Unions and ADR: The Relationship between Labor Unions and Workplace Dispute Resolution in U.S. Corporations

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I. INTRODUCTION

The use of alternative dispute resolution (ADR) practices has become commonplace in many large American firms. A growing number of organizations are turning to various ADR methods designed to deal with inevitable organizational conflicts and disputes.[1] Much has been written about the implications this dramatic change has had for employers, managers, and their employees.[2] Nevertheless, despite ADR's prevalence and the extensive research documenting its organizational manifestations, many empirical questions remain regarding the factors and pressures that have brought about this substantial transformation in the way organizations manage and address workplace conflict. ADR scholars have developed a number of theoretical frameworks in an attempt to better explain the widespread diffusion of ADR in the United States and in other developed countries.[3]

At the heart of this research is an attempt to isolate central predictors of organizational use of different dispute resolution approaches. Why do some organizations use ADR practices, while others choose to rely on traditional

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[1] DAVID B. LIPSKY ET AL., EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS 75–115 (2003) (Chapter 3 documents the rise of ADR in the United States); U.S. GEN. ACCOUNTING OFFICE, EMPLOYMENT DISCRIMINATION: MOST PRIVATE SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION (1995) (The GAO surveyed 2000 businesses about their use of ADR in resolving discrimination complaints. It found that 90% of the companies surveyed used one or more ADR methods for resolving such complaints but few used arbitration); David W. Harwell & Michael E. Weinzierl, *Alternatives to Business Lawsuits*, 41 BUS. AND ECON. REV. 40 (1995) (Discusses the survey of businesses conducted by DeLoitte and Touche in 1993, which also found the growing use of ADR practices by employers); U.S. GENERAL ACCOUNTING OFFICE, ALTERNATIVE DISPUTE RESOLUTION: EMPLOYERS' EXPERIENCES WITH ADR IN THE WORKPLACE (1997) (Another study by the GAO, focusing on employers' use of ADR to resolve workplace disputes).

[2] *See, e.g.*, Ariel C. Avgar, Treating Conflict: Conflict and Its Resolution in Health Care (2008) (unpublished Ph. D. dissertation, Cornell University); LIPSKY ET AL., *supra* note 1, at 117–52 (discussing how many U.S. employers have moved from using ADR techniques to establishment of conflict management systems); Alexander James Colvin, Citizens and Citadels: Dispute Resolution and the Governance of Employment Relations (1999) (unpublished Ph.D. dissertation, Cornell University).

[3] *See, e.g.*, LIPSKY ET AL., *supra* note 1, at 117–19; Alexander J.S. Colvin, *Institutional Pressures, Human Resource Strategies, and the Rise of Non-Union Dispute Resolution Procedures*, 56 INDUS. & LAB. REL. REV. 375, 389–91 (2003); David B. Lipsky & Ariel C. Avgar, *Toward a Strategic Theory of Workplace Conflict Management*, 24 OHIO ST. J. ON DISP. RESOL. 143, 189 (2008).

litigation or managerial authority to resolve workplace disputes? This study contributes to the effort to understand the adoption of workplace ADR by examining the relationship between the union status of the employer and a number of measures of ADR adoption and practice in large U.S. corporations. Since the 1970s, large employers in the U.S. have pioneered the use of ADR to resolve workplace disputes, and it is obviously of central interest to understand what role the union status of the firm may have played in promoting or deterring the widespread adoption of ADR.[4]

In fact, we have not been able to discover any data-driven, empirical research on the relationship between unions and ADR. Everything we know about this topic, it seems, is based principally on supposition, anecdotes, interviews, and case studies.[5] In this paper we use data from a sample of 368 corporations obtained in a 2011 survey of Fortune 1000 corporations to analyze the relationship between unions and workplace ADR in large U.S. companies. We examine an array of factors that distinguish union from nonunion corporations in their use of workplace ADR.

In the next section of this paper we attempt to clarify the influence that unionization may have on employer decisions to adopt and use ADR by reviewing the literature on this topic. Two perspectives on understanding the union role emerge from the literature. The first is the *union avoidance* or *union substitution* perspective, which holds that employers use ADR as a means of avoiding the unionization of their facilities or as a substitute for collective bargaining in resolving workplace disputes. The second is the *union complementarity* perspective, which holds that employers view ADR as a complement to collective bargaining, i.e., as a means of adapting some of the techniques used in collective bargaining (negotiation, mediation, arbitration, etc.) for the employer's nonunion employees. Both of these perspectives can be viewed as alternative strategies employers may use in managing workplace conflict. By viewing the use of ADR practices as a function of an employer's strategic choice, we underscore the importance of

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[4] A number of scholars have examined the relationship unions and ADR, albeit without the use of empirical data. *See, e.g.,* David Lewin, *Unionism and Employment Conflict Resolution: Rethinking Collective Voice and Its Consequences*, 26 J. OF LAB. RES. 209, 209–39 (2005); Peter Feuille & Denise R. Chachere, *Looking Fair or Being Fair: Remedial Voice Procedures in Nonunion Workplaces,* 21 J. OF MGMT. 27, 27–29 (1995). For a study that does use empirical data, *see* Colvin, *supra* note 3.

[5] *See* LIPSKY ET AL., *supra* note 1, at 303–04 (using data from a 1997 survey of Fortune 1000 corporations but bases its analysis on the relationship between unions and ADR on case studies); Avgar, *supra* note 2 (basing its analysis of the role of unions in a conflict management system on a case study of a large hospital in Ohio and uses survey data from a sample of employees at the hospital).

an employer's goals and objectives in deciding how to view the question of unionism and which specific ADR practices to implement to achieve those objectives.

In the following section we describe the methodology we used in conducting this study and present descriptive statistics on unions and the use of ADR by the corporations in our sample. We then present the results of our statistical analysis, followed by a discussion of our interpretation of those results. In brief, we find that the relationship between unions and ADR in major U.S. corporations is a nuanced one. Although we cannot dismiss entirely the role of union avoidance, we find that union complementarity is more useful in explaining the corporation's adoption of ADR practices and systems. We find that the distinction between entirely nonunion corporations and partially unionized corporations is an important one. In many nonunion firms the threat of unionization is virtually nonexistent, and so unionism plays no role in the employer's choice of a conflict management strategy. By contrast, in partially unionized firms management must weigh its relations with unions carefully in crafting an ADR strategy for its nonunion employees. We uncover strong evidence that a company's experience with collective bargaining significantly colors its views of various ADR practices. We also find that the strategic priority that management attaches to improving and controlling workplace relationships influences its decisions regarding the adoption of ADR.

II. TOWARD CONCEPTUAL CLARITY ON THE ROLE OF UNIONISM

The growing use of ADR to resolve workplace disputes over the last four decades occurred simultaneously with the decline in union membership as a proportion of the workforce (often referred to as union density). From its peak of 35% of wage and salary workers in 1954, union density steadily declined and in 2011 reached 11.8%.[6] It would be easy to jump to the conclusion that the simultaneous decline of unionism and rise of ADR are causally linked. A major purpose of this paper is to use empirical data to examine whether and to what extent that link exists. But we also know that there are other factors that explain the relative decline of unionism, and those factors do not necessarily match the factors that explain the rise of ADR. For example, a major reason for the decline of unionism in the U.S. is the decline of employment in the smokestack industries, the industries hit hardest by international competition and deindustrialization. Whether the shift from a

[6] News Release, Bureau of Labor Statistics, Union Members – 2011 (2012), http://www.bls.gov/news.release/pdf/union2.pdf.

manufacturing to an information economy helps explain the rise of ADR, however, is at best problematic.[7] To understand the relationship between unions and ADR, it is useful to trace briefly the evolution of collective bargaining in the U.S.

A. *The Evolution of Collective Bargaining*

The origins of collective bargaining in the U.S. can be traced to the 19th century, but the contemporary industrial relations system has its roots in the rise of unionism during the Great Depression of the 1930s. Unions successfully organized production workers in autos, steel, rubber, electrical appliances, and other industries during the 1930s and 1940s. The passage of the National Labor Relations Act (NLRA or Wagner Act) in 1935 gave private sector workers the right to join unions and engage in collective bargaining,[8] and most scholars agree the law significantly assisted unions in their efforts to organize the unorganized.[9] Union organizing efforts during this period were usually characterized by considerable turmoil and often by violence.[10] After the United States entered World War II, policy makers

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[7] There are numerous discussions of the relative decline of unionism in the United States over the past 50 years. *See, e.g.,* LIPSKY ET AL., *supra* note 1, at 63–69.

[8] National Labor Relations Act, 29 U.S.C. § 157 (2010).

[9] Barry T. Hirsch & Edward J. Schumacher, *Private Section Union Density and the Wage Premium: Past, Present, and Future*, 22 J. OF LAB. RES. 487, 487 (2001) ("Following a dramatic spurt in unionization after passage of the depression-era National Labor Relations Act (NLRA) of 1935, union density peaked in the mid-1950s, and then began a continuous decline. At the end of the century, the percentage of private wage and salary workers who were union members was less than 10 percent, not greatly different from union density prior to the NLRA."); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organize under the NLRA,* 96 HARV. L. REV. 1769, 1771 (1983) ("When the NLRA was enacted in 1935, union density—the ratio of union membership to the nonagricultural work force —was only 13%. In just one decade, union density nearly tripled, reaching 35%."). Weiler obtained union density data for the United States for the period 1935–1955 from GEORGE BAIN & ROBERT PRICE, PROFILES ON UNION GROWTH 88–89 (1980).

[10] Two standard sources on the history of the American labor movement before World War II are PHILLIP TAFT, ORGANIZED LABOR IN AMERICAN HISTORY (1964) and WALTER GALENSON, THE CIO CHALLENGE TO THE AFL: A HISTORY OF THE AMERICAN LABOR MOVEMENT, 1935–1941 (1960). Both books document the many strikes that occurred during union organizing campaigns in the 1930s. Many of these strikes resulted in violent clashes between workers and police. For example, the newly formed United Automobile Workers engaged in a sit-down strike (that is, the workers occupied the plants and refused to work) at General Motors plants in 1937. At the Flint, Michigan GM plant, on January 11, strikers and city police engaged in a violent confrontation.

sought a means of bringing order out of the chaos that existed in many industries.[11] By the end of World War II, both employers and unions were eager to develop "processes and procedures that would serve to resolve conflict and regulate employment relationships."[12] At a White House conference convened by President Truman in the fall of 1945, major union and business leaders agreed that the use of mediation and arbitration should be encouraged to resolve labor disputes.[13]

For nearly thirty years following World War II, a broad if fragile consensus prevailed at many work sites: "Managers would recognize the legitimacy of unions, unions would restrict their concerns to well-defined workplace issues, and government would be the impartial arbiter, helping to ensure a level playing field."[14] The so-called "New Deal system of industrial relations" called for the use of mediation to resolve interest disputes (disputes involving the negotiation of a new collective bargaining agreement) and arbitration to resolve rights disputes (disputes involving the application and interpretation of a collective bargaining agreement).[15]

By the 1970s, however, the New Deal system of industrial relations was beginning to break down. Globalization, international competition,

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According to Galenson, "[F]or hours the strikers battled the police, fighting clubs, tear gas, and riot guns with such improvised weapons as two-pound car door hinges and streams of water from fire hoses. The news of the riot spread, and the strikers were reinforced by thousands of supporters who poured into Flint." Fourteen strikers suffered bullet wounds, and the confrontation became known as "The Battle of the Running Bulls." *Id.* at 137–38.

