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Lisa B. Bingham

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Self-Determination in Dispute System Design and Employment Arbitration

BY

LISA B. BINGHAM*

INTRODUCTION

A private civil justice system is evolving, one that is relatively unconstrained by law and relatively uninformed by systematic empirical research. There are a variety of appropriate metaphors, even sound bites, to describe the current state of dispute resolution. Some call it "Wild West Justice."¹ This captures the notion of a dispute resolution frontier, one where justice is ad hoc. It also identifies emerging systems as existing in a state before civilization arrives, a state in which the strong and well-armed have certain distinct advantages. Another related metaphor is "Dispute Resolution Darwinism."² In its best light, this is often cast as allowing the bloom of one thousand conflict resolution processes.³ In theory, time will tell which process or system of processes is the "fittest."

We may already be witnessing the first mass extinction as large institutional organisms move in to occupy entire habitats in the civil justice ecosystem. For example, employers, sellers of consumer goods, banks, HMOs, and other institutional players in the economy are using adhesive arbitration clauses, and courts are enforcing them,⁴ despite the

* Keller-Runden Professor of Public Service, and Director, Indiana Conflict Resolution Institute, Indiana University School of Public and Environmental Affairs. The author gratefully acknowledges the able research assistance of Douglas Shontz and Charles R. Salter, candidates for the degree of juris doctor at Indiana University School of Law, Bloomington, Indiana. In addition, I thank Professors Ian Ayres, Jennifer Gerarda Brown, Edwin Greenebaum, Harry Mazzadoorian, Susan Summers Raines, and Leonard Riskin for helpful comments on earlier drafts of this work. This paper is an outgrowth of work presented at the Quinnipiac/Yale Workshop on Dispute Resolution. This work was supported in part by a grant from the William and Flora Hewlett Foundation to the Indiana Conflict Resolution Institute, Indiana University School of Public and Environmental Affairs, Bloomington, Indiana. Any errors are my own.

1. James F. Henry, *Some Reflections on ADR*, 2000 J. DISP. RESOL. 63, 68.

2. A. Nancy Welsh, *All in the Family: Darwin and the Evolution of Mediation*, 7 Disp. Resol. Mag. 20 (2001) (discussing the evolution of various models of mediation).

3. Frank E.A. Sander, *The Future of ADR*, 2000 J. DISP. RESOL. 3, 4. Professor Sander uses the metaphor to refer to the period 1975-1982. One could argue, however, that there have been two separate contexts in which we have experienced this evolutionary springtime. The first was within court systems and the judicial branch; the current spring is within companies, organizations, public agencies, and the executive branch.

4. A comprehensive review of the relevant case law is outside the scope of this article. See generally The Harvard Law Review 'Ass'n, *Developments in the Law—The Paths of Civil*

criticisms of many commentators.⁵ The arbitration clauses in turn can

Litigation: ADR, the Judiciary, and Justice: Coming to Terms with the Alternatives, 113 HARV. L. REV. 1753, 1851 (2000) (exploring developments of ADR generally, with attention to judicial use of ADR); RICHARD BALES, *COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT* (1997); David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73 (1999) (reviewing enforceability of adhesive arbitration clauses and arguing in favor of mandatory arbitration, provided there are certain reforms); Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344 (1997) (reviewing enforceability of predispute arbitration agreements and arguing that a well-designed private arbitration alternative for employment claims is in the public interest); Catherine Cronin-Harris, *Mainstreaming: Systematizing Corporate Use of ADR*, 59 ALB. L. REV. 847 (1996) (tracing expanded use of ADR within business world); Joseph T. McLaughlin, *Arbitrability: Current Trends in the United States*, 59 ALB. L. REV. 905 (1996) (observing that United States courts will enforce almost all arbitration agreements, regardless of the claims genesis as a statutory or non-statutory dispute); see also *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (holding that employment contracts are not exempt from the Federal Arbitration Act unless they pertain to transportation workers); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (holding that an arbitration clause in a franchise agreement was enforceable and that the Federal Arbitration Act preempted a state statute that voided the clause); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (reading the Federal Arbitration Act broadly and holding that an arbitration clause was enforceable in all interstate commerce); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (holding that the Federal Arbitration Act preempts state law and securities arbitration clauses allow arbitrators to award punitive damages); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (holding that an arbitration agreement in a securities representative registration document requires claim brought under the Age Discrimination in Employment Act to be subject to arbitration); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (holding that an arbitration clause in a distribution and sales agreement was enforceable). But see *Badie v. Bank of Am.*, 79 Cal. Rptr. 2d 273 (Cal. Ct. App. 1998) (holding that customers did not consent to bank's unilateral imposition of ADR clause by accepting change of terms provision in credit account contract).

5. See, e.g., Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 Hous. L. REV. 1237 (2001) (arguing that for consumers, the realities of arbitration differ from its idealized benefits); Sarah R. Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759 (2001) (arguing for reform of mandatory arbitration to protect one-shot players such as employees, consumers, insureds, victims of torts, and patients); Sidney Charlotte Reynolds, *Closing a Discrimination Loophole: Using Title VII's Anti-Retaliation Provision to Prevent Employers from Requiring Unlawful Arbitration Agreements as Conditions of Continued Employment*, 76 WASH. L. REV. 957 (arguing against mandatory arbitration); Ronald Turner, *Employment Discrimination, Labor and Employment Arbitration, and the Case Against Union Waiver of the Individual Worker's Statutory Right to a Judicial Forum*, 49 EMORY L.J. 135 (2000) (arguing that unions should not be permitted to negotiate mandatory arbitration of individual discrimination claims, and criticizing development of mandatory arbitration); Sharona Hoffman, *Mandatory Arbitration: Alternative Dispute Resolution or Coercive Suppression?*, 17 BERKELEY J. EMP. & LAB. L. 131 (1996) (arguing that mandatory arbitration of employment disputes tramples employee rights and thus contracts with such mandatory provisions should be voidable); Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449 (1996) [hereinafter Cole, *Incentives and Arbitration*]; Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996) [hereinafter Stone, *Yellow Dog Contract*] (arguing that workers' de jure rights cannot be enforced through mandatory pre-dispute arbitration systems and advocating legislative proposals to reverse the trend toward privatizing employment rights); Jean R. Sternlight, *Panacea or Corporate Tool?*:

displace voluntary conflict resolution, or even court- or agency-annexed mediation processes. Lawyers are replacing non-lawyer dispute resolvers.⁶ State court efforts to regulate mediation in the courts have led to certification requirements that displace non-lawyers,⁷ and also to debates

Debunking the Supreme Court's Preference for Binding Arbitration, 74 WASH. U. L.Q. 637 (1996) [hereinafter Sternlight, *Panacea or Corporate Tool?*] (criticizing the Supreme Court's preference for arbitration because allowing adhesive arbitration clauses permits "stronger parties to take advantage of weaker parties" and noting that "[a] General Accounting Office report concluded that most arbitrators who decided employment discrimination cases brought against the securities industry were white males with an average age of 60") (citing General Accounting Office, Pub. No. GAO/HEHS-94-17, *Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes* 2 (1994)); Jean R. Sternlight, *Focus, Simplicity vs. Fairness in Arbitration: Steps Need to Be Taken to Prevent Unfairness to Employees, Consumers*, 5 NO. 1 DISP. RESOL. MAG. 5 (1998) [hereinafter Sternlight, *Simplicity vs. Fairness*] (discussing the increased use of adhesive arbitration clauses in consumer contracts and arguing that the public may not be "better off" because of the trend); Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1993 J. DISP. RESOL. 1 (criticizing mechanisms that coerce parties to participate in ADR as inconsistent with ADR's philosophy of voluntariness).

6. Maureen E. Laflin, *Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 479 (2000) (noting an increase in the number of lawyer-mediators and arguing for ethical rules specifically targeted at this group); Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71 (1998); Carrie Menkel-Meadow, *New Roles: Problem Solving: The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 TEMP. L. REV. 785 (1999) (analyzing the expanding role of lawyers as dispute resolvers); Louis J. Weber, *Court-Referred ADR and the Lawyer-Mediator: In Service of Whom?*, 46 SMU L. REV. 2113 (1993) (describing court-referred ADR as an "additional" dispute resolution mechanism, an "add-on" procedure, and calling for the return to ADR as a public service, away from its current direction as a vehicle of profit for greedy lawyers scrambling in a depressed market).

7. Laflin, *supra* note 6, at 485 n.21 ("Most federal district courts and at least eight states require that mediators in civil cases be licensed attorneys The states include: Delaware, . . . Florida, . . . Idaho, . . . Indiana, . . . Louisiana, . . . Michigan, . . . Montana, . . . South Carolina, . . . and Washington D.C."); Stephanie A. Henning, Note, *A Framework for Developing Mediator Certification Programs*, 4 HARV. NEGOT. L. REV. 189 (1999) (arguing that certification requirements should focus on training and performance tests, and avoid basing requirements on professional background or advanced degrees because limiting mediators to lawyers and psychologists reduces the amount of innovation and diversity in the mediation field); Dana Shaw, Comment, *Mediation Certification: An Analysis of the Aspects of Mediator Certification and an Outlook on the Trend of Formulating Qualifications for Mediators*, 29 U. TOL. L. REV. 327 (1998) (advocating a need for mediator certification requirements and supporting National Standards for Court-Connected Mediation Programs created by the Center for Dispute Settlement and the Institute of Judicial Administration); Weber, *supra* note 6, at 2115 (describing court-referred ADR as an "add-on" procedure and calling for the return to ADR as a public service, away from its current direction as a vehicle of profit for greedy lawyers scrambling in a depressed market); Elizabeth Plapinger & Donna Stienstra, *Federal Court ADR: A Practitioner's Update*, 14 ALTERNATIVES TO HIGH COST LITIG. 7 (1996) ("Almost all federal courts, and many state courts, offer litigants at least one ADR process; some have a full array of ADR options."); *see also* Local Rules of the United States District Courts for the Southern and Eastern Districts of New York Local Civil Rules, S. & E.D. N.Y. U.S.D.C. Civil L.R. 83.12 (2000) (providing that a potential mediator must be member of any state bar or D.C. bar); Rules of Practice and Procedure for

over the unauthorized practice of law.⁸ The Dispute Resolution Section of the American Bar Association is the fastest growing section of the bar,⁹ open to lawyer and non-lawyer dispute resolvers alike. It has a policy that the field is broad enough for both kinds of professionals. Nevertheless, professional associations representing non-lawyer dispute resolvers, the Society for Professionals in Dispute Resolution, and the Academy of Family Mediators, have merged to form the Association for Conflict Resolution,¹⁰ in the hope that this larger, stronger life form can hold its own in the competition for habitat. In the face of this mass extinction, even if we assume for the sake of argument that the fittest dispute resolution systems will survive, the question remains: fittest for what?

Most dispute resolvers function like the Lone Ranger, another useful metaphor. They ride in, solve the conflict, save the day, and depart, leaving the parties to wonder: "Who was that masked neutral?" Usually, these lone rangers take the dispute system design as they find it. They do not participate in creating it. Usually, they do not have many cases within a single system, so they do not develop a larger perspective. If they have more than one case, they may have isolated snapshots of the system instead of the whole, continuously-moving picture. They rely on codes of ethics and voluntary standards of professional conduct to police the system.¹¹ However, conflict of interest rules, particularly for lawyer-

Contested Cases Under the Oregon Safe Employment Act, Jurisdiction over Appeals: Untimely Appeals, Mediator Qualifications, OR. ADMIN. R. 438-085-0210 (2000).

8. Carrie Menkel-Meadow, *Is Mediation the Practice of Law?*, 14 ALTERNATIVES TO HIGH COST LITIG. 57 (1996) (suggesting mediation is practicing law, especially in "evaluative mediation" in which legal predictions are made or settlements are drafted); Geetha Ravindra, *State ADR: Balancing Mediation with Rules on Unauthorized Practice*, 18 ALTERNATIVES TO HIGH COST LITIG. 21 (2000) (arguing mediation is practicing law and discussing general guidelines to assist mediators to avoid the practice of law when mediating disputes); Bruce Meyerson, *ADR Ethics Forum: Mediation Should Not Be Considered the Practice of Law*, 18 ALTERNATIVES TO HIGH COST LITIG. 107 (2000) (arguing that mediation is not practicing law because mediators are neutral and not serving a "client's interest alone").

