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W. Mark C. Weidemaier

University of North Carolina School of Law

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FROM COURT-SURROGATE TO REGULATORY TOOL: RE-FRAMING THE EMPIRICAL STUDY OF EMPLOYMENT ARBITRATION

W. Mark C. Weidemaier*

A growing body of empirical research explores the use of arbitration to resolve employment disputes, typically by comparing arbitration to litigation using relatively traditional outcome measures: who wins, how much, and how quickly. On the whole, this research suggests that employees fare reasonably well in arbitration. Yet there remain sizeable gaps in our knowledge. This Article explores these gaps with two goals in mind. The first and narrower goal is to explain why it remains exceedingly difficult to assess the relative fairness of arbitration and litigation. The outcome research does not account for a variety of “filtering” mechanisms that influence the relative merits of the cases adjudicated in each system. This Article explores these filters, focusing on one in particular: most employee grievances are resolved within the workplace through relatively informal procedures. Workplace structures thus filter out most employee grievances before they reach arbitration. This fact has significant implications for efforts to interpret the arbitration outcome research. It also highlights the significance of the workplace as a locus of dispute resolution activity. Indeed, a growing body of research focuses directly on workplace compliance and grievance procedures.

Recognizing the significance of workplace dispute resolution leads to this Article’s broader goal. That goal is to expose, and hopefully bridge, an artificial conceptual divide that separates the arbitration research from research into workplace dispute resolution. Many researchers view internal compliance and grievance procedures as a means of harnessing the employer’s own regulatory capacity. This conception drives a research agenda that explores the role of workplace structures in generating private norms and in implementing (or subverting) public norms like anti-discrimination. By contrast, the arbitration outcome research conceives of arbitration narrowly as a court surrogate, one that should ideally yield equivalent outcomes at lower cost. Although legitimate to a degree, this conception artificially separates arbitration from other employer-structured disputing procedures and yields an empirical agenda that leaves fundamental questions unanswered. This Article closes by discussing two of these questions: First, do arbitrators play a meaningful regulatory role, either by shaping other arbitrators’ practices or by shaping the terms of arbitration contracts? Second, under what circumstances do arbitrators effectively generate and enforce norms?

* Assistant Professor of Law, University of North Carolina School of Law. This Article elaborates on a presentation made at the January 2008 Association of American Law Schools Annual Meeting. I thank Omri Ben-Shahar for inviting me to participate. For comments on early drafts of this Article, thanks to Rachel Arnow-Richman, Scott Baker, Christopher Drahozal, Adam Feibelman, Melissa Jacoby and Kim Krawiec.

INTRODUCTION

Over the past decade or so, a growing body of empirical research has explored the use of arbitration to resolve employment disputes. Much of this research compares arbitration to litigation using relatively traditional measures of outcome: who wins, how much, and how quickly. On the whole, employees appear to fare reasonably well in arbitration.

Yet there remain sizeable gaps in our knowledge. This Article explores these gaps with two goals in mind. The first, and narrower, goal is to explain why it remains exceedingly difficult to assess the relative fairness of arbitration and litigation. This is because the outcome research does not account for a variety of "filtering" mechanisms that influence the relative merits of the cases adjudicated in each system. Part I of this Article explores these filtering mechanisms, focusing on one mechanism in particular: employers resolve most employee grievances within the workplace, long before they are filed as formal legal claims. Indeed, workplace dispute resolution may be an equally if not more important phenomenon than arbitration itself, and it is the subject of a growing body of research.¹

This Article's second, and broader, goal is to argue that an artificial conceptual divide between arbitration and workplace dispute resolution has limited the arbitration research agenda in important ways. As Part II explains, many researchers conceptualize the workplace as a "law-making" body and workplace grievance procedures as part of a broader, employer-structured regulatory process. This conception has driven a research agenda concerned with the capacity of workplace structures to implement (or subvert) important public norms and to generate private norms in the absence of governing law.

By contrast, the arbitration outcome research implicitly or explicitly conceives of arbitration as a surrogate for the courts—that

1. I use the terms "grievance procedure" and "dispute resolution procedure" interchangeably, although in the sociological literature the terms "grievance" and "dispute" have discrete meanings. A "grievance" occurs when an individual believes "that he or she . . . is entitled to a resource which someone else may grant or deny." Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 *LAW & SOC'Y REV.* 525, 527 (1980-81). Not all grievances are expressed; those that are communicated to the responsible party are "claims," and claims that are rejected in whole or in part become "disputes." *Id.* These distinctions, however, are relatively unimportant for my purposes, and I use both terms to refer to procedures for resolving expressed employee grievances—i.e., "claims." Note that, within the workplace, many employee claims may not be legally cognizable causes of action.

is, as a quasi-external forum for enforcing individual rights.² This conception has driven a research agenda concerned primarily with comparing the outcomes of arbitrated to litigated disputes. This research is extraordinarily valuable, and the conception of arbitration that drives it is undeniably legitimate. But the conception is also artificial. Part II argues for a conceptual shift, one that explicitly acknowledges that arbitration is not merely a court surrogate but is also part of a broader, employer-structured regulatory process. Conceptualizing arbitration in this manner illuminates a number of important empirical questions that have yet to be adequately addressed. Part II closes by briefly discussing two of these questions: First, do arbitrators play a meaningful regulatory role, either by shaping other arbitrators' practices or by shaping the terms of arbitration contracts? Second, how effectively do arbitrators generate and apply both public and private norms?