[11] On December 17, 1941—ten days after the Japanese attacked Pearl Harbor—President Roosevelt signed an executive order establishing the National War Labor Board, which was given the task of "adjusting and settling labor disputes which might interrupt work which contributes to the effective prosecution of the war." TAFT, *supra* note 10, at 546.

[12] LIPSKY ET AL, *supra* note 1, at 43 ("By the end of World War II, both labor and management in the United States were anxious to rationalize and bring order to a chaotic workplace. Both sides were willing to develop processes and procedures that would serve to regulate employment relationships. The New Deal version of the social contract was the consequence of these shared objectives.").

[13] Harry C. Katz & David B. Lipsky, *The Collective Bargaining System in the United States: The Legacy and the Lessons*, *in* INDUSTRIAL RELATIONS AT THE DAWN OF THE NEW MILLENNIUM 145–61 (Maurice F. Neufeld & Jean T. McKelvey eds., 1998) (providing a full account of Truman's 1945 White House conference).

[14] LIPSKY ET AL., *supra* note 1, at 43.

[15] THOMAS A. KOCHAN ET AL., THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 21–46 (1986) (The term "New Deal system of industrial relations" is closely associated with this book, which is a classic treatment of the forces that destabilized that system).

technological change, and the deregulation of several major industries were some of the important factors undercutting the New Deal system. The decline of manufacturing industries, the growth of white-collar jobs, the change in the composition of the workforce (which now featured a growing proportion of women and minorities), and the statutory protection of individual rights were other factors that served to weaken unions and undercut collective bargaining. Scholars generally agree that the transformation of the workplace that took root in the 1970s was an important determinant of the rise of ADR to resolve workplace disputes.[16]

At the risk of oversimplification, contemporary employers have a choice of two strategies in dealing with unions. They can accept the legitimacy of unions and work with them through collective bargaining (admittedly, quite often in an adversarial relationship, but sometimes in a collaborative one).[17] Alternatively, they can pursue policies, sometimes aggressively, designed to avoid unions or eliminate them from their facilities.[18] We hypothesize that

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[16] *See, e.g.*, KOCHAN ET AL., *supra* note 15, at 38–45 (providing an excellent discussion of the factors that undermined the U.S. industrial relations system in the 1960s and 1970s); LIPSKY ET AL., *supra* note 1, at 54–73 (linking the destabilization of the New Deal industrial relations system in the 1970s to the rise of ADR).

[17] There are numerous accounts of both collaborative and adversarial collective bargaining relationships in the industrial relations literature. For a discussion of collective bargaining relationships in the pulp and paper industry, the automobile supply industry, and the railroad industry, *see* RICHARD E. WALTON ET AL., STRATEGIC NEGOTIATIONS: A THEORY OF CHANGE IN LABOR-MANAGEMENT RELATIONS 67–210 (1994). For a discussion of the change from adversarial to more cooperative labor-management relations in the automobile industry, *see* HARRY C. KATZ, SHIFTING GEARS: CHANGING LABOR RELATIONS IN THE U.S. AUTOMOBILE INDUSTRY 167–74 (1985). For an account of the development of collaborative relations between Kaiser Permanente and its unions, *see* THOMAS A. KOCHAN ET AL., HEALING TOGETHER: THE LABOR-MANAGEMENT PARTNERSHIP AT KAISER PERMANENTE (2009).

[18] A turning point in U.S. labor relations occurred in 1981, when air traffic controllers engaged in an illegal strike against the federal government. President Reagan fired all of the striking air traffic controllers, thereby destroying their union. For an account of this episode, *see* ROBERT HUTCHENS ET AL., STRIKERS AND SUBSIDIES: THE INFLUENCE OF GOVERNMENT TRANSFER PROGRAMS ON STRIKE ACTIVITY 59–68 (1989). After the air traffic controllers strike, some employers adopted the practice of dismissing employees who went on strike and hiring replacements. In 1983, the owners of Greyhound bus lines hired replacement drivers when their regular drivers went on strike in an effort to eliminate the union. *See* Peter T. Kilborn, *Money Isn't Everything in Greyhound Strike*, N.Y. TIMES, April 9, 1990, at A1. *See also*, Michael Hoyt, *Downtime for Labor: Are Working People Less Equal than Others—Or Is Labor Just a Dead Beat?*, 22 COLUM. JOURNALISM REV. 36, 36–40 (1984).

this choice of strategies by employers affects their adoption and use of ADR practices.

B. *External and Internal Factors Influencing the Use of ADR*

In explaining the rise of ADR, some researchers have made a distinction between the role of factors *external* to the organization (or exogenous factors) and the role of factors within the organization (*internal* or endogenous factors).[19] For example, several scholars have advanced the argument that the adoption of ADR practices is, first and foremost, a reaction by organizations to the external pressure created by the passage of several significant workplace statutes in the 1960s and 1970s (such as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Occupational Safety and Health Act of 1970). These statutes, some claim, led to a dramatic increase in employment litigation, and this so-called "litigation explosion" pushed organizations to develop dispute resolution practices that buffered them from the pressures of the public judicial system.[20]

Others scholars have argued that, in addition to external pressures, internal factors shaped the organizational adoption of ADR practices by U.S. employers.[21] For example, over the last three decades, many employers have restructured the way in which work is performed in their organizations.

> A hallmark of the reorganization of the workplace is the decline in the importance of hierarchy and the rise of team-based work. Many U.S. employers have discovered that employee performance and productivity can

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[19] The distinction between internal and external factors is a key part of the analysis developed in LIPSKY ET AL., *supra* note 1, at 117–52; *see also*, David B. Lipsky et al., "The Antecedents of Workplace Conflict Management Systems in U.S. Corporations: Evidence from a New Survey of Fortune 1000 Companies," (July 2, 2012) (paper prepared for the 16th World Congress of the International Labor and Employment Relations Association).

[20] WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT 131–57 (1991). For a more skeptical view of the authenticity of the so-called "litigation explosion," *see* Terence Dunworth & Joel Rogers, *Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971-1991*, 21 L. & SOC. INQUIRY 497, 497–592 (1996).

[21] LIPSKY ET AL., *supra* note 1, at 133–138. Among the internal factors identified by the authors of this book are organizational cultures, management commitment, and management responses to major lawsuits.

> be enhanced if employees are empowered to assume more responsibility for the manner in which they perform their work.[22]

In many organizations the reorganization of the workplace—particularly the movement to team-based work—was associated with the employer's introduction of ADR.[23]

C. *Union Avoidance*

The distinction between external factors and internal factors, however, does not fit the role that unionism plays in the adoption of ADR practices. Unionism is both an external and an internal factor in affecting the employer's decision making on ADR. On the one hand, much of the ADR literature views unionization as an external "threat" that has had a strong influence on decisions by employers to adopt ADR. Union avoidance is often viewed as a major motive underlying the employer's use of ADR. According to this perspective, organizations seeking to avoid unionization are more likely to adopt ADR practices, thereby providing their employees with a nonunion version of what unions deliver to their members. The threat of unionization, according to this argument, is likely to increase the use of ADR by a nonunion employer or by an employer who is partially unionized.[24]

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[22] *Id.* at 65.

[23] *Id.* at 65–69; Colvin, *supra* note 3.

[24] Rosemary Batt, Alexander J.S. Colvin & Jeffrey Keefe, *Employee Voice, Human Resource Practices, and Quit Rates: Evidence from the Telecommunications Industry*, 55 INDUS. & LAB. REL. REV. 573, 589 (2002) ("Prior research suggests that firms adopt dispute resolution procedures as a union avoidance strategy. To the degree that this is true, we would expect nonunion dispute resolution procedures to be particularly strong in this industry [telecommunications] because the threat of union organizing is high. In addition, we examined stronger forms of nonunion procedures, including nonunion arbitration and peer review panels. Even with this relatively favorable setting for nonunion procedures, we found no statistically significant results for nonunion arbitration procedures and only marginally significant results for peer review procedures, which were not robust with respect to alternative specifications of the model.") (citation omitted); Colvin, *supra* note 3, at 380–81 ("The threat of unionization can strongly influence the organizational practices of nonunion employers. . . . The ability of peer review panels to function legally within the confines of the general legislative prohibition on nonunion employee representation plans creates a strong institutional incentive for employers to adopt this form of employee involvement in dispute resolution to help forestall threats of unionization.").

For example, Wal-Mart, the world's largest company, famously pursues aggressive strategies to avoid unionization.[25] One of the strategies Wal-Mart uses to avoid unionization is its Open Door Policy, initially introduced in the 1970s, which the corporation promotes as a means for employees to voice their concerns and as a mechanism for improving relations between management and workers. In the research we report in this paper, we discovered that 91% of Fortune 1000 companies use open door policies, which are often viewed as a keystone of their ADR portfolio. In our data, however, it is not evident that most corporations use open door policies as a union avoidance technique. But according to a report by Human Rights Watch, "At its core, the Open Door Policy is motivated by Wal-Mart's hostility to worker organizing. . . . The policy affords [Wal-Mart] the opportunity to tell its employees that 'third party representation' is not necessary, as they are allegedly able to bring their concerns directly to management."[26] According to Human Rights Watch, Wal-Mart instructs its managers to achieve the company's goal of avoiding unionization by using the Open Door Policy to assure employees (called associates by Wal-Mart) that "at any time, at any level, in any location [they] may communicate verbally or in writing with any member of management up to the president, in confidence, without fear of retaliation."[27] When faced with a unionization drive, Wal-Mart managers have told their employees "[t]here is no reason that associates need a union. They don't need representation because if they have concerns, they can go directly to management, and if that doesn't work, they can go higher up."[28]

D. *Union Complementarity*

In past research on workplace ADR union avoidance has been found to be one of the factors motivating management's adoption of ADR practices and systems, but it is not necessarily the only factor or even a major factor. In fact, for many companies the adoption of workplace ADR has been driven by other factors much more significant than union avoidance, most notably

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[25] For one account of Wal-Mart's anti-union policies, *see* Erin Johansson, *Checking Out: The Rise of Wal-Mart and the Fall of Middle Class Retailing Jobs*, 39 CONN. L. REV. 1461, 1461–91 (2007). For another account of Wal-Mart's policies, *see* HUMAN RIGHTS WATCH, DISCOUNTING RIGHTS: WAL-MART'S VIOLATION OF U.S. WORKERS' RIGHT TO FREEDOM OF ASSOCIATION (2007).

[26] HUMAN RIGHTS WATCH, *supra* note 25, at 79–80.

[27] *Id.* at 80.

[28] *Id.* at 81.

management's desire to avoid the time and costs associated with litigation.[29] All of these factors—some external to the organization and others internal—have arguably led to the rise of ADR and to a historic transformation in the means used by employers to manage workplace conflict. In the context of the dramatic changes that have transformed employment relations in the U.S., it remains unclear precisely what role unions and collective bargaining have played in the rise of ADR.

It is quite possible that companies that have engaged in collective bargaining with unions have learned (or at least developed the perception) that the effects of collective bargaining on the management of the company have not all been negative. Case studies of collaborative relationships between unions and employers have documented the positive effects of unions on management practices.[30] Research demonstrates that the presence of unions within an organization has clear implications for internal organizational structures and practices. Unions affect a host of internal factors within an organization, from skills development and training practices to the institutionalization of career ladders and seniority rules.[31] Furthermore—and central to the question of ADR adoption—unions institutionalize a grievance procedure for unionized employees, which scholars such as Freeman and Medoff believe is the principal means by which unions provide "voice" for the employees they represent.[32] It is possible, if not likely, that a grievance procedure established under collective bargaining augments the awareness of the employer's nonunion employees about the benefits of voice mechanisms, including other dispute resolution practices. According to this argument, unions affect the diffusion of dispute resolution practices to nonunion employees not by acting as an external threat but by serving as an internal motivator.