9. American Bar Association Section of Dispute Resolution, *ABA Section of Dispute Resolution Annual Report 1998-1999*, at <http://www.abanet.org/dispute/yrend99.html> (last visited July 15, 2002) (noting that the Dispute Resolution Section posted the highest growth rate of any in the American Bar Association).

10. Jerome O. Pitt, *Conflict Resolution Organizations to Merge*, IND. LAW., July 5, 2000, at 11 (discussing merger of Society of Professionals in Dispute Resolution (SPIDR), the Academy of Family Mediators (AFM), and the Conflict Resolution Education Network (CREnet)); Conflict Resolution Education Network, *Historic \$2.45 Million Grant Awarded for Merger of AFM, CREnet and SPIDR*, at http://www.crenet.org/About_CREnet/confed.htm (last visited July 15, 2002) (announcing merger plan and schedule). See Internet homepage of the Association for Conflict Resolution, at <http://www.acresolution.org> (last visited July 15, 2002).

11. Jack M. Sabatino, *ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289 (1998) (discussing standards created by private firms and courts for alternative dispute resolution proceedings);

dispute resolvers,¹² have driven them into isolating solo practice, where it is easy to lose perspective on how one neutral's experiences relate to the evolving systems. Neutrals discuss how to get through impasse or render solvable the intractable.¹³ Some of the talk is about the edge at which the public civil justice system regulates what neutrals do; thus, the proposed Uniform Mediation Act¹⁴ and the revision of the Uniform

Tanya A. Yatsco, Comment, *How About a Real Answer? Mandatory Arbitration as a Condition of Employment and the National Labor Relations Board's Stance*, 62 ALB. L. REV. 257, 281 (1998) (calling the Due Process Protocol an "excellent beginning" to help standardize arbitration); Carrie Menkel-Meadow, *Professional Responsibility for Third Party Neutrals*, 11 ALTERNATIVES TO HIGH COST LITIG. 129 (1993) (suggesting a need for ABA Model Rules to include a code of ethics for third-party neutrals including: conflicts of interest, bias, impartiality, fees, party counseling, disclosure, and information); Laflin, *supra* note 6, at 479 (advocating need for uniform rules applying to mediators, especially lawyer-mediators); *see also* American Arbitration Association, *Commercial Dispute Resolution Procedures*, at <http://www.adr.org/> (last visited July 15, 2002); American Arbitration Association, *National Rules for the Resolution of Employment Disputes*, at <http://www.adr.org/> (last visited July 15, 2002); CPR Institute for Dispute Resolution, *CPR Rules for Non-Administered Arbitration*, at <http://www.cpradr.org/> (last visited July 15, 2002); CPR Institute for Dispute Resolution, *Principles for ADR Provider Organizations* (draft for comment, June 2000), at <http://www.cpradr.org/> (last visited July 15, 2002).

12. Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871 (1997) (advocating strict conflict of interest rules and the need to prevent lawyers from representing one of the parties from a mediation over which he presided); Amanda K. Esquibel, *The Case of the Conflicted Mediator: An Argument for Liability and Against Immunity*, 31 RUTGERS L.J. 131, 172 (1999) (arguing that conflicted mediators should not have immunity "because it cuts off avenues of truth seeking and redress"); Michelle D. Gaines, *A Proposed Conflict of Interest Rule for Attorney-Mediators*, 73 WASH. L. REV. 699, 700, 729 (1998) (proposing conflict of interest rule for attorney-mediators that "protects the parties to mediation, preserves public acceptance of mediation, and encourages attorneys to practice mediation," and "should be adopted as part of the Rules of Professional Conduct in all states").

13. *See generally* Howard Gadlin & Elizabeth Walsh Pino, *Neutrality: A Guide for the Organizational Ombudsperson*, 13 NEGOT. J. 17 (1997) (discussing techniques to maintain the ombudsperson's appearance of neutrality); Kenneth Kressel, *Practice-Relevant Research in Mediation: Toward a Reflective Research Paradigm*, 13 NEGOT. J. 143 (1997) (advocating greater use of reflective analysis for mediation research as opposed to traditional empirical research methods through a case study of divorce mediation and citing from the works of Donald Schon); Don Peters, *Mapping, Modeling, and Critiquing: Facilitating Learning Negotiation, Mediation, Interviewing, and Counseling*, 48 FLA. L. REV. 875 (1996) (advocating use of reflective learning for law students, especially for interviewing, counseling, and mediation skills through contact with practicing attorneys); Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 389-90 (1995) (drawing analogies between Donald Schon's theories on reflective practice and current knowledge of cognitive science, and advocating greater use of reflective analysis in legal education).

14. Bridget Genteman Hoy, Comment, *The Draft Uniform Mediation Act in Context: Can it Clear up the Clutter?*, 44 ST. LOUIS U. L.J. 1121, 1123 (2000) (arguing that the intent of the Uniform Mediation Act (UMA) is "commendable," but it "may fail to unify the states on all salient issues, it inappropriately applies to private mediation [and] its broad applicability may prevent it from clearing up the clutter of mediation regulation"); Mindy D. Rufenacht, Comment, *The Concern Over Confidentiality in Mediation—An In-Depth Look at the Protection Provided by the Proposed Uniform Mediation Act*, 2000 J. DISP. RESOL. 113, 134 (arguing that the UMA's confidentiality provision "will provide adequate protection for all parties involved in mediation");

Arbitration Act have both generated substantial debate at conferences.¹⁵

Relatively little discussion addresses evolving dispute resolution systems. The story of six blind people and the elephant is another apt metaphor for neutrals as lone rangers. Each can feel some piece of the mammoth alternative dispute resolution (ADR) field, but none can get a grip on the whole. Instead, there is substantial argument about the right way, and the wrong way, to practice. Most commentary addresses dispute resolution at the case level.

Nevertheless, there is some excellent work examining systemic issues. A small, brave band toils in the field of voluntary protocols, setting best practices standards such as those for integrated conflict management system design, broader codes of ethics for third party providers of neutrals, and other means of self-regulation for a field that knows no single professional or disciplinary home.¹⁶ These happy few attempt to

National Conference of Commissioners on Uniform State Laws, *Draft Uniform Mediation Act*, available at <http://www.pon.harvard.edu/guests/uma/> (last visited July 15, 2002) (containing information about the reasons for drafting the UMA and information about the process).

15. National Conference of Commissioners on Uniform State Laws, *supra* note 14; Departments, ADR News, *Revised UAA Adopted*, 55-Oct. DISP. RESOL. J. 6 (2000) ("National Conference of Commissioners on Uniform State Laws ('NCCUSL') voted overwhelmingly to adopt the Revised Uniform Arbitration Act ('RUAA')."); Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 58-59 (1999) (advocating contract model of arbitration and discussing AAA's opposition to "judicialized arbitration" in revision of the Uniform Arbitration Act (UAA)); Resources, *A Summary of a Recent Committee Document on the RUAA*, 11 WORLD ARB. & MEDIATION REP. 84 (2000) (discussing RUAA, motivations of the drafting committee, and recent court decisions impacting the revision process); Timothy J. Heinsz, *Revised Uniform Arbitration Act: Discovery, Punitive Damages, Review, Attorney Fees All Get Tentative OK by NCCUSL Drafting Committee*, 5 No. 1 DISP. RESOL. MAG. 15, 21 (1998) (stating that while no revisions to UAA are final, "changes and additions that have been made are intended to maintain the arbitral concepts of party autonomy, speed, low cost, efficiency, finality and fairness").

16. SPIDR, *Guidelines For The Design Of Integrated Conflict Management Systems Within Organizations*, at <http://www.spidr.org/article/icmsD.html> (last visited July 15, 2002); CPR Inst. for Dispute Resolution, *Principles for ADR Provider Organizations*, available at <http://www.cpradr.org> (last visited July 15, 2002); CPR Inst. for Dispute Resolution, *Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral* (draft for comment, Apr. 1999), at <http://www.cpradr.org/>; Comm'n on Ethics and Standards of Dispute Resolution, *ADR Ethics Project*, at <http://www.cpradr.org/ethics.htm> (last visited July 15, 2002); Am. Arbitration Ass'n, *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship*, at <http://www.adr.org> (last visited July 15, 2002); Am. Arbitration Ass'n, *A Due Process Protocol for Mediation and Arbitration of Consumer Disputes*, at <http://www.adr.org> (last visited July 15, 2002); Am. Arbitration Ass'n, *Health Care Claims Settlement Procedures*, at <http://www.adr.org> (last visited July 15, 2002); see also, Mary Rowe, *The Post-Tailhook Navy Designs an Integrated Dispute Resolution System*, 9 NEGOT. J. 207 (1993) (discussing characteristics and implementation of United States Navy's conflict management system); Cathy A. Constantino, *Using Interest-Based Techniques to Design Conflict Management Systems*, 12 NEGOT. J. 207, 208 (1996) (discussing six principles to use in designing a conflict management system and arguing for the need to involve all of the stakeholders in the design process).

step back to take a broader, systematic perspective and to influence the direction of ADR's evolution. They walk the talk by having broad, inclusive, consensus-based processes. It is a difficult, time-consuming, valiant, and valuable effort. In the end, the best case scenario is that a court will cite the work product as persuasive authority on the question of the legal limits of the evolving ADR system.¹⁷ However, there is little hard evidence, few statistics, and limited systematic public policy research to prove that any of the proposed ways is the right way, or even an effective way.

There is an issue underlying these efforts, a current of tension in the discussions, that concerns one of the core values underlying ADR: disputant self-determination. Proponents of alternative or appropriate dispute resolution often argue its chief value is disputant control over the process.¹⁸ This notion of disputant control or self-determination is distinct from legal consent. It is not the same concept as voluntary consent

17. *Conn. Gen. Life Ins. Co. v. Sun Life Assur. Co. of Can.*, 210 F.3d 771, 773 (7th Cir. 2000) (citing Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473 (1987)); *Bailey v. Fed. Nat'l Mortgage Ass'n*, 209 F.3d 740, 745 (D.C. Cir. 2000) (citing Harry T. Edwards, *Where Are We Heading with Mandatory Arbitration of Statutory Claims in Employment?*, 16 GA. ST. U. L. REV. 293 (2000); Morton H. Orenstein, *Mandatory Arbitration: Alive and Well or Withering on the Vine?*, 54 DISP. RESOL. J. 57 (1999)).

18. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996) (discussing continuums of mediator roles from facilitative-broad to evaluative-narrow and highlighting the importance of at least some disputant control over the mediation in three out of the four mediator roles); Neil Vidmar & Jeffrey Rice, *Jury-Determined Settlements and Summary Jury Trials: Observations About Alternative Dispute Resolution in an Adversary Culture*, 19 FLA. ST. U. L. REV. 89, 93 (1991).

Although a substantial body of empirical research has found that control is a very significant factor in determining whether disputants will judge a procedure as fair, the matter is more complicated. In many conflicts, the disputants perceive the need to have a third party, rather than themselves, decide the outcome. They recognize that their interests are diametrically opposed, and an authoritative ruling is needed. They want to retain control over evidence gathering, presentation, and arguments about the meaning of the evidence but recognize that someone else, a neutral third party, needs to decide the final outcome. Thus, procedures that include important aspects of adversary adjudication or arbitration are often judged more fair and acceptable than those, such as mediation, that do not The proponents also ignore the social and psychological limits of disputants' desire for control over the resolution process, and they misconceive legal-adversarial approaches to disputes as incompatible with—indeed, hostile to—ADR.

