rissetto v. Plumbers and Steam-*

cessful specialist institutions.<sup>76</sup> New Zealand appears to have begun to experience these problems.<sup>77</sup>

Unfortunately, labor and employment law are particularly susceptible to these problems. Work touches on almost every aspect of our lives. It defines what we do with a large portion of our waking hours, is the source of important relationships, and provides the resources for most people's daily lives. We may socialize outside the workplace, raising issues of liability for conduct while engaged in company-sponsored non-work activities. Personal relationships may begin at work, potentially implicating employer policies on nepotism. When families and other personal relationships disintegrate, work is involved.<sup>78</sup> The interconnectedness of employment with other as-

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fitters Local 343, 1996 WL 490350 (9th Cir. Aug. 29, 1996). The D.C. Circuit, on the other hand, recently held that a claim of disability in a social security proceeding did not prevent a claimant to be otherwise qualified for a position under the Americans with Disabilities Act, since the latter statute required assessing the employee's ability to perform a job with accommodation by the employer and the former did not. *Swanks v. Washington Metropolitan Area Transit Authority*, 1997 WL 335143 (D.C. Cir. June 20, 1997); *Whitbeck v. Vital Signs, Inc.*, 1997 WL 335140 (D.C. Cir. June 20, 1997).

Even where cases may not raise boundary issues directly, the question of when problems are sufficiently general to warrant allowing attacks in the general court system remains. The specialist body may make decisions consistent with the specialized rules but inconsistent with more general rules governing due process, for example. Thus, in the United States, social security disability decisions—"a system of mass administrative justice"—require a safety valve of access to the federal courts for review, "which has assured a sense that justice was achievable, even in a massive system that grudgingly accepts its gritty imperfections." Phyllis E. Bernard, *Social Security and Medicare Adjudications at HHS: Two Approaches to Administrative Justice in an Ever-Expanding Bureaucracy*. 3 HEALTH MATRIX 339, 353 (1993). In the particular case of American social security law, this has been complicated by the refusal of the specialist decision-making body to accept generalist courts' interpretations of the underlying law (the doctrine of nonacquiescence) and conflicts between the bureaucracy and the actual decision-makers charged with implementing the specialist regulations. Creating the institutional mechanisms necessary to control these problems, such as review authority in a higher level generalist court, is thus also important. Of course, if the generalist court is capable of the review function, this calls into question its lack of competence to handle the initial dispute.

76. Bruff, *supra* note 61, at 339 ("[T]he subject matter for specialized courts should be chosen "for its segregability from other claims."); Dreyfuss, *supra* note 44, at 409 (extent to which field can be segregated important to success of specialist institution). Not only can litigation over which disputes are appropriate destroy any gains in judicial economy created by specialization, but litigants are more likely to lose substantive rights through mistaken pursuit or non-pursuit of claims when they must maintain dual actions in specialist and generalist courts than where one body can hear all claims. *Id.* at 438-39. See also HOWARD, *supra* note 28, at 16 (criticizing New Zealand courts' handling of boundary problems in labor and employment law). Even sympathetic observers conclude "that the issue of jurisdiction is constantly evolving." Shirley Homewood, *Decision-making Trends in the Court and Tribunal*, in A SPECIALIST EMPLOYMENT LAW JURISDICTION 8 (1993).

77. ROBERTSON, *supra* note 2, at 17 (summarizing comments of New Zealand judges on jurisdictional problems); *id.* at 21 ("complex, haphazard and arbitrary nature of the jurisdictional divide between the Employment Court and the High Court"); *id.* at 42-54 (detailing specific boundary problems).

78. If health insurance is provided by an employer, for example, the collapse of a marriage raises issues about how the ex-spouse's coverage will be affected. Allocation of income

pects of our lives is one reason why cases are unlikely to fall neatly into boxes labeled "employment and labor" and "other."<sup>79</sup> As Bernard Robertson notes, "Employment cases can raise questions in contract, tort, equity, restitution, public law and even criminal law. It seems then that Employment Court judges, far from being experts in a narrow area, have to have a thorough understanding of the whole seamless web of the law, as do High Court judges."<sup>80</sup>

Changes in workplace structure also make it increasingly difficult to distinguish employment from other commercial relationships. As more individuals find themselves outside the traditional model of employment, classifying their relationships into either "employment" or "other" becomes more difficult. Robertson labels the distinction between contractors and employees as the "greatest" boundary problem, noting that "[t]wo people operating under very nearly the same contractual conditions can find their affairs regulated by entirely different procedural and substantive law."<sup>81</sup> Indeed, the blurring of such classifications is undoubtedly partially related to employment and labor law. As programs like workers' compensation become more expensive for employers, the incentive to restructure to avoid the legal label of employer increases.