On the one hand, in a corporation that has both unionized and nonunion facilities, the firm's experience with mediation, fact-finding, arbitration, and other dispute resolution techniques used under collective bargaining in its unionized facilities may lead it to believe that extending the use of those techniques to its nonunion facilities may be a worthwhile idea. It is possible

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[29] LIPSKY ET AL., *supra* note 1, at 101–05; Lipsky et al., *supra* note 19.

[30] A classic work on this topic is SUMNER SLICHTER ET AL., THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 859–68 (1960); *see also*, *supra* note 17 and accompanying text.

[31] SLICHTER ET AL., *supra* note 30, at 59–141, 178–210.

[32] A landmark work on union voice is RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 103–09 (1984); another important book on the importance of the grievance procedure in providing voice for employees is JAMES W. KUHN, BARGAINING IN GRIEVANCE SETTLEMENT (1961).

that the experience the firm has under collective bargaining may also alert it to the downside of those dispute resolution techniques and affect the way it shapes the use of the techniques for its nonunion facilities. In either case, we maintain, the firm views the adoption of ADR as a complement to collective bargaining, and not as a means of undercutting it in its unionized facilities or avoiding it in its nonunion facilities.

On the other hand, a corporation that has both unionized and nonunion facilities may view the use of ADR in its nonunion facilities as a strategy to avoid the unionization of those facilities. For example, in 2003 the Raytheon Corporation, a major defense contractor headquartered in Waltham, Massachusetts, established a comprehensive "Alternative Dispute Resolution Program."[33] The new program was intended principally for production employees at Raytheon's nonunion facilities.[34] At the time, Raytheon consisted of eight major divisions and employed 80,000 employees at numerous plants in both the U.S. and abroad. At many of its plants the production employees were represented either by the United Steelworkers or the International Association of Machinists. But a significant number of the corporation's facilities remained nonunion. In presentations made by the director of the Alternative Dispute Resolution Program at conferences and other venues, he candidly acknowledged that one of management's major

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[33] News Release, Raytheon, *Raytheon Enters EEOC's National ADR 'Referral Back' Program: Defense/Aerospace Leader Joints Other Major Firms in Employing Innovative Program* (April 21, 2004), *available at* www.investor.raytheon.com/phoenix.zhtml?c=84193&p=irolnewsArticle&ID=517282&highlight= (last visited July 25, 2012); Linda Cinciotta, *Alternative Dispute Resolution Comes of Age in the Federal Government*, (Oct. 28, 2003), http://www.justice.gov/odr/aatllegalcenter102803.htm ("The private sector faces a comparable problem, but for a different reason. Corporations are pressured by the competitive and global economy. They must find a workable solution to cut the cost of their workplace conflict. Many of them are doing so by adopting integrated systems that allow them to manage conflict, not just disputes. These integrated conflict management systems anticipate conflict and try to intervene with it before the conflict develops into real problems. Our former Associate Attorney General, now your colleague, Jay B. Stephens (Vice President and General Counsel at Raytheon Co.) is providing a good example. Raytheon's new workplace ADR program is a proactive systems approach, and the Raytheon program leaflet describes it well: 'The ADR process is not about winning; it is about fair and responsible reconciliation and restoring relationships, when different views of a situation bring people into conflict.'").

[34] In 2003–06, the director of Raytheon's ADR program was Warren Cunningham. Mr. Cunningham made two presentations about Raytheon's program at classes taught by two of the authors of this paper (Avgar and Lipsky). Much of what we know about the Raytheon program was obtained from our conversations with Mr. Cunningham and from the PowerPoint presentations that he used in our classes.

motives for introducing an advanced ADR program was the corporation's desire to avoid the unionization of its nonunion facilities. In the corporation's view, the provision of a fair and equitable system for resolving employee disputes would be perceived by its nonunion employees as an attractive substitute for collective bargaining.[35]

We cannot test directly the role that either union avoidance or union complementarity may have played in prompting large U.S. employers to adopt ADR practices (in large part because the vast majority of these employers will not admit publicly—or in surveys—that union avoidance was one of their major motivations). However, our statistical results will allow us to make reasonable inferences about employer motives, including union avoidance, for introducing ADR. We now turn to the methods and data we use in our analysis.

III. DATA AND METHODS

In 2011, the Scheinman Institute on Conflict Resolution at Cornell completed a comprehensive survey of the use of ADR by Fortune 1000 firms. The survey was co-sponsored by the International Institute for Conflict Prevention and Resolution (CPR) and the Straus Institute for Dispute Resolution at Pepperdine University, and it was administered by Cornell's Survey Research Institute (SRI). Cornell conducted a similar survey in 1997; that survey documented: (1) the growing use of ADR, especially arbitration and mediation, to resolve workplace disputes; (2) the corporate preference for interest-based (rather than rights-based) methods of resolving disputes; and (3) the emergence of a new phenomenon, namely, integrated conflict management systems.[36] The vast majority of Fortune 1000 firms in 1997 relied on mediation and arbitration to resolve employment disputes, but they were also using a variety of other techniques to handle such disputes, including fact-finding, med-arb, and nonunion grievance procedures.[37]

The 1997 survey was the first to document the emergence of integrated conflict management systems in U.S. corporations. Although there is no

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[35] Course presentations by Warren Cunningham, former ADR Director, Raytheon (2003–2006). In 2006, Mr. Cunningham left the Raytheon Corporation and became a human resource executive at the Wal-Mart Corporation.

[36] LIPSKY ET AL., *supra* note 1. An earlier version of this section of the paper appeared as David B. Lipsky, *How Corporate America Uses Conflict Management: The Evidence from a New Survey of the Fortune 1000*, 30 ALTERNATIVES TO THE HIGH COST OF LITIG. 139 (2012). We thank CPR for permission to reprint portions of that article here.

[37] *Id.* at 82.

standard definition of a conflict management system, there is widespread recognition that a system differs from a practice or technique in four ways: (1) a system entails a comprehensive, proactive approach to managing and resolving conflict in an organization; (2) a system has a broad scope, allowing many different types of disputes (statutory, nonstatutory, etc.) to be heard and resolved; (3) a system provides multiple access points for employees who have complaints (e.g., an employee can file a complaint with his supervisor, the human resource function, the counsel's office, or the office that manages the system); and (4) a system provides multiple options for resolving disputes (e.g., both interest-based and rights-based methods).[38] On the basis of the 1997 survey, Lipsky et al., estimated that about 17% of Fortune 1000 companies had all or most of the features of an integrated conflict management system.[39]

In the 2011 survey of the Fortune 1000, the co-sponsors had the objective of replicating in part the 1997 survey but also wanted to add some new survey items designed to capture ADR developments that had occurred since the first survey was conducted. Also, the 1997 survey had not asked respondents about the level or status of unionism in their organizations. Indeed, the earlier survey contained no information on the corporation's collective bargaining relationships. The co-sponsors of the 2011 survey very much wanted to explore the relationship between unions and ADR, and therefore, they filled some of the gaps that existed in the previous survey.

In both the 1997 and 2011 surveys, the objective was to interview the general counsel (GC) in each of the Fortune 1000 corporations. If we could

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[38] In 1999, the Society for Professionals in Dispute Resolution (SPIDR) appointed an eleven-person committee to develop a definition of a so called "integrated conflict management system" and to provide guidelines for the design and implementation of such systems; the committee was co-chaired by Ann Gosline and Lamont Stallworth (Lipsky was a member of the committee). The SPIDR committee's report was published by Cornell's Institute on Conflict Resolution in 2001. *See* Ann Gosline et al., *Designing Integrated Conflict Management Systems: Guidelines for Practitioners and Decision Makers in Organizations*, 4 CORNELL STUD. IN CONFLICT AND DISP. RESOL. 135, 135–46 (2001). The definition of an integrated conflict management system developed by the SPIDR committee was subsequently adopted by Lipsky and his co-authors. *See* LIPSKY ET AL., *supra* note 1, at 11–19.

[39] LIPSKY ET AL., *supra* note 1, at 126. The authors classified large U.S. corporations as having one of three possible conflict management strategies, which they label "contend," "settle," and "prevent." "[C]ompanies that we have classified as having a prevent strategy have either adopted a full-blown conflict management system or have adopted a policy of using ADR in all types of disputes and have implemented many of the features of a full-blown system." Seventeen percent of the corporations in their sample fell into the "prevent" category. *Id.* at 147.

not interview the GC, we attempted to interview one of the GC's top deputies. In 1997 we obtained interviews with attorneys in 606 of the Fortune 1000 firms; in 2011 we obtained interviews with attorneys in 368 of these companies. The director of SRI believes that the decline in the response rate in the new survey was the consequence of so-called "survey fatigue," which she reported had affected most of the surveys conducted by SRI. In comparing the characteristics (revenue, number of employees, and industry) of our sample of corporations with the characteristics of all of the Fortune 1000 corporations, we found that our sample is an excellent cross-section of the larger group.

The results of the new survey provide a rich tapestry of data on the use of ADR and conflict management systems by the corporations in our sample. They also provide a basis for comparing the ADR policies and practices pursued by major corporations in 2011 with the policies and practices pursued by major corporations in 1997. In this paper, we do not tap into all of the data resources at our disposal. To achieve our objective of understanding the relationship between unions and ADR, we need only provide a brief summary of our survey results. Table 1 shows the proportion of employees covered by ADR practices in the corporations in our sample. The most surprising finding in the table is that 43% of our respondents reported that none of their employees were covered by ADR practices. However, in a significant proportion of these corporations, 40%, at least some of the employees were represented by unions and covered by a collective bargaining agreement. In about one-fifth of the corporations, more than 75% of the employees were covered by ADR practices. In sum, there is extraordinary variation in both the proportion of employees covered by ADR practices and the proportion covered by unions in these corporations.

Table 1. Proportion of Corporation's Employees Covered by ADR

Proportion of Employees Covered by ADR	*Percentage of Companies*
More than 75%	19.0
Between 51 and 75%	3.5
Between 26 and 50%	3.5
Between 1 and 25%	19.4
Zero	43.3
Don't know	11.3

Figure 1 provides a comparison of various types of ADR practices used by major U.S. corporations in 1997 and 2011. It is important to note that this comparison includes not only employment disputes but also consumer, commercial, and other types of corporate disputes. Also, some caution must

be used in interpreting the results because there was a significant change in the companies included in the Fortune 1000 in 1997 and the companies included in 2011. For example, there was a marked decline in the number of manufacturing companies included in the newer list, and a marked increase in the number of retail and wholesale trade, finance, and insurance companies. Lastly, note that Figure 1 shows the proportion of corporations that used a particular technique at least once in the previous three years. This particular metric, of course, is only one of several that might be used to gauge the frequency of ADR use. In fact, we know that the majority of corporations in our sample used some of the techniques (particularly arbitration and mediation) numerous times within the previous three years.

[See Figure 1]

Figure 1 shows that the vast majority of corporations in 1997 and 2011 relied on mediation and arbitration as techniques to resolve workplace and other disputes. In fact, the figure shows that the proportion of companies using mediation increased from 87% to 98% over the course of 14 years. There was also a discernible increase in the proportion of companies using fact-finding and med-arb. Of special note is the finding that the proportion of corporations having an ombuds function increased from 10% to 14%—in relative terms, a 40% increase. In the contemporary organization, the ombuds office is frequently the hub of a conflict management system. Also note that Figure 1 includes two techniques (early neutral evaluation and early case assessment) that were not included in our 1997 survey. These techniques were novel ones in 1997, but Figure 1 shows that by 2011 they had become prominent in the ADR portfolio.