Id.; Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1 (1991); Joel Kurtzberg & Jamie Henikoff, *Freeing the Parties from the Law: Designing an Interest and Rights Focused Model of Landlord/Tenant Mediation*, 1997 J. DISP. RESOL. 53 (1997) (disputing critics of mediation by noting that because of self-determination in the process, mediation has advantages over traditional courts because "it encourages the parties to craft creative solutions to their problems"); see also JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975); E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

for purposes of imputing agreement to an adhesive arbitration clause.¹⁹ Instead, self-determination includes procedural justice notions of a disputant's perceptions of control and fairness. I argue here that dispute systems vary across two separate dimensions of disputant self-determination. Those dimensions are disputant self-determination in the design of the system as a whole, and disputant self-determination within a given case using a specific dispute resolution process provided by the overall system design. Self-determination in dispute system design includes making choices regarding what cases are subject to the process, which process or processes in sequence are available (mediation, early neutral evaluation, and binding arbitration, for example), what due process rules apply, and other structural choices for setting up a private justice system. Self-determination at the case level includes whether the process results in a voluntary, negotiated settlement agreement or an imposed binding third party decision. It includes self-determination as to process and outcome within a given dispute involving a single set of parties. Most discussions of self-determination in dispute resolution tend to ignore the system design level, or assume that self-determination is present, or conflate the two levels.

Part I of this article will review the proposed distinction between self-determination at the case level and self-determination in dispute system design. The remaining three parts of the article focus on arbitration of labor and employment disputes. Part II examines what we know about systems in which both parties have full self-determination over dispute system design. Part III examines adhesive binding arbitration in employment disputes, i.e., a dispute system design imposed by one party. In this part, I present original empirical research on employment arbitration award patterns before and after implementation of the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of Employment (the "Due Process Protocol" or the "Protocol").²⁰ This research provides evidence of a change in the overall pattern of outcomes after the Protocol, which is intended to regulate employer-promulgated arbitration plans. Part IV briefly reviews third party dispute system designs, for example, arbitration programs designed for the disputants by a court, legislature, or administrative agency. I conclude that there is evidence that self-determination as to

19. For a discussion of legal consent in arbitration, see Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83 (1996) [hereinafter Ware, *Employment Arbitration*].

20. See generally JOHN T. DUNLOP & ARNOLD M. ZACK, *THE MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES* (1997). The text of the Due Process Protocol is available as an appendix in this volume, or at the website of the American Arbitration Association, at www.adr.org.

dispute system design has an impact on how a dispute resolution system functions, and that this impact has not been adequately explored by researchers or considered by courts.

I. SELF-DETERMINATION WITHIN A SINGLE CASE CONTRASTED WITH SELF-DETERMINATION IN DISPUTE SYSTEM DESIGN

The Model Standards of Conduct for Mediators provide in several sections for party "self-determination."²¹ They suggest that mediation is based on the principle of self-determination, that mediators must have qualifications necessary to satisfy the reasonable expectations of the parties, that mediators must conduct the process in a manner consistent with party self-determination, and that they have a duty to improve the practice of mediation.²² These standards do not define self-determination, nor do they distinguish between self-determination at the case level and self-determination in system design. I use self-determination at the case level to refer to a single set of disputing parties in conflict within a given dispute resolution process, for example, a single mediation case or a single arbitration case. Self-determination at this level refers to the parties' experience of control over both process and outcome in a single dispute.

Self-determination in dispute system design refers to control over the structure of a process or set of processes to handle a series of disputes. There is an established and growing body of literature on dispute system design that focuses primarily on a dispute resolution program within an organization, not the courts.²³ Most of these discussions

21. They provide in relevant part:

I. Self-Determination: A Mediator shall recognize that mediation is based on the principle of self-determination by the parties. ***

IV. Competence: A Mediator shall mediate only when the mediator has the necessary qualifications to satisfy the reasonable expectations of the parties. ***

VI. Quality of the Process: A Mediator shall conduct the mediation fairly, diligently, and in a manner consistent with the principle of self-determination by the parties. ***

IX. Obligations to the mediation process: Mediators have a duty to improve the practice of mediation."

Am. Arbitration Ass'n, American Bar Association Dispute Resolution Section & Litigation Section, & Society of Professionals in Dispute Resolution, *Model Standards of Conduct for Mediators*, at <http://www.abanet.org/ftp/pub/dispute/modstan.txt> (last visited July 15, 2002).

22. *Id.*

23. See generally CATHERINE A. COSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS* (1996); WILLIAM URY ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO HANDLE CONFLICT* (1989); see also Corinne Bendersky, *Culture: The Missing Link in Dispute Systems Design*, 14 NEGOT. J. 307 (1998) (advocating a need to tailor dispute systems with company culture and examine similarities between explicit/policy-driven dispute resolution and implicit methods of dispute resolution); Costantino, *supra* note 16, at 62-65 (advocating use

assume that the sponsoring company, organization, or agency will make the ultimate choices about the final dispute system design. Since the leading professional organizations approved Model Ethical Standards at a time when courts had already implemented mandatory mediation programs, it is reasonable to conclude that its drafters contemplated self-determination as to outcome at the individual case level. In mandatory court-annexed programs, legislatures and courts effectively make dispute system design choices for the parties before the parties use mediation for a given case. The legislatures authorized courts to mandate mediation and the courts are exercising that power.²⁴

A number of leading scholars have helped us develop a better understanding of what self-determination might mean at the case level.²⁵ These scholars distinguish between self-determination as to process and

of "interest-based" design in which the designer acts to facilitate design by working with all of the stakeholders). Early work by Ury, Brett, and Goldberg took the collectively bargained grievance procedure as a model of a dispute system, and experimented with innovations including grievance mediation, or the use of mediation for labor grievances after they were filed but before they reached binding arbitration. Jeanne M. Brett & Stephen B. Goldberg, *Grievance Mediation in the Coal Industry: A Field Experiment*, 37 INDUS. & LAB. REL. REV. 49 (1983). The literature discusses issues such as providing multiple points of access to the system, including loop-backs from impasse to negotiation, arranging steps in a sequence from interest-based to rights-based processes, and structuring the system to move from low cost to high cost processes. COSTANTINO & MERCHANT, *supra* at 59-61. Dispute system designers advocate soliciting input from the potential users of the process through focus groups and stakeholder participation mechanisms. *Id.* at 62-65. There is literature on the value of an ombudsperson's office, and an emerging movement toward integrated conflict management systems for all the various grievance or dispute resolution processes available within an organization. See Lisa B. Bingham & Denise R. Chachere, *Dispute Resolution in Employment: The Need for Research*, in EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE 104-05 (Adrienn E. Eaton & Jeffrey H. Keefe eds., 1999). See also SPIDR, *supra* note 16.

24. See generally John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?* 24 FLA. ST. U. L. REV. 839, 844 (1997) (discussing Florida rules and arguing for high quality consent by parties, including explicit consideration of parties' goals and interests, explicit identification of plausible options, parties' explicit choice of options for consideration, careful consideration of options, mediators' restraint in pressuring parties to select particular options, limitation on use of time pressure, and confirmation of consent, all in light of evolving "litimediation" culture in which mediators view lawyers, not parties, as clients); see also C.H. Crowne, *The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice*, 76 N.Y.U. L. REV. 1768 (2001).

25. Jennifer Gerarda Brown, *Ethics in Environmental ADR: An Overview of Issues and Some Overarching Questions*, 34 VAL. U. L. REV. 403 (2000) (advocating intervention by a mediator to insure greater self-determination by parties in the context of environmental disputes); Robert A. Baruch Bush, "What Do We Need a Mediator for?": Mediation's "Value-Added" for Negotiators, 12 OHIO ST. J. ON DISP. RESOL. 1, 34 (1996) (arguing "evidence shows clearly that disputants place great value on the degree and quality of participation" in mediation and that mediators should place less emphasis on evaluation and more on "empowering" the disputants in the process); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 93 (2001) (emphasizing a need to "clarify the meaning of 'self-determination' and to develop effective mechanisms to protect it," because of the "institutionalization of court-connected mediation").

as to the outcome of that process.²⁶ The debate regarding transformative, facilitative, and evaluative mediation usually addresses this aspect of the concept of self-determination.²⁷ The debate concerns how a mediator should perform services within a given case. Should the mediator attempt to engender empowerment and recognition among the parties?²⁸ Should mediators adopt a variety of techniques based on the level at which the conflict lives?²⁹ Does the mediator usurp party self-determination when she gives an opinion regarding the likely outcome of a case in court?³⁰ Recent commentary regarding the role of counsel in mediation also tends to focus its analysis on the case level. These discussions concern concepts such as mediation advocacy³¹ and the changing nature of mediation experienced within a given case when courts create private markets by mandating that parties represented by counsel participate in the process.³²

Relatively little commentary discusses self-determination in the area of dispute system design. Increasingly, commentators advocate requiring that counsel inform clients of alternative or appropriate dispute resolution generally, and the different kinds of processes in particular.³³

26. Welsh, *supra* note 25, at 7 (containing extensive discussion of self-determination as to the mediation process and advocating a protection by making the outcome of settlement subject to a cooling off period).

27. Riskin, *supra* note 18, at 13 (proposing a grid for understanding mediation practice with two dimensions of mediator roles from facilitative to evaluative, and scope of mediated issues from broad to narrow); Carrie Menkel-Meadow, *The Many Ways of Mediation*, 11 NEGOT. J. 217 (1995) (reviewing recent literature regarding different methods of mediation); Robert A. Baruch Bush, *A Study of Ethical Dilemmas and Policy Implications*, 1994 J. DISP. RESOL. 1, 49 (proposing mediator standards of practice that focus on "categories of ethical dilemmas").

28. See generally ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).

29. See generally BERNARD MAYER, *THE DYNAMICS OF CONFLICT RESOLUTION* (2000).

30. Baruch Bush, *supra* note 27, at 22 (noting that a survey of Florida mediators found the dilemma "reported more often than any other" was preserving self-determination when "tempted to give the parties a solution" or "tempted to oppose a solution formulated by the parties").

31. See, e.g., Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 274 (1999) (arguing that while lawyers need to modify their method of advocacy for mediation, adversarial behavior should not be abandoned and lawyers should consult with clients on division of responsibilities for mediation to overcome "economic and psychological," or strategic barriers to an appropriate settlement); Peter Robinson, *Contending with Wolves in Sheep's Clothing: A Cautiously Cooperative Approach to Mediation Advocacy*, 50 BAYLOR L. REV. 7 963, 965 (1998) (discussing competitive and cooperative techniques for mediation advocacy, need for "balanced and flexible approach to mediation," and need to make "conscious strategic decisions" in determining advocacy method).

32. John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 841 (1997) (asserting that the increased use of court-mandated mediation will increase the number of lawyers who specialize in mediation and increase the amount of advocacy used in mediation).

33. Plapinger & Stienstra, *supra* note 7, at 8.

This provides an opportunity for party self-determination in dispute system design, if only the design of a process for a single case. Scholars advocate fully informed consent by clients; this requires that lawyers and their clients understand the difference between mediation and arbitration, and the differences among various models of mediation.³⁴ However, there is often an unstated assumption that the client is represented by counsel and has a choice in how to design an ADR process for the case. Many disputants act pro se. The most controversial new systems give employee or consumer disputants no choices in ADR system design and may even prohibit representation by counsel.³⁵

In parallel to this commentary is the increasingly heated discussion among arbitration scholars regarding the legitimacy of adhesive arbitration clauses, or "mandatory arbitration."³⁶ The current state of the law is that the stronger contracting party may require the weaker contracting party to participate in arbitration of any disputes arising out of the contract through an adhesive clause, provided that clause meets the standards for enforcing a contract in that jurisdiction. These standards include defenses such as duress, unconscionability, fraud, and, to a limited extent, public policy.³⁷ In this context, if the weaker party proceeds

34. Edwin H. Greenebaum, *On Teaching Mediation*, 1999 J. DISP. RESOL. 115 (discussing models of mediation and roles of mediators in context of clinical education in mediation).

35. Mei L. Bickner et al., *Developments in Employment Arbitration: Analysis of a New Survey of Employment Arbitration Programs*, 52-JAN DISP. RESOL. J. 8 (1997).