Moreover, as Robertson notes, boundary problems multiply because the specialist and generalist courts may have different views of the appropriate boundary locations.<sup>82</sup> The creation of boundary disputes should thus be considered a major reason for avoiding specialist courts in labor and employment law.

### F. Cross-pollination

Specialization has costs for the development of the law in the areas covered by both the specialist and the residual generalist rules. Because both specialist and generalist judges are no longer directly exposed to the material seen by the other, the flow of legal ideas between the two is reduced.<sup>83</sup>

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and retirement and other benefits between former spouses is also necessary in many cases.

79. Distinguishing between employment law and labor law is itself becoming difficult in the United States, as an increasing number of decisions wrestle with the possible preemption of state employment law claims by federal regulatory statutes such as the National Labor Relations Act (NLRA) and Employment Retirement Income Security Act (ERISA) and attempts by employees covered by collective bargaining agreements to obtain the more generous remedies available at common law.

80. ROBERTSON, *supra* note 2, at 26.

81. *Id.* at 22.

82. *Id.* at 40-41.

83. POSNER, *supra* note 51, at 156 ("Judicial specialization would also reduce the cross-pollination of legal ideas."); Bernard, *supra* note 75, at 352 (Specialization will lead to "balkanization" of the judiciary.). Cross-pollination is important primarily to the extent that decisions will be improved by judges having broader experience. If the decision-maker is called upon to decide cases under a complex statutory scheme, then the benefit from cross-pollination is likely to be small. The more general the rules to be construed by the decision-

That exposure to a wide range of problems has important benefits: it is a better guarantee of "sound decision-making" than "initiation into an arcane set of mysteries,"<sup>84</sup> prevents judges from attributing an exaggerated importance to particular problems,<sup>85</sup> and prevents judges from relying on "preconceptions that the fresh mind unclouded with intimate knowledge would wish to reexamine,"<sup>86</sup> and prevents marginalizing the judges and the opinions they write.<sup>87</sup>

This is particularly important for labor and employment law; the task of interpreting contracts is one where exposure to a wide range of cases is likely to benefit the judge.<sup>88</sup> Even if special rules apply to particular provisions of employment contracts, they are still contracts and the techniques of contract interpretation are general ones. Moreover, understanding the differences between the special rules and the more general rules would be enhanced by experience with both forms.

The arguments made about the difficulties in drawing boundaries between employment and labor law and the rest of the law apply to the importance of doctrinal cross-pollination as well. As employment becomes more intermingled with other aspects of our lives, the benefits to law from developments elsewhere increase. This cross-flow has been important in the United States.<sup>89</sup> Indeed, the common law process depends on borrowing concepts, trying them, and adjusting them to fit the circumstances of new cases.<sup>90</sup>

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maker, the more useful cross-pollination is likely to be.

84. Bruff, *supra* note 61, at 331.

85. *Id.* at 331.

86. Currie & Goodman, *supra* note 43, at 69.

87. Dreyfuss, *supra* note 44, at 413.

88. Epstein, *supra* note 2.

89. For example, the implied covenant of good faith and fair dealing is a generally applicable contract law concept which some U.S. courts have applied to employment cases. Significant precedents in the early development of this doctrine have come from non-employment cases, particularly in the insurance area, where the concept is more fully developed. *See, e.g.*, *K Mart Corp. v. Ponsock*, 732 P.2d 1364 (Nev. 1987) (applying insurance law rationale to employment case). From an initial broad reading of the implied covenant, many American courts have backed away, limiting damages, rejecting it outright, or limiting its application. *See, e.g.*, *Decker v. Browning-Ferris Indus. of Colo., Inc.*, 931 P.2d 436, 443 (Colo. 1997) (covenant "is designed to ensure enforcement of other obligations assumed by the parties" to a contract). On the opposite end of the ideological spectrum, the at-will rule in the U.S. also developed in part by analogy to agency, real estate, and partnership cases and continues to be defended in part by analogies to some of those areas. *See, e.g.*, Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 958-62 (1984); Andrew P. Morriss, *Bad Data, Bad Economics, and Bad Policy: Time to Fire Wrongful Discharge Law*, 74 TEX. L. REV. 1901 (1996).