Our 2011 results show that the use of mediation by Fortune 1000 corporations had remained relatively stable across a variety of disputes (employment, commercial, consumer, etc.) over a 14-year period. However, our results reveal a noteworthy decline in the use of arbitration across a variety of disputes. Figure 2 shows that the proportion of corporations that reported using employment arbitration at least once in the previous three years declined from 62% to 38%—in relative terms, about a 40% decline. Note also that Figure 2 shows that the use of arbitration in construction disputes declined from 40% to 22%, while the use of arbitration in commercial disputes declined from 85% to 62%. It is possible that a major reason for the decline in the use of arbitration was the recession that began in 2008, but we lack the data to test this proposition. The respondents in our survey provided other reasons for the decline in the use of arbitration. Many of them believe that arbitration has increasingly become similar to litigation, and they suggest that "external law"

(relevant statutes and court cases) has made arbitration more costly, complex, and time-consuming. Our new survey confirms the findings of our 1997 survey, namely, that corporate attorneys prefer to use mediation and other interest-based options (rather than arbitration and other rights-based options) to resolve employment and other types of disputes.

[See Figure 2]

Another possible reason for the decline in the use of employment arbitration is the rise in the use of conflict management systems in U.S. corporations. Among the hallmarks of a conflict management system, as we have noted, is their emphasis on resolving employment disputes within the organization, using internal dispute resolution mechanisms, rather than resorting to outside arbitrators or mediators to resolve such disputes. As previously noted, on the basis of our 1997 survey, we estimated that about 17% of the Fortune 1000 corporations used a conflict management system. A major objective of our 2011 survey was to discover how many corporations had adopted and were currently using a conflict management system. We included several questions in our survey instrument designed to provide an estimate of the use of such systems by major corporations. The metrics needed to make such an estimate, however, have proven to be laden with ambiguities and definitional difficulties that make arriving at a precise estimate challenging. In part, this is because there is no standard definition of a "conflict management system," and many corporate attorneys and other practitioners view the use of ADR techniques (such as arbitration and mediation) as synonymous with the use of a system. Thus, when we asked our respondents, "Do you believe your company has a conflict management system?" about 67% answered "yes." Fortunately, the inclusion of other items in our survey instrument that covered core characteristics of an authentic conflict management system allowed us to develop more valid estimates of the proportion of our respondents that actually had a system.

For example, we asked each respondent whether his or her company had "an office or function dedicated to managing your dispute resolution program." About 38% answered "yes" to this question. Although some systems are managed directly by the corporate counsel's office or by the human resource function, past research suggests that the most fully developed systems are managed by independent or semi-autonomous offices within the organization. These offices often are given names intended to suggest their central function; Prudential's conflict management system, for example, was managed under the rubric "Roads to Resolution," and was headed by a vice president who was also the corporation's chief ethics

officer.[40] The U.S. Postal Service has "Redress," General Electric has "Resolve," Alcoa has "Resolve It," PECO Energy has "PEOPLE*SOLVE," and other organizations use other names.[41] As we previously mentioned, corporations are increasingly using an ombudsman to manage a conflict management system. This list of examples suggests that conflict management systems exist in both nonunion corporations (Prudential) and in heavily unionized ones (GE, Alcoa, and PECO). By using other data in our survey, we were able to refine further our estimate of the number of corporations in our sample that have either all or most of the characteristics of an authentic conflict management system. Our best estimate is that roughly one-third of the corporations have a system. In our statistical analysis, we examined the relationship between union status and the existence of a conflict management system; no matter how we defined a "system," however, we could not find a significant relationship between that phenomenon and union status.

Our survey results disclose considerable variation in the use of ADR and conflict management systems in Fortune 1000 corporations. Although as many as one-third of these companies use a form of a conflict management system, our results suggest that as many as 40% rarely use any ADR techniques and continue to rely largely on traditional methods (including litigation) to resolve disputes. Our findings also show that major U.S. corporations that rely on ADR have adopted a wider array of ADR techniques over the past 14 years, including so called "hotlines," open door policies, early neutral evaluation, early case assessment, and conflict coaching. Is there a relationship between the variation in ADR practices and systems used by Fortune 1000 corporations and the union status of those corporations? Our statistical results provide an answer to that question.

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[40] For discussion of the Prudential conflict management system, see LIPSKY ET AL., *supra* note 1, at 147–152.

[41] For a discussion of the dispute resolution program at the U.S. Postal Service, *see* Lisa B. Binghamet al., *Highlights of Mediation at Work: The Report of the National REDRESS Evaluation Project of the United States Postal Service*, 18 NEGOTIATION JOURNAL 1, 136–59 (2002); for a discussion of the program at General Electric, *see* Mark Nordstrom, *General Electric's Experience with ADR,* in ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF THE NEW YORK 53RD ANNUAL CONFERENCE OF LABOR 197–226 (Samuel Estreicher & David Sherwyn eds., 2004); for a discussion of the program at Alcoa, *see* Dale C. Perdue, *Employment Dispute: Resolve It! Alcoa at the Forefront of Alternative Dispute Resolution, in* ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF THE NEW YORK 53RD ANNUAL CONFERENCE OF LABOR 233–234 (Samuel Estreicher & David Sherwyn eds., 2004); and for a discussion of the program at PECO Energy, *see* LIPSKY ET AL., *supra* note 1 at 148–150.

IV. STATISTICAL FINDINGS

In this section we use the data we obtained from our survey of Fortune 1000 corporations to analyze the relationship between the union status of the corporation and several critical dimensions of the corporation's ADR practices and policies, specifically: (1) the ADR practices (arbitration, med-arb, nonunion grievance procedures, etc.) that it uses to resolve disputes with its nonunion workforce; (2) the extent to which its nonunion employees are covered by its ADR practices and policies; and (3) the reasons (given by respondents in our survey) the company chooses to use (or not to use) various ADR practices and policies.

A. *Mean Number of ADR Practices and Union Status*

In Table 2, we compare the mean number of total nonunion ADR practices found in each of the Fortune 1000 companies contained in our sample, differentiating between companies with and without some union presence. Respondents were asked if their firm used each of the following practices among their nonunion workforce: mediation, fact-finding, arbitration, med-arb, peer review, mini-trials, in-house grievance systems, early neutral evaluation, or early case assessment. Answers were aggregated for each firm to create a continuous index of practices, from zero to nine.

Table 2: Mean Number of Fortune 1000 ADR Practices and Union Status of Firms

Union Status of Firm	*Mean*	*Std. Error*	*Change in Means (% Change)*	*Mean*	*Std. Error*	*Change in Means (% Change)*
Nonunion	4.33	.195	-0.16 (-3.7%)	4.70	.212	-0.13 (-2.6%)
Union	4.17	.184		4.58	.197	
Controls Included?[42]	No			Yes		

*** = significant at the .01 level; ** = significant at the .05 level; * = significant at the .10 level.

[42] Controls consist of exogenous and endogenous factors that might influence the number of ADR practices a firm employs, such as the firm's size and industry, the firm's strategic approach and commitment to ADR, and the firm's employee productivity.

About 54% of surveyed firms indicated that they had some union presence in the company. These unionized firms offered, on average, 4.17 different ADR practices to their nonunion employees. Nonunion firms in our sample, however, provided a mean of 4.33 practices to their workforce. Taken in purely descriptive terms, this figure appears to suggest that nonunion companies provided 3.7% greater numbers of practices than unionized companies.

However, what appears to be a difference between the two groups of companies does not withstand even the most basic statistical test. Running a bivariate means comparison of the two groups reveals that there is no statistical difference between the mean values. To confirm this finding of nonsignificance, we ran a more sophisticated quantitative analysis, called a generalized linear regression, which allowed us to control for a variety of exogenous and endogenous factors we believed might predict how many ADR practices a firm has. These controls included the firm's employment size and industry, its strategic approach and commitment to ADR, and its per-employee productivity levels (measured by total revenue per employee). In using this analytical approach, we employ estimated marginal means to compare unionized and nonunion firms after controlling for all the above factors. We find that adding controls in fact lowers the mean difference between the two groups to 2.6%, a result that is, of course, also nonsignificant. In all, what might appear in descriptive terms to be a slight reduction in the numbers of ADR practices available to employees at unionized companies does not hold up under empirical scrutiny.

B. *Individual ADR Practices and Union Status*

Although the sheer number of practices a firm employs is not affected by whether the firm is unionized, perhaps it is the case that the use of certain individual practices, like arbitration, might be associated with a firm's union status. Our second test disaggregates the portfolio of ADR options to test for a relationship between unionism and single ADR practices. In this paper we specifically highlight four practices: arbitration, med-arb, fact-finding, and in-house grievance systems.[43] We use generalized logistic regressions, where the dependent variable is dichotomized into a binary "yes" or "no" value, for each practice. The results, found in Table 3, show the effects of union status

[43] All practices were tested individually, with the exception of mediation. As the vast majority of firms indicated that they used mediation, it was impossible to create a model to explain variance between firms that used mediation and firms that did not. Where models could be created, union status was not found to significantly predict variance in any individual practices other than those reported in the table.

on these variables, with and without controlling for other exogenous and endogenous factors.

Table 3: Individual Fortune 1000 ADR Practices and the Union Status of Firms

FORTUNE 1000 USE OF ARBITRATION						
Union Status of Firm	*Mean*	*Std. Error*	*Change in Means (% Change)*	*Mean*	*Std. Error*	*Change in Means (% Change)*
Nonunion	.81	.034	+.06	.88	.041	+.06*
Union	.87	.027	(+7.4%)	.94	.024	(+6.8%)
Controls Included?[44]	No			Yes		
FORTUNE 1000 USE OF MED-ARB						
Union Status of Firm	*Mean*	*Std. Error*	*Change in Means (% Change)*	*Mean*	*Std. Error*	*Change in Means (% Change)*
Nonunion	.58	.046	-.11* (-	.68	.063	-.19** (-
Union	.47	.043	19.0%)	.49	.061	27.9%)
Controls Included?	No			Yes		
FORTUNE 1000 USE OF AN IN-HOUSE GRIEVANCE SYSTEM						
Union Status of Firm	*Mean*	*Std. Error*	*Change in Means (% Change)*	*Mean*	*Std. Error*	*Change in Means (% Change)*
Nonunion	.34	.044	+.14**	.44	.079	+.11
Union	.48	.043	(+41.2%)	.55	.069	(+25.0%)
Controls Included?	No			Yes		
FORTUNE 1000 USE OF FACT-FINDING						
Union	*Mean*	*Std.*	*Change in*	*Mean*	*Std.*	*Change in*

[44] Controls consist of exogenous and endogenous factors that might influence our dependent variable, such as the firm's size and industry, the firm's strategic approach and commitment to ADR, and the firm's employee productivity. Note that in all other analyses we account for the extent to which the firm's industry has undergone deregulation. When measuring arbitration effects, however, there is a collinear relationship between union status and industry deregulation, so we exclude this variable from our empirical analysis. When deregulation is included, union status becomes nonsignificant, but the deregulation variable itself is not significant, implying collinearity.