36. See, e.g., Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000) [hereinafter Sternlight, *Will the Class Action Survive?*]; Colin P. Johnson, Comment, *Has Arbitration Become a Wolf in Sheep's Clothing?: A Comment Exploring the Incompatibility Between Pre-Dispute Mandatory Binding Arbitration Agreements in Employment Contracts and Statutorily Created Rights*, 23 HAMLINE L. REV. 511 (2000); Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399 (2000); Harry T. Edwards, *Where are We Heading with Mandatory Arbitration of Statutory Claims in Employment?*, 16 GA. ST. U. L. REV. 293 (1999); Beth E. Sullivan, *The High Cost of Efficiency: Mandatory Arbitration in the Securities Industry*, 26 FORDHAM URB. L.J. 311 (1999); Christine Stegehuis, *Mandatory Arbitration and the Medical Malpractice Plaintiff*, 27-MAY COLO. L. 77 (1998); Richard E. Speidel, *Symposium on Trial: Consumer Arbitration of Statutory Claims: Has Pre-Dispute (Mandatory) Arbitration Outlived its Welcome?*, 40 ARIZ. L. REV. 1069 (1998); John P. Roberts, *Mandatory Arbitration by Financial Institutions*, 50 CONSUMER FIN. L.Q. REP. 365 (1996); Anne Brafford, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?*, 21 J. CORP. L. 331 (1996); Heidi M. Hellekson, Note, *Taking the "Alternative" Out of the Dispute Resolution of Title VII Claims: The Implications of a Mandatory Enforcement Scheme of Arbitration Agreements Arising Out of Employment Contracts*, 70 N.D. L. REV. 435 (1994); Michael Z. Green, *Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap for the Unwary Consumer?*, 5 LOY. CONSUMER L. REV. 112 (1993).

37. See, e.g., Ware, *Employment Arbitration*, *supra* note 19, at 120-28 (arguing that all standard contract defenses should apply in disputes over voluntary consent to adhesive arbitration clauses, focusing in particular on duress); Hoffman, *supra* note 5, at 149 (suggesting that in addition to duress and unconscionability, a public policy defense can be used in situations "where

with the economic relationship (employment, health care treatment, purchase of consumer goods and services), the weaker party is deemed to have consented to the clause. The entire economic relationship is presented as a take it or leave it offer; dispute system design is part of this larger whole. This is consent as a legal concept.³⁸ A variety of disgruntled would-be litigants would assert forcefully that it is not voluntary consent or self-determination as a subjective, psychological concept.³⁹ In this context, it is clear that the weaker party and its counsel have no control over dispute system design—at least that is the case after the parties have entered into the economic relationship. The economically more powerful party has already made all the design choices in adopting the arbitration plan. Some scholars argue that arbitration in these contexts should not be called appropriate or alternative dispute resolution at all.⁴⁰ Professor Fiss's argument against settlement is most forceful here because the disputants who might be motivated to make new law or set precedent are contractually disabled from doing so.⁴¹

This debate illustrates the tension between self-determination as an underlying core value of ADR and the notion of legal consent as a historical reality. Distinguishing between self-determination at the case level and self-determination in system design can foster a more productive discussion of this tension. Table 1 is an effort to illustrate the different dimensions of self-determination in ADR.

Congress or a state legislature has created statutory rights benefiting one party, which arguably limit the ability to arbitrate disputes relating to those rights”).

38. See Ware, *Employment Arbitration*, *supra* note 19, at 103-12; Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1358 (1997)

(arguing that “arbitration clauses should be invalidated if they fail to satisfy general principles of contract law, in the absence of other circumstances indicating that the employee understood what he was waiving. But to go further and insist that these clauses will be upheld only if they satisfy some vague test for ‘voluntariness’ is problematic”).

39. See, e.g., Maura Dolan, *State High Court Limits Companies' Use of Arbitration*, L.A. TIMES, Aug. 25, 2000, at A1; Mary Williams Walsh, *Court Considers if Employer Can Force Pledge Not to Sue*, N.Y. TIMES, Nov. 3, 2000, at A1; Jenny Strasburg, *Workers Fight Lawsuit Waiver; Justices Will Decide Whether Employers Can Force Mandatory Arbitration on Hires*, S.F. EXAMINER, May 31, 2000, at C1; *Proceeding Under Fire: Consumers, Employees Face Take-It-Or-Learn-It Contracts*, S.F. EXAMINER, Apr. 30, 2000, at B1; Davan Maharaj, *Arbitration Clauses Upheld in State Court*, L.A. TIMES, Sept. 15, 1999, at 19; David Segal, *Short-Circuiting the Courts; An Overburdened Legal System Has Turned Mediation into Big Business*, WASH. POST, Oct. 7, 1996, at F12.

40. Jean R. Sternlight, *Is Binding Arbitration a Form of ADR?: An Argument that the Term “ADR” Has Begun to Outlive Its Usefulness*, 2000 J. DISP. RESOL. 97.

41. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

TABLE 1. SELF-DETERMINATION AT THE CASE LEVEL AND IN DISPUTE SYSTEM DESIGN.

<i>Self-Determination in Individual Case</i>		
Self-Determination in System Design	Parties Control Outcome	Third Party Controls Outcome
Both/All Parties	A. Ad hoc mediation Ad hoc non-binding evaluative processes	D. Ad hoc arbitration Labor arbitration Negotiated binding processes
One Party	B. Mandatory or voluntary mediation Mandatory or voluntary non-binding processes	E. Adhesive binding arbitration
Third Party	C. Court-annexed mediation or non-binding processes (mandatory or voluntary) Public sector labor mediation	F. Court or administrative adjudication Legislated binding arbitration

This table contains six different cells. Cells A, B, and C form the left hand column and address different levels of self-determination in dispute system design in mediation and among other non-binding processes in which parties retain control over, or self-determination as to, the outcome at the case level. These cells represent arm's length negotiated use of mediation, adhesive mediation structured by one party, and court connected mediation and non-binding ADR. I have recently addressed these in detail elsewhere.⁴² Cells D, E, and F form the right hand column of Table 1 and address different levels of self-determination in various forms of binding arbitration, an ADR process in which the parties cede control over the outcome to a third party who issues a binding decision subject to limited judicial review. These cells include arm's length negotiated use of binding arbitration, adhesive binding arbitration imposed by a stronger contracting party on a weaker party, and binding arbitration imposed by an authoritative third party such as the legislature. The following sections will address in turn each of these three cells or categories of self-determination in dispute system designs using binding arbitration.

42. Lisa B. Bingham, *Why Suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution*, 2002 J. DISP. RESOL. 101.

II. BOTH DISPUTANTS HAVE FULL SELF-DETERMINATION IN SYSTEM DESIGN, AND CHOOSE TO CEDE SELF-DETERMINATION OVER CASE OUTCOME (CELL D)

In Cell D, the parties mutually determine system design; they mutually agree to cede control over the outcome to an arbitrator. Into this category falls labor and voluntary arm's length negotiated use of binding arbitration. This category also includes arbitration by post dispute submission or pre-dispute ad hoc arbitration when mutually agreed as contrasted with imposed. System design self-determination is high because the parties can negotiate together over key design features. These features include, but are not limited to: (1) the types of cases that the parties wish to submit to binding arbitration; (2) the relevant rules, provider, or neutrals; (3) discovery; (4) the time frame for decision; (5) the decision standard; and (6) the form and nature of decision (a naked award or a reasoned decision). However, self-determination at the case level is low because once the parties present their evidence to this private judge, the power to decide the outcome of the process is no longer in their hands. Short of a timely, voluntary, negotiated settlement and withdrawal of the case from the process, the arbitrator will dictate the outcome. That award will be relatively final and difficult to overturn in a court.⁴³

Some might argue that there is self-determination at the case level because the parties themselves chose a binding process. This conflates the two dimensions of self-determination. There is social-psychological literature demonstrating that disputants report lower satisfaction with control over the process in binding arbitration than in mediation.⁴⁴ This

43. Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443, 503 (1998) (proposing a new paradigm for commercial arbitration to reduce "tension between the need for on-the-record decisionmaking and the existing judicial standards" for vacating an award); Stephen L. Hayford, *Reining in the "Manifest Disregard" of the Law Standard: The Key to Restoring Order to the Law of Vacatur*, 1998 J. Disp. Resol. 117, 137 [hereinafter Hayford, "Manifest Disregard"] (advocating associating "manifest disregard" of the law with FAA section 10(a)(3) as a ground for vacating arbitration awards to help make the doctrine uniform); Stephen L. Hayford & Scott B. Kerrigan, *Vacatur: The Non-Statutory Grounds for Judicial Review of Commercial Arbitration Awards*, 51-OCT DISP. RESOL. J. 22 (1996); Stephen L. Hayford, *Business Law Symposium: Commercial Arbitration in the Supreme Court 1983-1995: A Sea Change*, 31 WAKE FOREST L. REV. 1 (1996); Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731 (1996) [hereinafter Hayford, *Law in Disarray*]. See generally IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS, AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* (1994).

44. Debra L. Shapiro & Jeanne M. Brett, *Comparing Three Processes Underlying Judgments of Procedural Justice: A Field Study of Mediation*, 65 J. PERSONALITY & SOC. PSYCHOL. 1167 (1993). This study of labor grievances indicated disputants "value the opportunity to control the outcome and to help develop and negotiate that outcome," and therefore favored mediation over arbitration because of greater feeling of procedural justice. *Id.* at 1176. Also, the study indicated

finding has subjective reality. There is a meaningful difference between agreeing to a process, and agreeing to or with the outcome of that process. While there may be legal consent to the outcome, this is not the same as the psychological experience of control.

The traditional labor and commercial arbitration community usually argues that the parties have bargained for a particular quality of justice, namely the justice they can get from this arbitrator.⁴⁵ The history of favorable judicial treatment of binding arbitration refers primarily to processes in this cell, i.e., binding arbitration in labor relations, and commercial disputes involving disputants of comparable bargaining power negotiating over the process at arm's length. This is better understood as approval of a process where there is high self-determination in system design. In other words, the disputants together have made their bed, so the courts and legislature will let them lie in it.

There is a substantial body of field and experimental research that relates to this cell.⁴⁶ It includes the work done in industrial and labor relations on binding arbitration of grievances in a collective bargaining relationship. Most of this work uses a distributive justice framework to determine who wins what, when. This body of work has certain specific lessons for dispute system design. It demonstrates that the decision standard makes a difference in outcome,⁴⁷ that a party does better with counsel than without,⁴⁸ and that there is tremendous variability in arbitrators' decisions given the same stipulated facts.⁴⁹ It makes a difference what panel an arbitrator comes from because there are systematic ways in which third party providers construct the panels.⁵⁰ For a number of years, the overall macrojustice result in labor relations has held constant:

"the importance of training third parties to carry out the procedure in a manner that conveys neutrality, thoughtfulness, and consideration of the views of those who will be affected by the outcome." *Id.* But see E. ALLAN LIND ET AL., THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES 45 (1989) (comparing arbitration with judicial settlement conferences and finding higher satisfaction with arbitration).

45. FRANK ELKOURI & EDNA ELKOURI, *HOW ARBITRATION WORKS* (4th ed. 1991).

46. For reviews of the literature, see Peter Feuille, *Dispute Resolution Frontiers in the Unionized Workplace*, in *WORKPLACE DISPUTE RESOLUTION* 17-55 (1997).

47. Lisa B. Bingham & Debra Mesch, *Decision-Making in Employment and Labor Arbitration*, 39 INDUS. REL. 671 (2000) [hereinafter Bingham & Mesch, *Decision-Making*] (noting that an experimental study using case hypothetical found a lower rate of reinstatement for Model Employment Termination Act "good cause" standard than for traditional collective bargaining "just cause" standard).

48. Richard N. Block & Jack Stieber, *The Impact of Attorneys and Arbitrators on Arbitration Awards*, 40 INDUS. & LAB. REL. REV. 543 (1987).

49. Robert J. Thornton & Perry Zirkel, *The Consistency and Predictability of Grievance Arbitration Awards*, 43 INDUS. & LAB. REL. REV. 294 (1990).