90. *See* Robert G. Natelson, *Running With the Land in Montana*, 51 MONT. L. REV. 17, 91 (1990) (arguing that borrowing legal concepts is best done through common law process).

### G. Judicial Quality

If there is a significant reduction in the caliber of the judges, the quality of decisions may be lowered.<sup>91</sup> Avoiding such a loss of quality is particularly important where the rationale for specialization depends in part upon the need for greater skills in the specialized body, however, undercutting the specialization's advantages in such cases. To the extent the gains from specialization come from successfully segregating technical matters from other legal issues, the potential for the court's business to become boring and repetitive increases as well, reducing the ability to attract good judges.<sup>92</sup> Specialist courts also may be less prestigious than generalist courts.<sup>93</sup> The importance of this effect is unclear, however, as the drop in quality of the judges may need to be substantial before a noticeable effect appears.<sup>94</sup>

However, neither New Zealand nor the United States appears to have experienced any trouble securing decision-makers of sufficient caliber for their higher level tribunals such as the Employment Court<sup>95</sup> or the NLRB. Lower-level tribunals in the United States, such as unemployment compensation boards, are more difficult to staff with "top" lawyers, which is more likely a reflection of their lack of status as non-judicial bodies and relatively low salaries, than of their specialized functions.

### III. CONCLUSION

Examined in terms of the general criteria for specialization, both New Zealand and the United States fall short of justifying their current institutions. New Zealand's specialist institutions are inconsistent with its general shift toward governing employment with general legal principles rather than

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91. Jordan, *supra* note 44, at 748; Currie & Goodman, *supra* note 43, at 70.

92. Dreyfuss, *supra* note 44, at 425.

93. Bruff, *supra* note 61, at 331; Jordan, *supra* note 44, at 748. Since a court's prestige plays a role in attracting qualified individuals to serve on it, reducing the court's prestige through specialization may reduce the attractiveness of judicial appointments. Increasing specialization at the appellate level would reduce the variety of judges' work and, Posner argues, would reduce job satisfaction. POSNER, *supra* note 51, at 150-52.

94. It is possible, for example, that simply reducing the number of elite law school graduates on the bench could improve the quality of decisions if they were replaced by graduates of "lesser" law schools more attuned to the practical consequences of their decisions and less focused on abstract legal theory. In an empirical work-in-progress with Professors Gregory Sisk and Michael Heise, we found no evidence that elite law school background made federal district judges more likely to behave differently in reviewing the constitutionality of the federal sentencing guidelines in 1988, including deciding on the constitutionality of the guidelines or in choosing among the various theories advanced on why the guidelines were unconstitutional. See Sisk et al., *supra* note 56.

95. Even critics of the Labour Court and Employment Court concede that its status is equal to the High Court. ROBERTSON, *supra* note 2, at 2. New Zealand Employment Court Chief Judge T.C. Goddard noted that two judges "promoted" to the Employment Court from the High Court would not be likely to wish to return to "getting their teeth into the general jurisdiction of the High Court." Goddard, *supra* note 59, at 3.

with specialist rules.<sup>96</sup> American specialist institutions are the result of ad hoc intrusions into the labor market. In both countries, moving toward generalist decision-makers would reduce the potential for capture, eliminate costly boundary disputes, and provide greater opportunities for the law's continued evolution. In sum, both countries' specialist institutions appear to resemble "crunchy" Vegemite, not the more wholesome variety of jams.

In particular, New Zealand needs to reexamine the issue of the appropriateness of its institutions independent of the issue of specialist rules. The United States would do well to follow New Zealand's example and make both its rules and institutions subject to a public debate. The lack of such debate will only grow more troubling as the increasing numbers of ad hoc labor market interventions generate increasing conflicts amongst themselves.

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96. See ROBERTSON, *supra* note 2, at 17 (noting that the former president of the Labour Party and former National Party Finance Minister agree that the ECA is inconsistent).