Status of Firm		*Error*	*Means (% Change)*		*Error*	*Means (% Change)*
Nonunion	.38	.047	-.10 (-26.3%)	.44	.085	-.18** (-.40.9%)
Union	.28	.039		.26	.055	
Controls Included?	No			Yes		

*** = significant at the .01 level; ** = significant at the .05 level; * = significant at the .10 level.

When considering union status alone, the results indicate that there is no statistically significant difference in Fortune 1000 firms' use of arbitration when considering divergent union statuses. However, more robust empirical testing reveals an opposite result: there is, in fact, a relationship between the unionization of a firm and its use of arbitration for its nonunion workforce. After controlling for other factors, we find that unionized firms offered nonunion employees arbitration 6.8% more often than nonunion firms. This result is significant at the .10 level of analysis.

Firm use of med-arb tells a different story entirely; the results are also found in Table 3. Without controlling for other factors, unionized firms provided nonunion employees with a med-arb option at a rate 19% lower than nonunion firms ($p<.10$). Adding in additional variables increases the significance and magnitude of the difference between union status and med-arb use; unionized companies employed med-arb 27.9% less often than did nonunion companies.

We also consider whether firm unionization predicts the use of a nonunion grievance system. Our initial findings, without controls, indicate that companies with a union presence offered their nonunion employees a grievance system at rates 41.2% higher than did firms with no union presence. However, the statistical significance of this effect disappears when accounting for the size of the firm and the industry in which it operates.

Our final individual ADR practice is the use of fact-finding. Initial results, without controls, suggest that the unionization of a firm does not appear to significantly influence its use of fact-finding among nonunion employees. However, as with our results for arbitration, adding in other controls changes the results. When considering the effects of several exogenous and endogenous factors on fact-finding, the firm's union status significantly and negatively influences the company's odds of having this practice; unionized firms are 40.9% less likely to use fact-finding when dealing with disputes among their nonunion workers.

The results indicate that the effects of union status on individual ADR practices may be moderated by other variables, which help to increase or

decrease the significance of the effects. For instance, hierarchical logistic regressions indicate that the influence of union status on both arbitration and med-arb may be moderated by the amount of ADR coverage the firm provides. On the whole, the outcomes provide evidence that although the total number of ADR practices offered by a firm is not influenced by unionism, certain individual options are indeed influenced by the firm's union status. (Some of these options, like arbitration, are critical components of many companies' ADR systems.) Whereas unions are found to positively influence a firm's use of arbitration for its nonunion employees, the opposite is true for the more flexible med-arb and fact-finding options, which are substantially more likely to be found among firms with no union presence.

C. *Union Status and the Firm's Choice to Not Use Arbitration*

In addition to considering the practices the Fortune 1000 corporations employ to resolve disputes, our survey asked respondents to explain why they did *not* use arbitration to resolve conflicts among their nonunion workforce. We tested the extent to which a firm's unionization status could predict its reasons for not using employment arbitration. The results of our empirical analysis, with and without controls, are found in Table 4.

Table 4: Explanation for Fortune 1000 Firms that Do Not Use Arbitration, by Union Status

ARBITRATION LEADS TO COMPROMISE OUTCOMES						
Union Status of Firm	*Mean*	*Std. Error*	*Change in Means (% Change)*	*Mean*	*Std. Error*	*Change in Means (% Change)*
Nonunion	.38	.043	+.12**	.45	.070	+.16**
Union	.50	.040	(+31.6%)	.61	.057	(+35.6%)
Controls Included?	No			Yes		
ARBITRATION IS TOO DIFFICULT TO APPEAL						
Union Status of Firm	*Mean*	*Std. Error*	*Change in Means (% Change)*	*Mean*	*Std. Error*	*Change in Means (% Change)*
Nonunion	.48	.045	+.10*	.39	.069	+.15**
Union	.58	.041	(+20.8%)	.55	.058	(+41.0%)
Controls Included?	No			Yes		

*** = significant at the .01 level; ** = significant at the .05 level; * = significant at the .10 level.

We analyze two possible reasons that might explain why a firm does not use arbitration for its nonunion employees. First is the fact or perception that arbitration can result in compromise outcomes, and second is the difficulty a firm is likely to face in appealing arbitration awards. We find that the union status of a company significantly influences both of these reasons for a firm's decision to use techniques other than arbitration to resolve employment disputes.

Regarding the firm's possible concern about arbitration resulting in compromise outcomes, only 38% of the nonunion firms in our sample suggested this was a reason they did not use employment arbitration. However, exactly half of the unionized firms indicated that this was a reason they did not use arbitration for their nonunion workers. This difference is significant at the .05 level of analysis. When controlling for various factors that might influence the firm's response to this question, our findings remain robust. Indeed, when we control for size, industry, ADR coverage, and other factors, the difference between union and nonunion firms that say that they do not use arbitration because of the possibility of compromise outcomes rises to 35.6%. Similarly, firms in the Fortune 1000 that have a union presence, and therefore have had experience with arbitration, are much more likely than nonunion firms to cite the difficulty of appealing arbitrators' decisions as a reason for not using arbitration with their nonunion employees. Whereas less than half of the nonunion firms in our sample indicate that the difficulty of appeal is a reason why they do not use arbitration, almost 60% of the unionized firms say this is an influential factor. This difference is magnified when we control for other variables in addition to union status (though the result is significant both with and without controls).

D. *ADR Coverage and Union Status*

We believed that other features of a firm's dispute resolution practices, in addition to the number of ADR practices available to employees and the firm's reasons for using or not using certain ADR techniques, would also be needed to tell the full story of the connection between unions and workplace dispute resolution in the Fortune 1000. For example, we hypothesized that the union status of a firm would influence the extent to which its nonunion workers are covered by ADR. Our next model examines this relationship.

Table 5 provides descriptive comparisons of ADR coverage levels between union and nonunion companies and uses a simple statistical test,

namely, the χ^2 test. The descriptive results suggest a considerable difference in ADR coverage levels depending on the union status of a company. The absence of any ADR coverage in nonunion firms was 45.3% higher than the absence of ADR coverage in union firms. By equal measure, unionized companies provided low to moderate amounts of nonunion employee ADR coverage (that is, coverage from one to 25% of the workforce) at levels 96.6% higher than nonunion firms. Finally, union companies also provided greater ADR coverage for large shares of nonunion workers (26% or more), at levels 15% higher than nonunion firms. These differences in coverage by union status are confirmed as statistically significant, with a Pearson χ^2 test indicating significance at the .01 level of analysis.

Table 5: Crosstabs between the Level of ADR Coverage in the Fortune 1000 and Union Status

ADR Coverage Level	*Percent of Nonunion Firms*	*Percent of Union Firms*	*Percentage Point Change (% Change)*
No Coverage	58.1	40.0	Nonunion +18.1 (+45.3%)
One to 25% Coverage	14.5	28.5	Union +14.0 (+96.6%)
26% or More Coverage	27.4	31.5	Union +4.1 (+15%)

Pearson χ^2: 9.994 (significant at .01 level)

In the absence of controls, however, it is difficult to determine whether unionization is in fact causally related to larger levels of nonunion ADR coverage in the Fortune 1000. To determine more robustly this relationship, we employ generalized ordinal regressions on our data, controlling for other factors that might affect ADR coverage, such as the company's industry, size, location, strategic approach to ADR, and employee productivity. We compare these results against a model that includes only the unionization variable, without the benefit of controls. The results are shown in Table 6. Not surprisingly, given the outcomes reported above, we find a statistically significant relationship between unionization and ADR coverage when no controls are included: unionized firms are 71% more likely to have higher ADR coverage levels than nonunion companies. This outcome is significant at the .05 level of analysis.

Table 6: Ordinal Regression: Level of ADR Coverage in the Fortune 1000 and Union Status[45]

Variable	*Coefficient (Std. Error)*	*Odds Ratio*	*Coefficient (Std. Error)*	*Odds Ratio*
Union Firm	.537** (.244)	1.710	.828*** (.312)	2.288
Controls Included?	No		Yes	

*** = significant at the .01 level; ** = significant at the .05 level; * = significant at the .10 level.

Adding controls to our ordinal regression does not diminish the effects of unionization on ADR coverage. In fact, when accounting for all other factors within our data that might shape coverage levels, the unionization of the firm is highly influential; Fortune 1000 companies with a union presence are more likely by a factor of 2.288 to have higher ADR coverage levels than are nonunion companies ($p<.01$). This result, which is based on a more robust model for determining ADR coverage, is in fact more highly significant than the result obtained without the use of controls. The higher magnitude of significance suggests an additional consideration, namely, that the relationship between unionization and the ADR coverage of the nonunion workforce may be moderated by other variables included in the model, specifically the company's location and industry.[46] Although a formal test analyzing the interactions between these independent variables is beyond the scope of this paper, the overall determination is that there is a substantial and positive relationship between unionization and ADR coverage, and this relationship is confirmed by robust empirical analysis.

E. *Strategic Logic for Using ADR and Union Status*

To comprehend more fully the extent to which unionization might influence workplace dispute resolution in the Fortune 1000, we examined a company's strategic logic for electing to use ADR instead of litigation. Survey respondents were asked a number of questions regarding why they

[45] Note that our ordinal data are unable to pass the test of parallel lines. However, the results are intended to be confirmatory of our descriptive findings, and we maintain that the benefit of employing robust analytical techniques to confirm the relationship between unionization and ADR coverage outweighs this limitation.

[46] This is suggested by the finding that, in an incremental ordinal regression (not shown in this paper but available on request), the unionization coefficient changes when industry and location are added to the model.

typically used ADR as an alternative to the courts. We grouped many of these responses into two categories, which we labeled "efficiency benefits" and "legal benefits." Efficiency benefits relate to the saving of time and money vis-à-vis litigation. Legal benefits include the preservation of confidentiality and the avoidance of precedent. Many survey respondents also stressed another benefit of using ADR. They told us they preferred to use ADR rather than litigation because ADR helped to maintain and preserve management's relationships with other parties. Each of these benefits, we maintain, provides a company with a strategic reason to use ADR rather than resort to litigation. We further postulate that the extent to which a firm is unionized can potentially shape its strategy in using ADR.

To test the influence of the union status of a firm on its strategic choice to use ADR, we ran a series of three logistic regressions. Given the analytical value of using statistical controls, we included other factors that we think might influence the firm's strategic choice for using ADR, including employee productivity, size of the firm, industry, and location. In our first model (shown in Table 7), we find no significant relationship between unionization and efficiency benefits. That is, a majority of corporations use ADR to save time and money, and there is no significant difference between union and nonunion companies in this regard. Similarly, in our second model in Table 7, we again find that union status has no significant influence on legal benefits; again, a majority of firms value ADR because they believe its use provides certain legal benefits (for example, the avoidance of precedent) and there is no significant difference between union and nonunion companies in this regard.

Table 7: Logistic Regression: Strategic Logic for Using ADR and Union Status

Variable	EFFICIENCY BENEFITS		LEGAL BENEFITS		RELATIONSHIP BENEFITS	
	Coefficient (Std. Error)	*Odds Ratio*	*Coefficient (Std. Error)*	*Odds Ratio*	*Coefficient (Std. Error)*	*Odds Ratio*
Union Firm	-.150 (.314)	.861	-.166 (.331)	.847	.558* (.300)	1.748
Controls Included?	Yes		Yes		Yes	

*** = significant at the .01 level; ** = significant at the .05 level; * = significant at the .10 level.

In our third model, however, we find that union status has a highly significant influence on a firm's use of ADR because the firm believes ADR preserves relationships. This significance is found both with and without

controls. It appears that the managers of union companies are significantly more likely than the managers of nonunion companies to use ADR because they believe the use of ADR to resolve disputes with nonunion employees helps to preserve relationships with those employees ($p<.10$). We view this finding as a key difference between the ADR strategies used by union and nonunion companies. At union companies managers were 74.8% more likely to use ADR to ensure the preservation of the firm's relationships with its nonunion employees than were managers at nonunion companies.