50. See generally Bingham & Mesch, *Decision-Making*, *supra* note 47.

unions and management each win about half the time.⁵¹

In addition, early research on employment arbitration is best understood as falling into this category.⁵² This author examined distributive justice by comparing employee and employer win rates and proportion of damages recovered on their own claims in binding arbitration under the American Arbitration Association's (AAA) Commercial Rules in 1992.⁵³ The reason that this research fits into this cell is because the sample of cases arose out of arbitration clauses in individual employment contracts, generally negotiated at arms' length between employers and executives or white collar workers. In other words, there was de facto high self-determination in system design, at least compared to the newer adhesive arbitration clauses. In these early days of employment arbitration, there were no special panels or rules beyond the AAA Commercial Rules. Arbitrators generally issued a so-called "naked award," providing an answer as to who won, who lost, and who paid the arbitrator.⁵⁴ If cases took only one day to hear, the arbitrator served pro bono.⁵⁵ Employees won something on their own claims in the great majority of these cases.⁵⁶ Whether or not the arbitrator earned a fee on the case did not affect employer success. Both parties had lower rates of recovery when the case resulted in an arbitrator fee, probably because these were more complex, more hotly contested cases. This pattern of results tended to contradict assertions of systemic bias in favor of employers in employment arbitration. This pattern makes sense in that the sample addressed cases in which there was high self-determination in system design because the disputants, who were generally represented by counsel, agreed to use arbitration as the result of an arm's length negotiation.

III. ONE PARTY SELF-DETERMINATION IN SYSTEM DESIGN AND THIRD PARTY CONTROL OVER OUTCOME AT THE CASE LEVEL: ADHESIVE BINDING ARBITRATION (CELL E)

Cell E involves cases where one party has effective self-determina-

51. See generally Peter Feuille, *Dispute Resolution Frontiers in the Unionized Workplace*, in *WORKPLACE DISPUTE RESOLUTION: DIRECTIONS FOR THE TWENTY-FIRST CENTURY* 35 (Sandra E. Gleason ed., 1997) (citing statistics from American Arbitration Association).

52. See Table 2, *infra* p. 620.

53. Lisa B. Bingham, *Is There a Bias in Arbitration of Nonunion Employment Disputes?: An Analysis of Actual Cases and Outcomes*, 6 INT'L J. CONFLICT MGMT. 369 (1995) [hereinafter Bingham, *Bias in Arbitration*].

54. Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 529-38 (1997).

55. Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Arbitration Awards*, 29 MCGEORGE L. REV. 223, 233 (1998) [hereinafter Bingham, *Statistics in Judicial Review*].

56. Bingham, *Bias in Arbitration*, *supra* note 53, at 378.

tion in the design of the dispute resolution system and uses it to give control over outcome at the case level to an arbitrator: adhesive, binding arbitration. In this cell, one of the disputants has the economic power to impose binding arbitration on the other disputant under a plan it has structured unilaterally. The great bulk of critical commentary on ADR addresses this cell.⁵⁷ The core of the problem is that these designs impose a binding process on a party who does not want to participate, preferring, rather, a "day in court" in the civil justice system. The binding arbitration process deprives the party of self-determination as to the outcome of the case. The party's role in designing the system may be so limited that it is not permitted any choice in selecting the neutral, and in some instances, may be denied the right to have counsel present during the process.⁵⁸ It is the combination of low self-determination as to outcome and system design that makes these processes so troubling for many commentators. Professor Reuben would modify the limited scope of review in binding arbitration in certain circumstances to ensure due process consistent with constitutional minima in recognition of the state action inherent in enforcing contracts that send parties into private jus-

57. Sternlight, *Will the Class Action Survive?*, *supra* note 36, at 53-63 (discussing imposition of mandatory pre-dispute binding arbitration); Sternlight, *Panacea or Corporate Tool?*, *supra* note 5, at 674-97; Cole, *supra* note 5, at 452 (asserting a need to change rules governing adhesive arbitration clauses in employment contracts because of the advantage employers have as repeat players); Stone, *Yellow Dog Contract*, *supra* note 5, at 1050 (arguing that expanded use of adhesive arbitration clauses in employment contracts subjects "employment rights to a regime of private justice and cowboy arbitrations," and that Congress should outlaw employers' use of arbitration as a condition of employment); Carrie Menkel-Meadow, *Do the "Haves" Come out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 33, 43, 46-48 (1999) [hereinafter Menkel-Meadow, *Repeat Players in ADR*]. Mandatory arbitration "clauses often eliminate choices with respect to decisionmaker, rules of evidence, and procedure or substantive law." *Id.* at 33. "Employees, labor lawyers, and civil rights activists have been most distrustful of an 'employer-controlled' dispute resolution system that is thought to lack many procedural due process protections and which may be controlled by decisionmakers who do not understand the legal entitlements at issue." *Id.* at 43. "For some, the issues of fairness and advantage can be dealt with by program or system design." *Id.* at 46.

The idea is that macro justice concerns can be met and indeed enhanced with use of ADR where ADR can increase access and reduce cost and time for employee grievances, as well as provide for more tailor-made solutions, at least in some cases. Indeed, although there are those who argue that the main advantage for repeat players is the ability to manipulate rules, fora, and decisionmakers, some are concerned that if alternative justice systems are perceived as efficient and receptive to good solutions, they may actually increase the amount of claiming.

Id. at 47-48.

58. Bickner et al., *supra* note 35, at 11 (suggesting that an employee required to arbitrate because of an adhesive contract may be at a disadvantage because "an arbitrator's neutrality might be compromised since only one party is in a position to select, or reject, the arbitrator for future cases," and the employee may not always be permitted independent representation).

tice systems.⁵⁹ His argument is an effort to impose third party control over dispute system design through the courts.

For the foreseeable future, these systems are generally legal and enforceable. The United States Supreme Court upheld this use of arbitration in *Circuit City Stores v. Adams*,⁶⁰ a case in which an employee challenged the enforceability of a mandatory or compulsory arbitration plan under federal anti-discrimination laws. The disputants' briefs make public policy arguments for and against compulsory arbitration based on the fairness of the process. The Court, however, limited its discussion to the scope of the Federal Arbitration Act (FAA) and the act's exception for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."⁶¹ The question was whether this language excluded most employment contracts from coverage under the FAA. The Court held it did not and swept within the FAA's coverage most arbitration plans involving employment relationships. The Court's decision will only accelerate the growth of binding arbitration plans among large institutional players and remove the final obstacle to complete federal preemption of the field.⁶² With state legislatures effectively disabled from regulating arbitration,⁶³ and Congress politically unwilling to do so, there is a regulatory gap in this developing area of public policy.⁶⁴ Only the judicial branch, within the limits of the substantial finality accorded arbitration awards, likely will control evolving programs.

This is the area within which much of the effort toward self-regulation of ADR is aimed.⁶⁵ This self-regulation can best be understood as an effort to compensate for the control or self-determination that large

59. Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949 (2000).

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

61. Federal Arbitration Act, 9 U.S.C. § 1 (1994). Later, the Court permitted adhesive compulsory arbitration of age discrimination complaints. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (enforcing a compulsory arbitration clause contained in a U-4 securities registration form and compelling binding arbitration of an employee's claim of discrimination under the Age Discrimination in Employment Act).

62. Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331.

63. *Doctors' Assocs., Inc. v. Cassarato*, 517 U.S. 681 (1996).

64. Federal agencies are trying to fill the gap with policy statements, for example, that of the EEOC, see Richard A. Bales, *Compulsory Employment Arbitration and the EEOC*, 27 PEPP. L. REV. 1 (1999), and the NLRB, see Yatsco, Comment, *supra* note 11, at 291 (suggesting that the NLRB should reverse its position and support the enforcement of mandatory arbitration agreements).

65. Stephen Hayford and Ralph Peeples, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 OHIO ST. J. ON DISP. RESOL. 343 (1995) (calling for organizations and persons with a stake in arbitration to engage in a public dialogue to shape the form and character of the process and the neutrals).

institutional players are exercising over system design. For example, the Due Process Protocol attempts to guarantee employees minimal due process, such as the right to counsel, discovery, information about arbitrators' records, a role in selecting the arbitrator, allocation of arbitration fees, and a reasoned award.⁶⁶ Similarly, Protocols for Health Care and Consumer Dispute Resolution attempt to provide standards for system design through self-regulation. Recently proposed model ethical standards for third party providers of dispute resolution services also encompass programs in this cell.⁶⁷ These efforts are implemented through the voluntary choice of major third party providers, such as the AAA, to enforce them. None of the protocols, however, has the force of law; they impose no real limit on an institutional player that decides to opt out and set up its own panel or contractual relationship with a non-compliant third party provider.

There is some limited empirical research on this category of processes. This author has conducted a program of research on the macrojustice of employment arbitration awards using a distributive justice analysis that focuses on win/loss rates and proportion of demand recovered in money damages, as well as reinstatement to employment, as a remedy. A summary of this stream of research appears below in Table 2. This summary reports results in terms of the percentage of all arbitration claims that employees file against employers in which they win something (whether that relief is monetary or non-monetary).

66. Am. Arbitration Ass'n, *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship*, at <http://www.adr.org/rules/employment/protocol.html> (last visited July 15, 2002) ("Employees considering the use of . . . arbitration procedures should have the right to be represented. . . . Adequate but limited pre-trial discovery is to be encouraged and employees should have access to all information reasonably relevant."). For a detailed analysis, see generally JOHN DUNLOP & ARNOLD M. ZACK, *MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES* (1997).

67. CPR Inst. for Dispute Resolution, *Principles for ADR Provider Organizations*, *supra* note 11.

TABLE 2. SUMMARY OF PRIOR EMPIRICAL RESEARCH ON REPEAT PLAYER EMPLOYERS AND EMPLOYMENT ARBITRATION

Study	Award Year	AAA Rules	Total Case Sample	Employee Win Rate on Their Own Claims
Bingham ⁶⁸	1992	Commercial	171	74%
Bingham ⁶⁹	1993	Commercial	186	71%
		Employment	28	40%
Bingham ⁷⁰	1993-94	Commercial	186	
		Employment	84	
			<i>Repeat Player Employer</i>	16%
			<i>Non-repeat Player Employer</i>	71%
Bingham ⁷¹	1993-95	Employment Dispute Resolution	203	
			<i>Repeat Player Employer</i>	23%
			<i>Non-repeat Player Employer</i>	67%

An early study found differences in the pattern of outcomes between cases arising under the AAA Commercial Rules and the AAA Employment Rules in 1993. The Employment Rules cases included repeat employers using adhesive arbitration clauses in personnel manuals; employees had lower success rates in these cases.⁷² Two subsequent studies using Professor Galanter's conception of repeat players and one-shotters in the civil justice system⁷³ found evidence that employers that repeatedly use employment arbitration do better in the process than one-time users.⁷⁴ When one examines this phenomenon more closely, one

68. Lisa B. Bingham, *Bias in Arbitration*, *supra* note 53, at 378.

69. Lisa B. Bingham, *Emerging Due Process Concerns in Employment Arbitration: A Look at Actual Cases*, 47 LAB. L.J. 108, 114 (1996) [hereinafter Bingham, *Emerging Due Process*].

70. Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS. & EMP. POL'Y J. 189 (1997) [hereinafter Bingham, *Repeat Player Effect*].

71. Bingham, *Statistics in Judicial Review*, *supra* note 55, at 223 (1998).

72. Bingham, *Emerging Due Process*, *supra* note 69, at 116.

73. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974); *see also* Menkel-Meadow, *Repeat Players in ADR*, *supra* note 57, at 19.

74. Bingham, *Statistics in Judicial Review*, *supra* note 55, at 238; Bingham, *Repeat Player Effect*, *supra* note 70, at 210. It is important to note that the method used in these studies did not follow a conception of repeat player in a strict, game theoretic sense. Limitations in sample size and available data precluded the more desirable analysis, which would follow the relationship

finds that employers do better than employees when arbitration is pursuant to an adhesive personnel manual arbitration clause. This is an example of a case where the employee has no control over system design once he or she consents to the employment relationship.

Professor Galanter's catalogue of repeat player advantages generally translates into control over dispute system design. For example, repeat players: (1) have more experience; (2) use that experience to change how they will structure the next similar transaction; (3) have expertise, economies of scale, and access to specialist advocates; (4) have informal continuing relationships with institutional incumbents; (5) reputation and credibility in bargaining; (6) can use long-term risk taking strategies; (7) can influence rules through lobbying; (8) can play for precedent and favorable future rules; and (9) can invest resources in getting favorable rules implemented.⁷⁵ This conception of repeat players is broader than the game theoretic use of the term.

It is important to note that these studies do not compare employment arbitration to the civil justice system. They look only at sub-samples of employment arbitration cases compared to each other, for example, personnel manual cases compared to others, employee claims compared to employer claims, and one-time employer users compared to repeat employer users. Others have attempted to compare arbitrated and litigated outcomes.⁷⁶ These comparisons must be understood in the context of the selection bias inherent in the samples studied. It is unclear whether the samples of litigated and arbitrated cases are comparable.⁷⁷ These samples may be drawn from populations of cases that settle at different rates, have legal counsel at different rates, involve differing decision standards (statutory compared to contractual), and myriad other relevant and uncontrolled variables. The author's own arbitration

between individual employers and the specific arbitrators used repeatedly over time. Instead, the studies defined repeat player simply as an employer that appeared in the sample more than once. There were no repeat employees in the samples. This conception of the variable has been criticized. See Sherwyn et al., *supra* note 4, at 144. However, a later study of the repeat player variable found an effect whether cases were coded as repeat player cases for all the appearances of a given employer in the sample, or only for the second and subsequent appearances. See Elizabeth Hill, *Employment Arbitration Under the Auspices of the American Arbitration Association: An Empirical Study*, in ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF THE NEW YORK UNIVERSITY 53D ANNUAL CONFERENCE ON LABOR, KLUWER LEGAL INT'L (Samuel Estreicher ed., forthcoming 2002).

75. Galanter, *supra* note 73, at 97-103.

76. William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?* 50-OCT.-NOV. DISP. RESOL. J. 40 (1995); Lewis Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29 (1998) (reporting higher adjusted outcome or percentage of demand recovered for arbitration cases than litigation cases although there are lower cash awards in arbitration).

77. Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735 (2001).

research does not attempt this kind of comparison; instead, it compares sub-samples of arbitration cases using various criteria such as repeat use of arbitration by the employer in the sample or arbitration based on an adhesive personnel manual clause compared to an individual employment contract.

Self-regulation through the Due Process Protocol imposed certain minimum standards for dispute system design, including a right to counsel, information and references for arbitrators on a given selection list, participation in selection of the arbitrator for the specific case (though not selection of the third party administrator), allocation of forum and arbitrator fees and costs, discovery, and written, reasoned decision. The AAA enforced these protections systematically in the post-Protocol cases in the sample.⁷⁸ A study of cases decided after adoption of the Due Process Protocol found that employer success declined compared to pre-Protocol case outcomes in arbitration cases using an adhesive personnel manual arbitration clause.⁷⁹ These protections appear to have influenced the overall pattern of outcomes. This effect can best be understood in light of the limits that the Protocol places on employer self-determination in dispute system design. The AAA systematically screened out employer plans that failed to provide the minimum due process required by the Protocol.⁸⁰ This interfered with employer control over the dispute resolution system.

The following tables report descriptive characteristics of two samples of cases decided before and after the Protocol.⁸¹ The samples

78. Author's personal conversation with Robert Meade, AAA, Sept. 1998.

79. Lisa B. Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference*, in ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF THE NEW YORK UNIVERSITY 53^D ANNUAL CONFERENCE ON LABOR, KLUWER LEGAL INT'L (Samuel Estreicher ed., forthcoming 2002). This study uses a multivariate logistic regression with a dichotomous variable employer success and independent variables including repeat player, personnel manual, Due Process Protocol, together with interaction terms for personnel handbook and Protocol, and repeat player and personnel handbook. *Id.* It finds that the interaction between personnel handbook and Protocol is marginally statistically significant, and is associated with decreased employer success. *Id.*

80. Personal Conversation with Robert Meade, AAA.

81. These analyses were previously presented as conference papers but never previously published in journal article form. See Lisa B. Bingham, *Employment Arbitration after the Due Process Protocol: Preliminary Evidence that Self-Regulation Makes a Difference*, Paper Presented at the 1998 Conference of the Society of Professionals in Dispute Resolution in Portland, Or. (Oct. 15, 1998) (copy of paper available from author). Lisa B. Bingham, *Employment Arbitration After the Due Process Protocol: Preliminary Evidence that Self-Regulation Makes a Difference*, Colloquium presented at the Arbitration in the 21st Century Conference in New York, New York (Sept. 24, 1998) (copy of paper available from author); Lisa B. Bingham, *Employment Arbitration after the Due Process Protocol: Where Do We Go from Here?*, as part of panel entitled, Under My Thumb: Worker Rights in the Changing Workplace, at the 1999 Conference of the Law and Society Association in Chicago, Ill. (May 28, 1999) (copy of

include AAA Employment Rules cases decided between 1993 and 1995, and an additional sample of AAA Employment Rules cases decided after implementation of the Protocol in 1996-1997. The AAA identified the cases in the samples. They represented all the cases for which the AAA had on file arbitration awards during the 1993-1995 time period, and the first fifty-nine cases for which it had on file arbitration awards after the Protocol. Researchers used information from three document sources for each case: (1) the original demand for arbitration; (2) the final arbitration award; and (3) the AAA's own computer report closing the case. A case was included in analysis if the requisite information appeared anywhere in the three sources. If, however, key information was missing, that case was omitted from that particular analysis. For example, the mean and median demand amounts were calculated using only those cases for which demand information was available.⁸² The case files represented information for the majority of all arbitrations that concluded with an award during the time period 1993-1995. Table 3 reports means and medians of various characteristics in the cases, including the demand amount, the damages awarded, the percentage recovered (also known as "outcome," a ratio of damages divided by demand), arbitrator fees, employee and employer shares of fees, and AAA fees.

It is important to note that analyses of variance revealed no significant differences pre- and post-Protocol. In other words, the two samples are statistically similar in a number of key respects. In addition, the subject matter addressed in the cases was comparable. Table 4 reflects

paper available from author); Lisa B. Bingham, *Employment Arbitration After the Due Process Protocol: Preliminary Evidence that Self-Regulation Makes a Difference*, Colloquium Presented at Cornell University School of Industrial and Labor Relations in Ithaca, N.Y. (Mar. 30, 1999) (copy of paper available from author); Lisa B. Bingham, *If the Repeat Player Effect is Sophistry, Why Did the Protocol Make A Difference?*, address as part of a luncheon plenary panel entitled, Repeat Player Effect: Syndrome or Sophistry?, at the Second National Employment ADR Enclave of the American Arbitration Association in San Francisco, Cal. (Nov. 4, 1999) (transcript available from author).

82. The results reported in this paper are from a sample of 265 cases that were decided exclusively under the AAA Employment Dispute Resolution Rules during the period from January 1, 1993 through June, 1997. During that period, the cases were not subject to the Due Process Protocol. Sub-samples of 206 cases were from 1993-1995 and were the subject of previous studies (Bingham 1996, 1997, 1998). The remaining fifty-nine cases decided during the period June 1, 1996 to June 1, 1997 were subject to the Due Process Protocol. The total sample represents all the cases that the AAA could locate in its national files that involved an employment arbitration and were decided during the relevant time periods. While this is not the entire population of cases decided during this time period, it is the great majority of them, and the sample appears to be random. The AAA itself identified the cases for analysis, and while cases did not always contain complete information, they were used for every analysis in which the necessary information was provided by one of the three documents. There was no bias imposed by the selection of the researcher nor has any representative of the AAA ever suggested that the samples were unrepresentative of the awards during that time period.

TABLE 3. SELECTED COST CHARACTERISTICS OF SAMPLES OVERALL

	Pre-Protocol (N=162-206)		Post-Protocol (N=28-59)	
	Mean	Median	Mean	Median
Demand	\$184,395	\$19,350	\$236,073	\$46,000
Damages Awarded	\$52,737	\$0	\$39,279	\$0
Percentage Recovered	25%	0	25%	0
Arbitrator Fees	\$3,121	\$1,171	\$3,533	\$2,347
Employer Share of Fee	\$2,824	\$800	\$2,707	\$1,825
Employee Share of Fee	\$834	0	\$961	0
AAA Fees	\$2,506	\$937	\$1,717	\$1,250

that the cases were similarly distributed across the range of typical employment disputes in arbitration.

TABLE 4. FREQUENCY OF LEGAL CLAIMS BY EMPLOYEES

	Pre-Protocol ¹	Post-Protocol ²
Breach of Express Contract	59%	50%
Breach of Implied Contract	35%	19%
Wrongful Discharge Tort	7%	3%
Wrongful Dismissal Based on Implied Covenant of Good Faith and Fair Dealing	2%	0%
Race Discrimination	6%	7%
Sex Discrimination	5%	2%
Age Discrimination	2%	9%
Disability Discrimination	4%	5%
Invasion of Privacy	0.5%	0%
Defamation	3%	3%
Other Claims	10%	21%

¹ (N=187)

² (N=58)

[Percentages do not add to 100% because each case could raise multiple legal claims or separate causes of action.]

There were some interesting similarities in respect to other case factors, as reflected in Table 5. These factors include the percentage of employer claims, multiple arbitrator panels, repeat player employers, repeat arbitrators, and frequency with which damages or reinstatement was awarded.

TABLE 5. FREQUENCY OF VARIOUS DESCRIPTIVE CASE FACTORS

	Pre-Protocol ¹	Post-Protocol ²
Employer Claims	9%	12%
Multiple Arbitrator Panels	10%	10%
Repeat Player Employers	35%	29%
Arbitrators Used Repeatedly by a Single Employer	10%	7%
Damages Awarded (regardless of amount)	44%	53%
Reinstatement Awarded	7%	5%

¹ (N=205-206)² (N=59)

Statistically, there were significantly fewer personnel handbook arbitration clauses in the post-Protocol sample (35% pre- compared to 19% post-),⁸³ and statistically significantly more women arbitrators (24% pre- compared to 49% post-).⁸⁴ There appeared to be more highly compensated claimants in the post-Protocol sample, but limited information in the case files made coding this variable problematic.

Despite the great similarity between the two samples on these various descriptive dimensions, there were several important differences. Due to the small size of the post-Protocol sample, these can only be characterized as preliminary findings and trends. Table 7 reflects percentages of cases in which employees recovered some kind of relief on their own claims using a variety of different categorical variables. For example, there were roughly equivalent employee win rates with repeat player employers before and after the Protocol, 27% before and 29% after. The repeat player variable, coded as present whenever an employer appears more than once in the sample, continues to be statistically significant in a multivariate analysis.⁸⁵ In other words, employers win more frequently when they are repeat players in the sample.

This result has recently been replicated independently with a larger sample of post-Protocol cases.⁸⁶ The research showed that the repeat player effect existed whether repeat player cases were coded to include all the cases involving an employer who appeared more than once in the sample, or only those cases involving the second appearance of the

83. Pearson chi square = 5.265, $p < .02$.84. Pearson chi square = 14.208, $p < .0001$.85. Bingham & Sarraf, *supra* note 79.86. Hill, *supra* note 74.

TABLE 6. FREQUENCY OF RELIEF OF ANY KIND AWARDED TO EMPLOYEES ON THEIR OWN CLAIMS.

	Pre-Protocol ¹	Post-Protocol ²
Repeat Player Employer	27%	29%
Not Repeat Player Employer	70%	51%
Repeat Arbitrator	25%	50%
Not Repeat Arbitrator	58%	44%
Personnel Handbook Arbitration Clause	25%	40%
Other than Personnel Handbook	72%	46%

¹ (n=187)² (n=52)

employer in the sample (i.e., the first actual repeat appearance).⁸⁷ The researcher posits, however, that the underlying case of the repeat player pattern is actually an “appellate effect,” one caused by employer screening and settlement of meritorious claims at lower in-house steps of an employment dispute resolution program administered by a large employer with sophisticated human resource management practices. She finds that the repeat player variable and appellate effect variable are highly correlated.