In sum, our statistical findings demonstrate that: (1) the union status of a company affects its choice of the ADR practices it uses with nonunion employees; (2) the union status of a company is also significantly and positively related to the extent to which its nonunion employees are covered by ADR practices and policies; and (3) the union status of a company appears to be partially related to the strategic benefits the company associates with the use of ADR. More specifically, both union and nonunion companies use ADR because they believe it results in efficiency and legal benefits, but union companies, to a much greater extent than nonunion companies, use ADR because they believe it preserves relationships with their nonunion employees. Thus, on the whole, there is no difference between union and nonunion companies in the strategic logic that underlies their use of ADR policies and practices—with the important exception that union companies attach greater value to the use of ADR to preserve relationships than do nonunion companies. In the next section of our paper we examine the practical and policy implications of these findings and suggest their meaning for future research on ADR.

V. INSIDE OUR FINDINGS: IMPLICATIONS FOR THE STUDY OF ADR

A. *Overview*

The findings reported above provide a unique perspective on the role that unions play as one of the factors that shape ADR adoption patterns in U.S. corporations. Our findings offer evidence regarding three important dimensions of the use of ADR by U.S. corporations. First, our evidence casts light on the effects of unionization on the availability of different ADR practices. Although we do not find that union status affects the portfolio of ADR practices offered by the corporations in our sample, we do find that union firms are somewhat more likely than nonunion firms to provide arbitration for their nonunion employees. Also, we find that nonunion firms are more likely to offer med-arb to their employees than union firms. This evidence, therefore, links unions to the type of ADR practices present in a

given firm. Second, our examination reveals that unionization has a positive effect on the access employees have to ADR practices. These findings get at a very different aspect of the use of ADR. Whereas our findings on the availability of ADR practices deal with the effect of the union status of the firm on the quantity and type of those practices, our findings on ADR coverage or access deal with the effect of union status on the quality of ADR practices and policies. More specifically, these findings highlight the extent to which ADR practices are deeply embedded in the organizations adopting them. Third, our findings also capture the relationship between unionization and a firm's strategic posture toward ADR. Do unions affect the rationale at the heart of an organization's adoption of ADR? Do union firms differ from nonunion firms in the benefits they seek from the adoption of ADR practices and policies? We find partial confirmation of the proposition that union firms differ from nonunion firms in their view of the strategic benefits they derive from the use of ADR.

We maintain that a complete understanding of the organizational adoption of ADR requires an assessment of all three dimensions examined above. Researchers seeking to advance the study of ADR, we believe, should seek evidence on the factors that influence the availability of ADR practices, access to them, and the strategic intentions guiding firms that adopt them.

Taken together, our examination of each of the three dimensions of the use of ADR allows us to paint a more detailed portrait of the nature of the influence union status has on the use of ADR by large U.S. corporations. As we noted in our introduction, researchers have advanced two competing hypotheses about the nature of this relationship. Some have argued that employers view ADR as a substitute for unions and collective bargaining. Unionization affects corporate decisions to use ADR by providing an incentive for firms either to remain nonunion or to keep existing levels of unionization in their organization at bay. According to this hypothesis, a firm's decision about which ADR practices to adopt and how much coverage to provide its employees are, for the most part, dictated by the firm's attempt to avoid unions.

An alternative perspective, however, needs to be considered. It is possible—even likely—that the presence of unions in an organization provides a firm with an intimate understanding and awareness of the benefits and costs associated with the use of various dispute resolution techniques that are typically associated with collective bargaining. The knowledge and experience an employer gains from the use of mediation, arbitration, fact-finding, and other dispute resolution techniques associated with collective

bargaining motivates employers to adopt the use of those techniques to resolve disputes with their nonunion employees.[47]

Our findings provide important empirical evidence about these two competing hypotheses. Our analyses strongly suggest that the complementarities hypothesis is a better explanation of the effect of union status on the use of ADR practices and policies than the substitution or avoidance hypothesis. Firms with unions seem to have a better understanding of what the use of ADR entails, including both its advantages and disadvantages; they provide broader ADR coverage to their nonunion employees, and their strategic motivation for adopting ADR is centered on the perception that the use of ADR helps preserve relationships.

Next, we discuss each of our key empirical findings, highlighting their contribution to our understanding of the factors motivating employers to use ADR and the questions they raise about the dimensions of ADR we do not yet understand. We will piece together the evidence provided in each of the separate statistical analyses we have performed in an effort to construct a nuanced and comprehensive portrait of the influence of unions on the adoption of ADR practices and policies. In each of the following sections, we will consider the extent to which the empirical evidence strengthens or weakens the existing hypotheses about the relationship between unions and ADR.

B. *The Effects of Unions on the Availability of ADR Options*

One of the prevalent working hypotheses about the relationship between unionization and ADR practices is based on the "threat effect" of unions.[48]

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[47] Research on civil litigation and arbitration suggests that a party's experience in a proceeding is valuable. An important stream of research in the dispute resolution field deals with the so-called "repeat player effect." The repeat player effect holds that in any legal system a player that has experience has an edge over a player that does not have experience. Galanter is credited with being the first scholar to stress that repeat players have advantages over one-shot players in legal proceedings. Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change* 9 LAW & SOC'Y REV. 95 (1974). Empirical research on employment arbitration has found that repeat players (usually employers) obtain better outcomes than one-shot players (usually employees). Lisa B. Bingham is generally recognized for her path-breaking work on this topic. *See, e.g.*, Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998). More recently Colvin has confirmed Bingham's findings in a study of employment arbitration awards in cases administered by the American Arbitration Association. Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. OF EMP. LEGAL STUDIES 1 (2011).

Nonunion firms, according to this argument, are more likely to adopt ADR practices in an effort to ward off the "dangers"‘associated with being unionized. Support for this hypothesis would require empirical evidence that a firm's union status affects the availability of ADR practices. Do nonunion firms, threatened by the prospect of being unionized, offer a broader portfolio of ADR practices in an effort to avoid unions? The "threat effect" hypothesis would also be supported by evidence of a relationship between union status and specific ADR practices, such as arbitration. Are nonunion firms more likely to adopt specific types of ADR practices? Colvin, for example, found that nonunion firms facing the "threat" of unionization were more likely to adopt peer review panels while firms facing litigation threats were more likely to adopt arbitration.[49]

Our findings provide a new lens through which to understand the effects of the adoption of ADR by U.S. corporations. First, despite the prevalent proposition that union status affects the overall availability of ADR practices in firms, our regression analyses found no statistically significant relationship between a firm's union status and its portfolio of ADR practices. Nonunion firms, according to our findings, are no more likely to have a broad range of ADR practices than union firms. As social scientists, our instincts are to search for significant statistical relationships, but our first set of regression analyses does not find a statistically significant relationship between the union status of the firm and the range of ADR practices the firm uses. Nevertheless, we believe that this nonsignificant finding is extremely interesting because it sheds important light on the validity of the union avoidance hypothesis. Conventional wisdom holds that the threat effect of unionization motivates nonunion (or partially unionized) companies to adopt an array of ADR practices—indeed, a broader array of practices than would typically be the case in a union firm.

As we noted in our discussion of integrated conflict management systems, such systems are characterized by multiple access points and multiple options. In a union firm, an employee filing a grievance almost always has only one access point, namely, he or she is required to file a grievance with his or her immediate supervisor. By contrast, in an integrated conflict management system, an employee can file a complaint with his or her immediate supervisor or with the human resource office, the counsel's office, the office that manages the conflict management system, or other offices within the corporation. Similarly, in a union firm a grievance that is not resolved in earlier steps of the grievance procedure needs to be submitted

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[48] Batt et al., *supra* note 24; Colvin, *supra* note 24.

[49] Colvin, *supra* note 24, at 389.

to arbitration for a final decision. By contrast, in an integrated conflict management system, an employee with a complaint may have a choice of options for resolving that complaint (mediation, fact-finding, arbitration, etc.).[50] Thus, when Raytheon established its integrated conflict management system for its nonunion employees, it offered a wider array of ADR choices for its nonunion employees than it did for its union employees. Accordingly, we thought it made sense to hypothesize that union firms would offer a larger portfolio of ADR practices to their nonunion employees. However, our regression analyses did not support this hypothesis.

This finding is also at odds with hypotheses about both the external and internal effects of unions on ADR. From the perspective of the external pressures that unions wield on employers, nonunion firms do not appear to be more motivated than union firms to adopt a broad range of ADR practices. The threat of unions in nonunion firms does not seem to be sending them in search of a broader ADR portfolio.

Similarly, in partially unionized firms, the internal consequences associated with unions do not appear to affect the diffusion of ADR practices to the nonunion segments of the organization. One of the core functions of unions, as we have noted, is to provide institutional mechanisms through which workplace conflict can be addressed. Furthermore, in addition to altering the ways in which firms resolve conflict, unionization has a substantial effect on a firm's internal structures and practices.[51] Thus, one might have expected to find clear differences in the scope of ADR options afforded to employees in union and nonunion firms. Nevertheless, our evidence suggests that partially unionized firms are not influenced by the constraints placed on them by their unions or by the flexibility afforded to nonunion establishments in their adoption of ADR practices.

Taken together, our empirical analyses of the availability of ADR practices do not support either the external threat (union avoidance) or internal structure (union complementarities) hypotheses. This is not to say that union status does not matter when it comes to ADR adoption, but it does not appear to matter in one of the key ways some researchers and practitioners had assumed it would.[52] It is important to note that our analysis

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[50] LIPSKY ET AL., *supra* note 1.

[51] SLICHTER ET AL., *supra* note 30.

[52] Theodore J. St. Antoine, *Symposium on Labor Arbitration Thirty Years after the Steelworkers Trilogy: Afterward*, 66 CHI.-KENT L. REV. 845, 854 (1990) ("The propriety of participating in nonunion arbitrations has become a bone of contention within the National Academy of Arbitrators. . . . [T]here is worry that such procedures are simply union-avoidance devices and that the deck is heavily stacked against the grievant, who is a one-time player against the repeater employer.").

does not consider the effects of union status in specific settings or contexts. It is possible, for example, that nonunion firms in certain industries or settings are more likely to be influenced by either the external or internal pressures highlighted in the literature. Future research should put our non-finding to the test and examine the extent to which the availability of ADR practices may be affected by union status in particular contexts.

We also tested the relationship between a firm's union status and the likelihood of the firm adopting individual ADR practices, such as arbitration, med-arb, grievance systems, and fact-finding. Dispute resolution scholars often distinguish between interest-based and rights-based methods of dealing with conflict.[53] Rights-based methods include litigation and arbitration. The distinguishing characteristic of a rights-based method of resolving a dispute is that the method results in a decision (or award) by an impartial third party decision maker. Often the main task of the neutral in a rights-based ADR dispute is to declare formally which party was "right" and which party was "wrong." Interest-based dispute resolution techniques include mediation, facilitation, and fact-finding: the distinguishing characteristic of an interest-based method is that the impartial third party in the dispute has no authority to make a decision or issue an award. In contrast to rights-based techniques, neutrals using interest-based methods do not declare the legal merits of the parties' arguments nor do they decide on winners or losers. Rather, neutrals using interest-based methods seek to address each party's needs and wants in an attempt to lead the disputants to a voluntary settlement. Thus, the neutral in a rights-based process (e.g., an arbitrator or a judge) has a great deal more power and authority than a neutral in an interest-based process (e.g., a mediator or a facilitator).