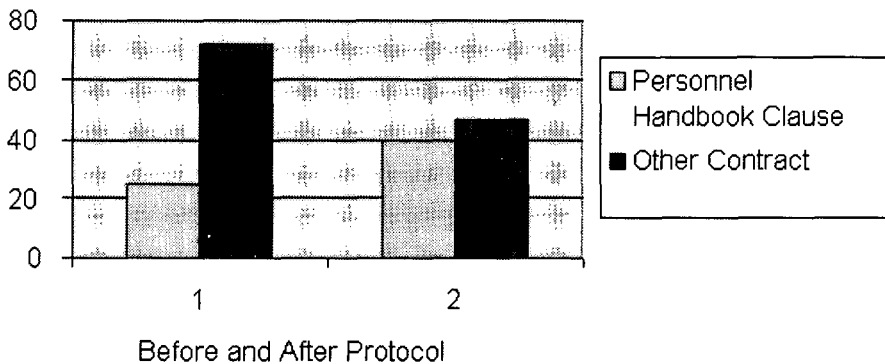
The appellate theory is an interesting one. There is data in Table 7, however, that suggests that more is at work in employment arbitration outcomes than simply large, more sophisticated employers settling meritorious cases against them in good faith. There is an interesting difference in employee win rates in cases involving arbitration pursuant to a unilateral employer-promulgated personnel handbook arbitration clause before and after the Protocol. Before the Protocol, the employees’ win rate on their own claims was 25%; afterward, it increased to 40%. The difference can be illustrated in part by Figure 1.

Figure 1 illustrates the difference using employees’ win rates on their own claims. An analogous difference in the gap between win rates on personnel handbook clauses and other contractual arbitration clauses before and after the Protocol was found to be marginally statistically significant in a multivariate analysis that used employer success as the dependent variable and a sample that included both employer and employee claims.⁸⁸ If the repeat player effect were simply an appellate effect, one would not expect to see any change. An alternative explanation may be that the AAA itself screened personnel handbook plans after the Protocol to ensure that they contained all the due process protections

87. Hill, *supra* note 74 (manuscript on file with author).

88. Bingham & Sarraf, *supra* note 79.

FIGURE 1. BEFORE AND AFTER DUE PROCESS PROTOCOL: EMPLOYEE WIN RATES WITH PERSONNEL HANDBOOK AND OTHER CONTRACTUAL ARBITRATION CLAUSES



that the Protocol required. It is possible that these additional procedural protections, including the right to counsel, reasonable discovery, participation in selection of the arbitrator, and information about the arbitrator to inform that selection, all contributed to leveling the playing field in employer-promulgated plans.

Another theory related to the appellate effect is that the cases that make it to employment arbitration are weak on the merits.⁸⁹ This is a difficult theory to test empirically. One researcher attempted to do so by a review of arbitration awards on their face.⁹⁰ She concluded that the employees' claims were weak and that the awards against them were justified by the merits.⁹¹ Unfortunately, ample research has identified wide variation in outcomes of hypothetical arbitration cases; when a sample fact pattern is given to a set of arbitrators, they do not uniformly decide the case the same way, even though they are using the same decisional standard.⁹² Moreover, it is difficult from the face of an award to know all the facts relevant to the case. Absent the information available in reasonably complete discovery, the outcome is difficult to evaluate. Arbitrators can only decide cases based on the information presented to

89. Hill, *supra* note 74.

90. *Id.*

91. *Id.*

92. See generally Bingham & Mesch, *Decision-Making*, *supra* note 47, at 671-94 (finding that commercial arbitrators ruled in favor of employees less frequently than labor arbitrators under both just cause and statutory dismissal standards), and studies cited therein.

them. An outside evaluator can only judge the merits based on the facts the arbitrator chose to include in the award.

In one leading and highly regarded study of New Jersey's court-annexed non-binding arbitration programs for tort cases involving automobile negligence claims, researchers found that more than half of all the litigants who had gone through an arbitration requested a *de novo* trial on their cases; surprisingly, arbitration and trial verdicts were in agreement only sixty-eight percent of the time in these *de novo* trials.⁹³ In thirty-two percent of the cases, the outcome was different at trial.⁹⁴ This was true notwithstanding the use of court selected arbitrators as subject matter experts with legal training, substantial experience, and ADR training. In short, it is difficult to draw absolute conclusions about the merits of arbitration awards from a facial reading; one can only act like an experienced trial lawyer and report one's best guess of the odds.

In a perfect world, researchers could take a large random sample of all employment disputes and randomly assign them to the public justice system or binding arbitration. We would then compare the outcomes as to rate of settlement before adjudication, outcomes in settlements and adjudicated awards, outcomes in arbitration and court, and efficiencies of the processes. In research, however, the world is usually imperfect, and in field research, it goes so far as to be deeply flawed. Getting all the relevant players' informed consent to such a study is likely to be impossible. That said, policy makers need this information, and researchers should endeavor to get as close to this perfect data as possible.

The severest critics of mandatory arbitration have no problem at all with mediation, including mandatory mediation.⁹⁵ Their concern with

93. ROBERT J. MACCOUN ET AL., *ALTERNATIVE ADJUDICATION: AN EVALUATION OF THE NEW JERSEY AUTOMOBILE ARBITRATION PROGRAM* 26-27 (1988).

94. *Id.*

95. See, e.g., Walsh, *supra* note 39, at A1 (quoting Cliff Palefsky as saying, "Remember how we used to mock the Soviet Union for having a civil justice system that was private?"); Strasburg, *supra* note 39, at C1 (quoting Cliff Palefsky as saying before the Cal. Sup. Ct., "Agreeing to arbitration 'as a condition of getting a job or putting food on the table' undermines the value arbitration can have when the system is used fairly. . . . The only way to make arbitration fair is to make it voluntary"); *Proceeding Under Fire*, *supra* note 39, at B1 (quoting Cliff Palefsky as saying,

The most significant shortcomings are the fact that the arbitrators do not need to know or follow the law; it can be enormously expensive; discovery is very limited, which can be fatal in certain cases; there is no appeal; it may be difficult to obtain the testimony of out-of-state witnesses; and arbitrators rarely award meaningful punitive damages or emotional distress damages and all too frequently fail to award attorneys' fees to prevailing parties, even though the law requires it.[]];

Segal, *supra* note 39, at F12 (quoting Cliff Palefsky as saying,

Laws are supposed to be an expression of the public will, so allowing corporations to opt out of the laws completely undermines the purpose of legislation. . . . When it's voluntary mediation, we think that ADR is great. But people need to understand

adhesive arbitration stems from one party's complete control over dispute system design.⁹⁶ The importance of the repeat player effect is only that it forces careful examination of the processes that employers are constructing unilaterally to resolve employment conflict out of court. The differences before and after the Protocol suggest that control over dispute system design is relevant. There does not yet exist sufficient data upon which to conclude what is causing the repeat player effect; there are many possibilities. Disputant self-determination as to dispute system design is certainly one that warrants continuing investigation.

IV. THIRD PARTY SELF-DETERMINATION AS TO DISPUTE SYSTEM DESIGN AND THIRD PARTY CONTROL OVER OUTCOME AT THE CASE LEVEL: COURT AND ADMINISTRATIVE ARBITRATION (CELL F)

There are circumstances in which neither disputant designs a dispute resolution system; instead, a court, administrative agency, or legislative body does it for them. For example, a significant number of state and federal courts provide mandatory or voluntary non-binding arbitration.⁹⁷ Many states provide non-binding and binding interest arbitration as a dispute settlement mechanism for public employee labor disputes.⁹⁸ States have also adopted arbitration to resolve disputes over allegedly defective automobiles, as in the so-called "Lemon Law" statutes.⁹⁹ Congress passed the Ted Stevens Olympic and Amateur Sports Act of 1978

that the goal of mandatory arbitration is finality, not justice or doing the right thing[]).

96. For a recent example of a study severely critical of adhesive arbitration plans and the forum costs they impose on would-be litigants, see Public Citizen Congress Watch, *The Costs of Arbitration* (May 1, 2002) (reporting case studies of individual disputes forced into arbitration through adhesive clauses, including examples of cases in which the plaintiffs abandoned their claims due to an inability to pay for forum costs, including filing fees, processing fees, costs for discovery, hearing room fees, and arbitrator fees). Other studies of arbitration costs have found them to be relatively low on average. See *infra* Table 3; Hill, *supra* note 74.

97. The Harvard Law Review Ass'n, *supra* note 4, at 1858 (observing that as of 1999, there was court-annexed arbitration in thirty-three states and twenty-two federal district courts) (citing STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 234 (3d ed. 1999)).

98. For a discussion of various state public employee arbitration statutes, see, for example, Rebecca Hanner White et al., *Ohio's Public Employee Bargaining Law: Can it Withstand Constitutional Challenge?*, 53 U. CIN. L. REV. 1 (1984); Robert Perkovich & Mark H. Stein, *Challenges to Arbitration Under Illinois Public Sector Labor Relations Statutes*, 7 HOFSTRA LAB. & EMP. L.J. 191 (1989); Dennis R. Nolan, *Federal Sector Labor Arbitration: Differences, Problems, Cures*, 14 PEPP. L. REV. 805 (1987); Robert P. Hebdon & Robert N. Stern, *Tradeoffs Among Expressions of Industrial Conflict: Public Sector Strike Bans and Grievance Arbitrations*, 51 INDUS. & LAB. REL. REV. 204 (1998); Stuart S. Mukamal, *Unilateral Employer Action Under Public Sector Binding Interest Arbitration*, 6 J.L. & COM. 107 (1986); Robert G. Howlett, *Interest Arbitration in the Public Sector*, 60 CHI.-KENT L. REV. 815 (1984).

99. See, e.g., FLA. STAT. ch. 681.109 (2001); GA. CODE ANN. § 10-1-787 (2001); ME. REV

to provide binding arbitration as the dispute settlement mechanism for Olympic athletes and their governing boards.¹⁰⁰ Arbitration is built into certain environmental laws.¹⁰¹ These are but a few representative examples.

In cases where a third party exercises self-determination over dispute system design, the resulting program takes a form that is different from adhesive programs. This part of the article is intended only to illustrate a few of these differences, not to constitute a comprehensive review of such programs. Even a cursory review suggests that self-determination over dispute system design is an important dimension for future research on arbitration. For example, studies of court-annexed programs have found that in designing programs for the disputants, courts are careful to solicit input from the bench, bar associations, and balanced committees of the plaintiffs' and defendants' bar.¹⁰² In adhesive arbitration programs, an enlightened employer might convene a focus group to inform dispute system design, but usually the system is constructed in consultation with the employer's counsel and designed unilaterally.

Court-annexed programs provide for the same basic protections as the Due Process Protocol. For example, it is axiomatic that parties may choose to be represented by counsel.¹⁰³ While this would appear to be a basic requisite of a fair process, it is one that private sector employers omitted from early arbitration dispute system designs and one that they are still reluctant to extend to in-house dispute resolution procedures.¹⁰⁴

STAT. ANN. tit. 10 § 1169 (2001); N.M. STAT ANN. § 57-24-4 (2001); D.C. CODE ANN. § 50-503 (2001).

100. 36 U.S.C.A. §§ 220501-220511 (2002).

101. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9615 (1998), specifically 42 U.S.C. § 9612(b), providing for arbitration by a board of arbitrators established by the President and selected through the procedures of the American Arbitration Association.

102. See, e.g., MACCOUN ET AL., *supra* note 93, at 1-2 (noting that variation in court-annexed arbitration program designs stem from legislative decisions informed by advice from the state judicial councils, court administrative offices, bar, and other interested organizations, as well as advice from key constituencies such as lawyers, insurance companies, public advocates, and individual litigants); BARBARA S. MEIERHOEFER, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS 31 (1990) (noting that all of the pilot courts consulted with the bar and in some cases, courts worked with bar association committees to craft the arbitration rule).

103. Barbara S. Meierhofer, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS 65-93 (1990) (reporting attorney views of arbitration programs). But note that the right to retain counsel is not the same as the economic ability to afford counsel. See Deborah L. Rhode, *Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 989 (1998) (arguing that there are not too many lawyers, but rather too many lawyers competing for the highest paying clients, and that the working class litigant is underserved).