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[53] *See* WILLIAM L. URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COST OF CONFLICT (1st ed. 1988). Ury, Brett, and Goldberg are credited with being the first scholars to distinguish rights-based methods from interest-based methods. It should be noted that there is a difference between interest disputes and rights disputes, on the one hand, and interest-based methods and rights-based methods of resolving disputes, on the other hand. Labor relations scholars have made a distinction between interest disputes (arising out of the negotiation of new contracts) and rights disputes (arising out of the application or interpretation of existing contracts) for decades. A rights-based method (such as arbitration) can be used to resolve an interest dispute (e.g., an impasse in the negotiation of a new collective bargaining agreement); an interest-based method (such as mediation) can be used to resolve a rights dispute (e.g., a grievance filed by a unionized employee over the interpretation of a clause in an existing collective bargaining contract). For a discussion of interest disputes and rights disputes by a neutral who helped to resolve thousands of both types of disputes, *see* THEODORE W. KHEEL, THE KEYS TO CONFLICT RESOLUTION: PROVEN METHODS OF SETTLING DISPUTES VOLUNTARILY (1st ed. 1999).

Arguably, union firms have experienced constraints on their managerial authority because of collective bargaining. Do union firms seek to gain flexibility in the way they settle disputes with their nonunion employees by using interest-based techniques and avoiding rights-based options? Alternatively, do union firms, which have had considerable experience with rights-based options such as arbitration, prefer to use rights-based options with their nonunion workforce? Similarly, are nonunion firms more or less likely to turn to rights- or interest-based options, given that they have not had the experiences with these options that union firms have had?

Our findings provide interesting insights to these questions. First, our evidence shows that union firms are more likely to offer arbitration to their nonunion employees than firms that are completely nonunion. Thus, a firm's union status does, in fact, influence its choice of specific ADR practices. Union firms, which have experience with labor arbitration, appear to pursue a rights-based option for employment disputes. On its face, this finding appears to support the internal complementarities hypothesis regarding the organization's use of ADR. It is possible that union firms seek to create some level of uniformity in the dispute resolution options they offer to their nonunion and union employees. If this presumption is correct, then factors internal to the organization (e.g., the desire for standardized workplace policies) are driving the higher adoption rates of arbitration in union firms. This finding, therefore, contributes to our understanding of the manner in which firms select specific ADR practices. A firm's decision, we suggest, is at least in part affected by internal considerations shaped, among other things, by a firm's union status.

We also examined the reasons firms gave for not using certain ADR practices. On the one hand, our evidence suggests that partially unionized firms are more likely to use arbitration to resolve disputes with their nonunion employees than nonunion firms. On the other hand, our evidence demonstrates that union firms that chose not to use employment arbitration did so for two principal reasons: these firms did not like the fact that the use of arbitration often results in compromise outcomes, and they also did not like the fact that arbitrators' decisions are difficult to appeal. Is there a contradiction in these two findings? We submit that the two findings can be reconciled. Union firms probably know much better than nonunion firms all of the advantages and disadvantages associated with using arbitration to resolve employee disputes. When a union firm chooses to use arbitration with its nonunion employees, it understands that arbitration is quicker and cheaper than litigation and results in final and binding decisions. But when a union firm decides not to use arbitration with its nonunion employees, it weighs the disadvantages more heavily than the advantages; rather than

appreciating the final and binding nature of arbitration, the firm dislikes the difficulty of appealing arbitrators' decisions, and by the same token, rather than valuing the quicker and cheaper decisions in arbitration, the firm dislikes the fact that they are more likely to be compromise decisions.

Second, our findings also document that union status has a significant effect on the use of med-arb. More specifically, nonunion firms are more likely to adopt this hybrid ADR technique than their unionized counterparts. Med-arb represents a combination of the rights-based elements of arbitration with the interest-based elements of mediation. In resolving disputes using this technique, parties first attempt to reach a settlement using mediation. If mediation proves unsuccessful, the technique then calls for the use of arbitration. Thus, the parties first have the opportunity to focus on their interests and needs in a mediation forum, while keeping the option of addressing their dispute in a rights-based forum. This technique provides the parties with greater flexibility than most other ADR practices. Our finding that nonunion firms are more likely to use med-arb suggests that these firms place a higher emphasis on maintaining flexibility in dealing with workplace conflict. Although med-arb can lead to a more formal and binding arbitration process, nonunion firms may be more likely than unionized firms to use the technique because it insures the initial use of an interest-based option.

It is important to note that our data do not allow us to empirically examine the underlying rationale for a firm's ADR preferences. Our findings, however, provide important evidence that union and nonunion firms have different preferences regarding the use of ADR practices. Future research should build on these findings and seek to uncover the factors that explain the differences between the preferences of union and nonunion firms for arbitration and med-arb.

C. *The Effects of Unions on Access to ADR Coverage*

Our discussion above relates to the relationship between union status and the firm's decision about the availability of ADR practices. Firm decisions about ADR adoption, however, go beyond the question of which practices will be made available to their workforce. Firms also make decisions about the extent to which employees will have access to these practices. We maintain that in assessing the effects of union status on ADR adoption patterns, the question of access is central to understanding this relationship. Workforce ADR coverage goes to the heart of the commitment an organization has to the basic principles and assumptions that are central to this organizational approach. Is a firm's use of ADR primarily symbolic in nature? Or does the firm's use of ADR reflect a more substantive and deeply

rooted commitment to using ADR to manage and resolve workplace conflicts? We maintain that the extent to which employees have access to ADR practices is an indicator of the extent to which an organization is committed to using ADR to manage and resolve workplace conflict.

Our empirical findings show that union status does, in fact, have a statistically significant effect on ADR coverage. Specifically, union firms were more likely than nonunion firms to provide their employees with access to the ADR practices they had in place. Nonunion employees in unionized firms are more likely to be covered by ADR practices than their counterparts in firms with no unions. If our assumption that ADR coverage is a good proxy for commitment, then our findings suggest that union firms are more committed to ADR policies than nonunion firms. We believe that this finding is of particular importance for the study of ADR patterns in general. First, this is the only study of which we are aware that considers the organization's commitment (at least by proxy) to ADR policies. Our findings emphasize the need for ADR scholarship to move beyond the analysis of adoption and to the study of variation in commitment levels. Understanding the pace at which ADR takes root within American firms requires, we maintain, an enhanced understanding of the organizational factors that lead to broader ADR coverage of a firm's employees.

We interpret our findings to support the argument that union and nonunion firms differ on their commitment to ADR, but they do not provide empirical evidence on the motivation underlying this commitment. There are a number of plausible explanations for the finding that partially unionized firms provide broader ADR coverage than nonunion firms. First, building on the discussion above regarding the threat effect of unions, it is possible that union firms are eager to prevent the unionization of their nonunion facilities. To prevent the spread of unionization, these firms may seek to provide ADR coverage to as many of their nonunion employees as possible. Thus, a firm's commitment to ADR, according to this argument, is not motivated by its endorsement of the principles at the heart of these practices. Rather, the firm's commitment is a means of avoiding the spread of unions. Although plausible, we are somewhat skeptical of the validity of this explanation. If commitment to ADR serves as a means of avoiding unions, we would expect to find a similar strategy in nonunion firms that are seeking to avoid unionization altogether. Our evidence, however, does not support such an interpretation. We did not find a significant relationship between union status and a firm's ADR portfolio. If firms were using ADR as a means of avoiding unions, we would also expect to find a significant relationship between union status and the breadth of ADR practices provided to employees.

We argued earlier that a partially unionized firm may seek consistency in its practices and policies with both its nonunion and union workforce. Collective bargaining contracts almost always provide employees covered by those contracts with access to a formal grievance procedure. These firms may be motivated to provide broader ADR coverage not to avoid the unionization of their nonunion employees, but rather by a desire to achieve consistency in dispute resolution policies across their organizations. Again, the firm's motivation is not necessarily a function of its belief that ADR is a superior method of dealing with workplace conflict, but rather by its commitment to organizational parity. Our finding that union firms are more likely to use arbitration to resolve disputes with their nonunion employees strengthens this argument.

We cannot say with certainty that the relationship between union coverage and ADR coverage supports or refutes either the union avoidance hypothesis or the union complementarities hypothesis. On balance, we believe our findings are more consistent with the latter hypothesis than the former, but without additional evidence on employer motives we cannot reach a dispositive conclusion. Our empirical findings on ADR coverage highlight the need for additional research on the relationship between organizational motivations and commitment to internal workplace dispute resolution.

D. *The Effects of Union Status on the Strategic Posture toward ADR*

Recently, conflict management scholars have begun to examine the strategic underpinnings associated with the organizational use of various dispute resolution practices. Lipsky and Avgar, for example, developed a theory of workplace conflict management that recognizes that organizations vary in the strategic goals they seek to achieve by using ADR policies and practices. For example, some organizations may use ADR to achieve a very basic objective, namely, the resolution of disputes that might otherwise be settled by litigation. Other organizations may use ADR as a means of achieving broader managerial and organizational goals, such as enhancing employee voice or improving the alignment between different management functions (such as the human resource function and the counsel's office).[54]

Lipsky and Avgar also argue that an organization's use of ADR to achieve its strategic objectives is a function of certain characteristics of the organization. Union status is certainly one of those characteristics, but there are others that are likely to influence the organization's ADR strategies. For

[54] Lipsky & Avgar, *supra* note 3, at 172–79. *See also*, Avgar, *supra* note 2.

example, organizations that have adopted team-based work are more likely to pursue broader ADR goals than merely the resolution of disputes. As we have noted, evidence from case studies suggests that corporations that have high-performance work systems also tend to use integrated conflict management systems.[55]

We found only partial support for the proposition that the union status of a corporation affects the strategic benefits the organization hopes to achieve by using ADR. There was no significant difference between union and nonunion firms in the importance they attached to achieving legal and efficiency benefits through the use of ADR. Both union and nonunion firms attached equivalent value to the use of ADR to achieve legal and efficiency benefits. But union and nonunion firms in our sample differed on the weight they attached to the use of ADR policies and practices to preserve relationships with their employees: union firms attached much more weight to the importance of using ADR to preserve relationships. It appears that the managers of union firms have learned through their experience in collective bargaining that it is important to use dispute resolution methods to preserve and enhance relations with their employees. We do not know enough about the nature of labor-management relations in the corporations in our sample to fully understand the link between a firm's experience with its unions and its desire to use ADR to preserve relationships with its employees. On the one hand, it is possible that a corporation that has had an adversarial relationship with its union (or unions) views ADR as a means of avoiding an adversarial relationship with its nonunion employees. On the other hand, it is also possible that a corporation that has had a collaborative relationship with its union (or unions) has learned that the use of negotiation, mediation, arbitration, and other dispute resolution techniques can help produce a positive relationship with its union employees and wants to replicate that experience with its nonunion employees. In either case, once again the corporation's experience in collective bargaining (whether positive or negative) has informed its view of the appropriate ADR strategy to use with its nonunion employees. If this argument has validity, then in our view it cannot be maintained that partially unionized firms use ADR as a union avoidance strategy. Rather, corporations that have both union and nonunion facilities seem to learn important lessons from their experiences with their unionized facilities and then apply those lessons in using ADR in their nonunion facilities. In brief, this explanation of corporate behavior supports the complementarities hypothesis, rather than the avoidance hypothesis.

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[55] LIPSKY ET AL., *supra* note 1, at 65–69.

When we consider the totality of evidence we have gathered—on the availability of ADR practices, the access employees have to those practices, and the ADR strategies pursued by the corporations in our sample—a portrait of the difference between a corporation with some union presence and a corporation without a union presence emerges. Corporations with a union presence use their experience in labor-management relations to shape the ADR policies and practices they use with their nonunion employees. Collective bargaining is a learning experience for these corporations; they apparently learn "best practices" in the use of dispute resolution techniques and they apply those lessons to developing ADR policies for their nonunion employees. By contrast, corporations without a union presence use ADR on a more limited basis, i.e., ADR coverage is lower in these firms than it is in union firms. It needs to be noted that for most of the nonunion corporations in our sample (especially those in finance, insurance, and most of wholesale and retail trade) the threat of unionization is absent or barely discernible. Although Wal-Mart may use the Open Door Policy and other ADR techniques to avoid unions, the growing use of ADR by major banks, Wall Street investment firms, and large insurance companies cannot be attributed to these corporations' fear of unionization.

Future empirical research should be focused on the relationship between other organizational characteristics and the use of ADR. For example, our interviews with corporate attorneys and managers suggest that corporations that are committed to policies that promote workforce diversity are more likely to use workplace conflict management systems. Also, corporations that have high ratings on indices of corporate social responsibility appear to have a stronger commitment to the use of ADR. To date, however, there have not been rigorous empirical analyses of these propositions. If we seek a fuller understanding of the development and implementation of ADR policies and systems, we need to conduct additional empirical research on the organizational characteristics and strategies that shape those policies.

VI. CONCLUSIONS

What are the implications of our findings for the study of unions and ADR? First and foremost, we believe this paper is the first to present hard evidence on the effects of unions on the adoption and use of ADR for nonunion employees. Although we cannot dismiss entirely union avoidance as a motive for the corporate use of ADR, we believe our findings regarding ADR availability, access, and strategy support the complementarities hypothesis. Our interpretation of the findings presented here suggest that most major corporations do not adopt ADR practices and policies to avoid

unions, in part because for many major corporations there is no realistic threat of unionization. In addition, however, major corporations that do have some level of union presence learn about the advantages and disadvantages associated with various dispute resolution techniques and seek to deliver the benefits of those techniques to their nonunion employees. We also believe that many corporations prefer to align the policies they use with their union employees with the policies they use for their nonunion employees, and this preference motivates them to extend the use of mediation, arbitration, and other ADR techniques to their nonunion employees.

Second, it is somewhat ironic that our findings highlight the important role that unions play in delivering access to voice and dispute resolution practices to nonunion employees. For many decades, both industrial relations practitioners and scholars have understood that the influence of unions on wages and other working conditions extends beyond their members and those covered by collective bargaining agreements to nonunion employees; this influence is often referred to as the "spillover effect" of unions.[56] Our findings provide a concrete example of the influence that unions continue to have on the working conditions of employees who are not covered by collective bargaining agreements. In an era when the strength of labor is clearly declining, these findings serve as a reminder that this decline has implications for the broader workplace ecology in which unions operate. If the presence of unions is associated with broader access to ADR for nonunion employees, it is likely that the continued decline of U.S. unions will have an adverse effect on the diffusion and use of ADR in nonunion settings.

Third, our findings also appear to address a longstanding puzzle in the industrial relations literature. Specifically, given the concrete benefits that unionized firms obtain from the grievance process, labor relations scholars have wondered why more nonunion firms do not adopt similar practices for

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[56] There is a large literature on union spillover effects. A classic work is H.G. LEWIS, UNIONISM AND RELATIVE WAGES IN THE UNITED STATES: AN EMPIRICAL INQUIRY (1st ed. 1963). *See also*, David Blanchflower, *Union Relative Wage Effects: A Cross-Section Analysis Using Establishment Data*, 22 BRIT. J. INDUS. RELATIONS 311 (1984); FREEMAN ET AL., *supra* note 32, at 150–61 (1984); Lawrence M. Kahn, *Union Spillover Effects on Organized Labor Markets*, 15 J. HUMAN RES. 87 (1980) ("The union impact on nonunion workers' real wage is made up of opposing forces and is therefore a priori ambiguous. One the one hand, unions may indirectly cause the crowding of workers into nonunion jobs, lowing wages there. On the other hand union threat effects may cause nonunion employers to raise wages. Further, these influences may vary according to demographic group. Thus, knowledge of the net effect of unions on nonunion real wages of different groups has direct implications for the union impact on income distribution among workers and for segmentation in the labor market.").

their employees. In their seminal book *What Do Unions Do?*, Freeman and Medoff discuss the effects that union grievance systems have on reducing employee turnover and state, "If grievance-and-arbitration and industrial jurisprudence rules reduce turnover, and if such reductions save companies money, the question naturally arises as to why nonunion firms don't mimic union firms and offer workers the benefits of voice as part of a profit-maximizing strategy."[57] Freeman and Medoff maintain that nonunion firms are more attune to young, mobile workers than union firms, and younger workers have less desire for voice mechanisms such as grievance procedures. They also assert that nonunion managers are reluctant to give up power and allow their decisions to be challenged in a grievance procedure that ends in arbitration.[58]

Much has changed since Freeman and Medoff addressed this question, and a growing number of nonunion firms have, in fact, adopted ADR practices. Nevertheless, Freeman and Medoff's puzzle is still relevant—what prevents a sizeable proportion of nonunion firms from seeking to benefit from practices that have yielded clear returns to unionized firms for many decades? Our findings may contribute some insight about this persistent question. First, we argue that experience counts: companies with a union presence develop an understanding of the pros and cons of dispute resolution techniques and are, therefore, able to make informed decisions about what elements of ADR they want to provide to their nonunion employees. By contrast, a company without a union presence, and therefore limited experience with dispute resolution techniques, may be required to take a proverbial "leap of faith" in adopting the use of ADR. Nonunion employers may not understand what Freeman and Medoff understand, namely, that grievance procedures, arbitration, and other voice mechanisms provide tangible benefits for employers. Second, Freeman and Medoff use profit maximization to frame their paradox, arguing that union-type voice mechanisms yield bottom-line results for employers. But establishing and managing these voice mechanisms is not costless for the firm. In nonunion firms, the costs associated with designing and implementing ADR practices and systems may be knowable, but the benefits are at best uncertain. Corporations that use ADR practices and systems believe that they save time and money by doing so. Lipsky and his colleagues conducted field interviews with executives and managers in over forty corporations, seeking information about the reasons these corporations had or had not adopted ADR practices. They observed, "There is in fact very little hard evidence that corporations

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[57] Freeman & Medoff, *supra* note 32, at 107.

[58] *Id.* at 107–108.

actually do save time and money by using ADR, however. Furthermore, it is not clear to us that many corporations are even gathering the information necessary to make a cost-benefit analysis. We pressed our respondents to tell us what they were doing in this regard, and most gave us vague responses or admitted they were not doing much."[59]

Finally, we hope our paper will inform the broader study of ADR, beyond the question of its relationship to unions. Our findings support the argument that organizational characteristics influence the adoption and use of ADR practices, but there is much that we do not yet know about other organizational characteristics that affect these practices. We believe, especially, that we lack an understanding of the role that management leadership plays in driving the ADR strategy of a corporation. Our survey data show that corporations that seem nearly identical (in terms of industry, number of employees, product mix, union status, and virtually every other observable characteristic) often pursue dramatically different ADR strategies. The explanation for this variance in strategies may very well be rooted in *differences* in factors such as corporate governance, organizational structure, and the character and philosophy of corporate officers. We hope that researchers in the future will gather data on these factors and use it in their analyses of the antecedents of ADR practices and systems.[60]

[59] LIPSKY ET. AL., *supra* note 1, at 313.

[60] We have started to incorporate some of these factors in Lipsky et al., *supra* note 19.

Figure 1. Experience with Types of ADR among Fortune 1000 Companies, 1997 and 2011

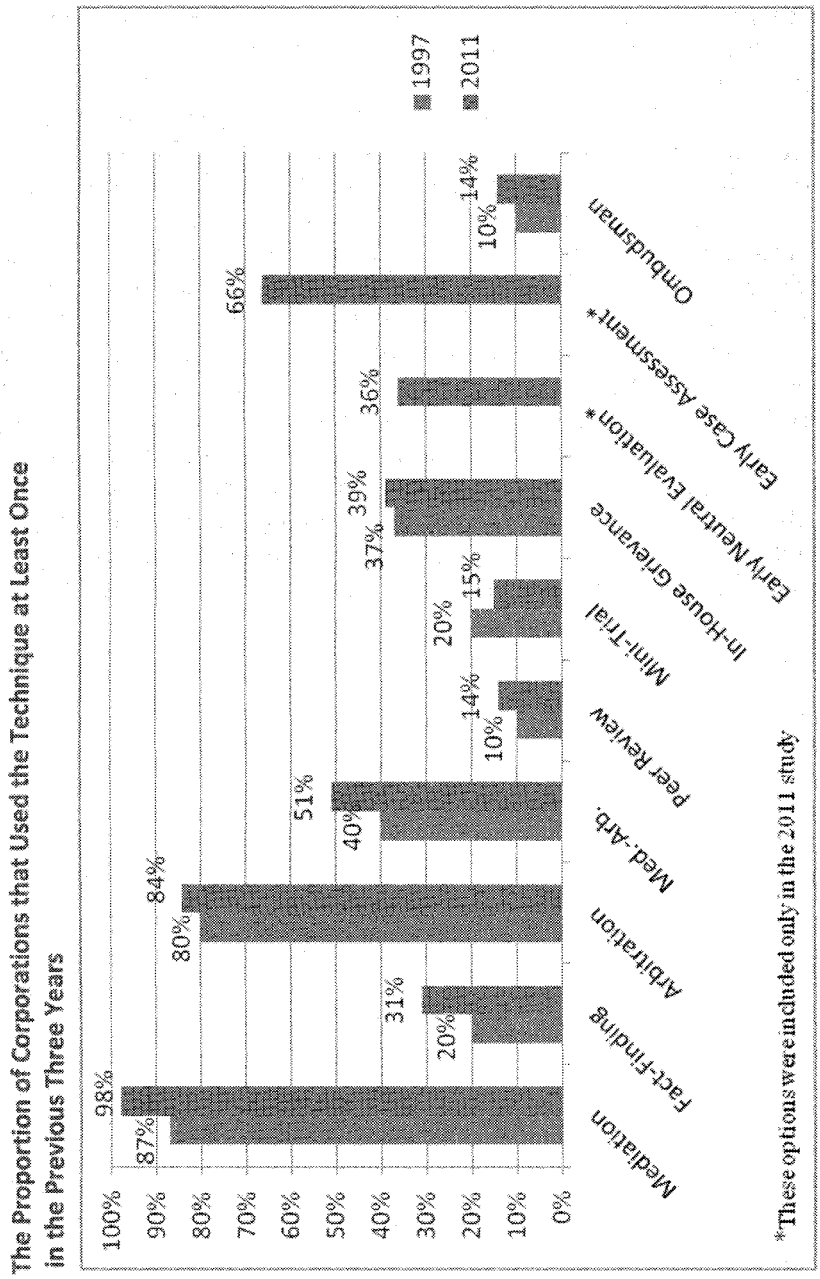

Figure 2. The Use of Arbitration by Type of Dispute, 1997 and 2011