104. Bickner et al., *supra* note 35, at 8; Alan J.S. Colvin, *The Relationship Between Employment Arbitration and Workplace Dispute Resolution Procedures*, 16 OHIO ST. J. ON DISP. RESOL. 643, 658 (2001) (observing that a major due process deficiency in many workplace procedures is the lack of provision for representation of employees in presenting complaints, and

In contrast, federal agency employers are barred from unilaterally mandating employment arbitration under the terms of the Administrative Dispute Resolution Act of 1996;¹⁰⁵ federal agencies allow free choice of representatives as a regular feature of employment mediation programs.¹⁰⁶

Another key design feature is the identity of the arbitration panel. Employers designing programs unilaterally may designate a major provider that has adopted the provisions of the Due Process Protocol; for example, the AAA,¹⁰⁷ National Arbitration Forum (NAF),¹⁰⁸ or Judicial Arbitration and Mediation Services (JAMS).¹⁰⁹ These providers publicize their panels of arbitrators and how the panels were constructed. For example, the AAA used local committees of the plaintiffs and defendants bar to select the initial Employment Arbitrator Roster.¹¹⁰ Nevertheless, other employers acting unilaterally may choose to designate a small, captive provider, or to create their own supposed panel.¹¹¹ This control over the people on the panel makes a difference. A controlled experimental study on arbitrator decision-making compared commercial arbitrators, labor arbitrators, National Academy labor arbitrators, and students, and found systematic differences in the way these groups decided a hypothetical employee dismissal case.¹¹²

In contrast, courts establish panels of arbitrators using a process that is wholly transparent. For example, most federal courts have established their own rosters of neutrals, and take responsibility for assuring their quality through local rules that set eligibility criteria.¹¹³ Qualifica-

that employers continue to be reluctant to permit representation from outside the company for in-house dispute resolution steps, even if the procedure permits mediation or arbitration).

105. 5 U.S.C. §§ 571-583 (2002).

106. See, e.g., Lisa B. Bingham et al., *Exploring the Role of Representation in Employment Mediation at the USPS*, 17 OHIO ST. J. ON DISP. RESOL. 341 (2002) (reporting on mediation duration, settlement rates, perceptions of fairness, and participant satisfaction with participation of employees and supervisors with different kinds of representation, including lawyers, union or professional association representatives, co-workers, friends, or no representative). There is a substantial argument for a right to union representation in employment dispute resolution during in-house and out-of-house dispute resolution steps. See Matthew W. Finkin, *Bridging The Representation Act*, 3 U. PA. J. LAB. & EMP. L. 391 (2001).

107. For policy statements on the Protocol, see the AAA website at <http://www.adr.org>.

108. The NAF policy statements can be found at <http://www.arb-forum.com>.

109. The JAMS policy statement appears at <http://www.jamsadr.com>.

110. Author's personal communications with representatives of the AAA.

111. See, e.g., *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) (holding that supposed panel of arbitrators was not impartial or independent and hence not arbitrators).

112. Bingham & Mesch, *Decision-Making*, *supra* note 47, at 671-94 (finding that commercial arbitrators ruled in favor of employees less frequently than labor arbitrators under both just cause and statutory dismissal standards).

113. ROBERT J. NIEMIC ET AL., GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR 67-69 (2001).

tions include ADR training, legal training and subject matter expertise, reputation in the local legal community, and minimum length of professional service.¹¹⁴ In addition, there are rules of professional conduct governing the neutral's behavior.

A related issue is the appointment of an individual arbitrator to a given case. In many court programs, the court or its ADR program administrator select the neutral to serve in a given case.¹¹⁵ In other programs, the design permits mutual selection of a neutral from the court's roster.¹¹⁶ Courts provide assistance through information relevant to the selection process. In addition, parties can mutually agree on a neutral outside the court roster. This guarantee of informed mutual party participation in selection of the neutral is not always present in adhesive, employer-promulgated arbitration, although it is a requisite of the Protocol.¹¹⁷

Yet another difference in dispute system design can be forum fees. In court-annexed arbitration programs, taxpayers subsidize the program. Courts employ ADR program administrators and usually absorb the cost of administration.¹¹⁸ For the arbitrator's fee, they choose among a mix of options including a market rate, a fee set by the court, pro bono service, or a mix of any of these, and they may divide the fee equally or unequally among the parties. However, one clear rule is that a participant unable to afford the cost of ADR is excused from paying.¹¹⁹ One study of arbitration in federal district courts found average arbitrator fees and hearing costs of \$125 to \$300, depending on the number of arbitrators, their fees, and whether they were paid per day or per case.¹²⁰ In contrast, some critics of unilaterally designed adhesive plans suggest that designers choose a fee for the plan's ability to deter claims.¹²¹ The significant point is that the party in control of dispute system design can also control forum costs.¹²²

A final difference that has provoked criticism of adhesive arbitra-

114. *Id.* at 72-74.

115. *Id.* at 70-72.

116. *Id.* at 69-70.

117. See Bickner et al., *supra* note 35, at 80.

118. NIEMIC ET AL., *supra* note 113, at 39.

119. *Id.* at 85-86.

120. Meierhoefer, *supra* note 103, at 4.

121. Public Citizen Congress Watch, *supra* note 96, at 1-3, 42 (reporting arbitration forum costs ranging from \$120 for a \$2,500 claim to a possible \$11,625 for a \$80,000 claim).

122. If a party unilaterally designs an employment arbitration system so as to render forum costs a barrier to access justice, courts may intervene. A recent empirical study finds evidence of increased judicial willingness to eliminate cost as a barrier to private dispute resolution. Michael H. LeRoy & Peter Feuille, *The Ever Green Tree of Compulsory Employment Arbitration? When Cost Is an Unlawful Barrier to Private Dispute Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 19 (2001).

tion is the substantial finality of arbitration awards and their limited scope of review compared to de novo review in a trial court.¹²³ An arbitration award can only be overturned on limited grounds, including statutory grounds such as corruption, fraud, undue means, evident partiality, and arbitrator misconduct or misbehavior. In addition, arbitration awards sometimes can be overturned based on non-statutory grounds such as public policy or manifest disregard of the law, and in a few criticized cases, the arbitrary and capricious, or completely irrational award.¹²⁴ This means that an arbitration award is generally not subject to vacatur for an error of law.¹²⁵ Some commentators have argued that this essentially privatizes what ought to be public justice and permits parties to contract out of their obligation to comply with public policy as embodied in statutes creating individual employment rights.¹²⁶ Several scholars have argued for broader judicial review of statutory employment rights issues in arbitration awards as a means of counteracting employers' ability to contract out of compliance with public law.¹²⁷

123. See *supra* note 43 and authorities cited therein.

124. See generally Hayford, *supra* note 43 (examining statutory and non-statutory grounds for vacating commercial arbitration awards); Hayford, "Manifest Disregard," *supra* note 43 (criticizing non-statutory expanded grounds for judicial review and arguing against judicial inquiry into the merits of commercial arbitration awards); Hayford, *Law in Disarray*, *supra* note 43 (containing a comprehensive review); Stephen L. Hayford, *Commercial Arbitration in the Supreme Court 1983-1995: A Sea Change*, 31 WAKE FOREST L. REV. 1 (1996) (reviewing change in Supreme Court attitude toward an embrace of commercial arbitration); Hayford & Kerrigan, *supra* note 43.

125. Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L.J. 1279 (2000) (describing the ability of parties and arbitrators to contract out of and disregard mandatory rules including public law, and advocating tort liability for arbitrators who decide a case in a manner that conflicts with mandatory rules of law).

126. Martin H. Malin, *Privatizing Justice But By How Much? Questions Gilmer Did Not Answer*, 16 OHIO ST. J. ON DISP. RESOL. 589 (2001) (using the decision principle of contracting out of statutory responsibilities to create a framework for judicial control of adhesive employment arbitration); Marcela Noemi Siderman, *Compulsory Arbitration Agreements Worth Saving: Reforming Arbitration to Accommodate Title VII Protections*, 47 UCLA L. REV. 1885 (2000) (arguing for increased judicial review and discovery, written opinions, the option of a jury trial, access to information on arbitrators, and nonwaivable remedies); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703 (1999) (observing that arbitration does make privatizable vast areas of law); Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577 (1997) (arguing that courts enforcing arbitration agreements are engaged in state action and that ADR is an extension of the public justice system with the attendant need for due process protections); Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187 (1993) (arguing for an expanded scope of judicial review of arbitration awards to ensure the enforcement of public law).

127. Monica J. Washington, *Compulsory Arbitration of Statutory Employment Disputes: Judicial Review Without Judicial Reformation*, 74 N.Y.U. L. REV. 844 (1999) (arguing for broader review). Even defenders of mandatory arbitration advocate compliance with public law. See Sherwyn et al., *supra* note 4, at 126 (arguing for a Model Arbitration Act that would provide a

Others have argued that mandatory binding arbitration may in some circumstances conflict with the Seventh Amendment right to a jury trial.¹²⁸ In contrast, in court-annexed arbitration programs, arbitration is both non-binding and subject to a de novo trial and full judicial review.

This section has illustrated how third party control over dispute system design can affect choices about the resulting system. Designing a system for resolving conflict is a quasi-legislative process. It is not surprising that one's presence at, or absence from, the negotiating table at which dispute system design choices are made should have an impact on the resulting program. More public policy research is warranted on this variable as a predictor of how the system functions and what outcomes it produces.

CONCLUSION

Large, institutional organisms are arrogating all the choices about the overall dispute system design to themselves, leaving little or no room for the exercise of self-determination in dispute system design for the individual employee or consumer disputant.¹²⁹ Whether this is a problem that we can or should regulate may be a function of the level of self-determination that the resulting system leaves the individual employee or consumer disputant within a given case using a specific dispute resolution process. In mediation, disputants retain the choice to walk away; they need not settle. In binding arbitration, there is no self-determination as to outcome once the case goes to the arbitrator for decision. The key and unresolved empirical question is whether these systems operate in a fashion that represents systemic bias so disadvantaging one disputant as effectively to deprive that party of legal rights the civil justice system would otherwise protect. In other words, does the design cross the boundary from process to substance? Does it move from

mechanism to ensure that arbitrators follow the applicable federal and state substantive law and comply with statutorily prescribed damage provisions).

128. Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669 (2001); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997).

129. Sternlight, *Panacea or Corporate Tool?*, *supra* note 5, at 711 (criticizing Supreme Court's preference for arbitration because allowing adhesive arbitration clauses permits "stronger parties to take advantage of weaker parties" and noting that "[a] General Accounting Office report concluded that most arbitrators who decided employment discrimination cases brought against the securities industry were white males with an average age of 60") (citing General Accounting Office, Pub. No. GAO/HEHS-94-17, *Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes* 2 (1994)); Sternlight, *Simplicity vs. Fairness*, *supra* note 5, at 5 (discussing increased use of adhesive arbitration clauses in consumer contracts and arguing the public may not be "better off" because of the trend).

merely being a change of forum to changing the subject?¹³⁰

For policy makers to decide this question, they will need considerably more information on how these systems operate than we have right now. Researchers have generally not compared different dispute system designs. Confidentiality, privacy, and private forums make access to the necessary data difficult and often impossible to get. This has implications for our evolving ADR ecosystem. Policy makers are making ADR policy in the dark. A number of organisms can grow in the dark; some even grow better in the dark. It is up to ADR service providers and employers to provide access to researchers for better policy analysis of these programs. A number of commentators have called for publication and public access to written, reasoned arbitration awards as a regulatory reform that could address some of the concerns regarding unilaterally designed arbitration programs.¹³¹ Transparency and accountability are powerful tools through which to shed light on our evolving private justice systems.

130. "In these cases we recognized that 'by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Gilmer v. Interstate/Johnson Corp.*, 500 U.S. 20, 26 (1991) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 128 (1985)).

131. Christopher B. Kaczmarek, *Public Law Deserves Public Justice: Why Public Law Arbitrators Should be Required to Issue Written, Publishable Opinions*, 4 EMPLOYEE RTS. & EMP. POL'Y J. 285 (2000) (proposing legislation to require arbitrators to issue written, publishable opinions that are publicly available to provide for dignity concerns of the parties, enhance confidence in and stability of arbitration, provide predictability, and confer institutional benefits of quality, legitimacy, and equal access to information, as well as public benefits of deterring wrongdoing by employers); Adriaan Lanni, *Protecting Public Rights in Private Arbitration: Cole v. Burns International Security*, 107 YALE L.J. 1157 (1998) (arguing for public disclosure of arbitration awards).