I. ARBITRATION OUTCOME RESEARCH: THE CONVENTIONAL WISDOM, WITH SOME CAVEATS

A. *The Existing Research at a Glance: Higher Win-Rates But Lower Awards in Arbitration*

Much of the empirical research on arbitration compares the outcomes of arbitrated to litigated disputes using fairly traditional outcome measures: speed of disposition, the frequency with which employees prevail on the merits (win-rate), and the size of the awards received by successful employees. Though relatively sparse, this research tends to paint employment arbitration in a reasonably favorable light.³ At least at first glance, the research suggests that employees win more often, and more quickly, in arbitration, but

2. Of course, courts also act as external monitors, policing the efficacy of workplace compliance and grievance procedures. It remains an open question whether arbitration can serve a similar policing function.

3. Professor St. Antoine provides a valuable summary of that research in his symposium contribution. See Theodore St. Antoine, *Mandatory Arbitration: Why it's Better Than it Looks*, 41 MICH. J.L. REFORM 783 (2008). See also HOYT N. WHEELER ET AL., *WORKPLACE JUSTICE WITHOUT UNIONS* 47–68 (2004); Richard A. Bales, *Normative Consideration of Employment Arbitration at Gilmer's Quinceañera*, 81 TUL. L. REV. 331, 342–52 (2006); Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury*, 11 EMP. RTS. & EMP. POL'Y J. 405, 412–34 (2007); David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1567–78 (2005). The existing research into arbitration remedies focuses on the monetary relief awarded to employees; thus, it does not have much to say about whether arbitration can effectively reshape workplace practices—whether by injunctive relief or by inducing employers to voluntarily change challenged workplace practices.

that average monetary awards to successful employees are larger in court.

Perhaps the clearest area of research relates to disposition times and demonstrates that arbitrators resolve disputes much more quickly than courts.⁴ Most studies, moreover, report employee win-rates in arbitration that exceed those reported by studies of employment litigation.⁵ Although the research into how much

4. See, e.g., Bales, *supra* note 3, at 343; Sherwyn et al., *supra* note 3, at 1578. The existing research generally compares the time between the filing of the arbitration demand and the arbitration award to the time between complaint filing and the trial court's judgment. This comparison does not take account of the additional time needed to obtain a court order confirming the arbitrator's award, a necessary step in converting the award into an enforceable judgment. Doing so would reduce, although probably not eliminate, arbitration's speed advantage. However, including time devoted to appeal would likely enhance arbitration's speed advantage given the relatively limited grounds for vacating an arbitrator's award, compared to the more expansive appellate review available for court judgments.

5. For relevant studies, see, e.g., Lisa B. Bingham, *Emerging Due Process Concerns in Employment Arbitration: A Look at Actual Cases*, 47 LAB. L.J. 108 (1996) (examining outcomes in a sample of AAA arbitrations); Lisa B. Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference*, in ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF THE NEW YORK UNIVERSITY 53D ANNUAL CONFERENCE ON LABOR 303 (Samuel Estreicher & David Sherwyn eds., 2004) (AAA arbitrations); Lisa B. Bingham, *Is There a Bias in Arbitration on Non-Union Employment Disputes?*, 6 INT'L J. OF CONFLICT MGMT. 369 (1995) (studying AAA arbitration outcomes from 1992); Lisa B. Bingham, *Unequal Bargaining Power: An Alternative Account for the Repeat Player Effect*, 50th Proceedings of the Industrial Relations Research Association 1998 Annual Conference in *Employment Arbitration*, 1 INDUS. REL. RES. ASS'N SERIES 33 (1998) [hereinafter Bingham, *Unequal Bargaining Power*] (AAA arbitrations); Stuart H. Bompey & Andrea H. Stempel, *Four Years Later: A Look at Compulsory Arbitration of Employment Discrimination Claims after Gilmer v. Interstate /Johnson Lane Corp.*, 21 EMP. REL. L.J. 21 (1995) (surveying awards rendered in NYSE and NASD arbitrations); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 451-56 (2004) (evaluating trends in employment litigation from 1979-2001); Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where do Plaintiffs Better Vindicate Their Rights?*, DISP. RESOL. J., Winter 2003, at 56, 58 (comparing results of NYSE and NASD arbitration to one federal district court); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Jan. 2004, at 44, 48-49 (comparing AAA awards to federal and state court trial outcomes); Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567 (1989) (examining data from federal civil rights cases, including employment discrimination cases); Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, DISP. RESOL. J., May-July 2003, at 8 (evaluating AAA arbitration awards); William M. Howard, *Arbitrating Claims of Employment Discrimination*, DISP. RESOL. J., Oct.-Dec. 1995, at 40 (comparing AAA and securities arbitration to federal court trial outcomes); Michael H. LeRoy, *Getting Nothing for Something: When Women Prevail in Employment Arbitration Awards*, 16 STAN. L. & POL'Y REV. 573 (2005) (evaluating results of arbitration awards challenged in court); Marika F.X. Litras, *Bureau of Justice Statistics Report on Civil Rights Complaints Filed in U.S. District Courts*, DAILY LABOR REPORT, Jan. 20, 2000, at E5-E17 (reporting on cases, including employment discrimination cases, terminated in federal district courts in 1998); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29 (1998) (comparing federal trial outcomes from 1994 to AAA arbitration); and David B. Oppenheimer, *Verdicts Matter: An Empirical Study of California Em-*

successful employees win is a bit less clear, most studies report smaller average awards in arbitration.⁶ A variety of methodological concerns, however, require that we qualify this relatively conventional understanding of the research. Because others have noted many of these concerns,⁷ my primary goal in the following section is to marshal empirical support demonstrating their significance. That is, the following section demonstrates why, even if we concern ourselves only with traditional outcome measures like win rates and award amounts, the existing research does not permit firm conclusions about the relative merits of arbitration versus the courts.

B. Methodological Limitations, and Why They Matter

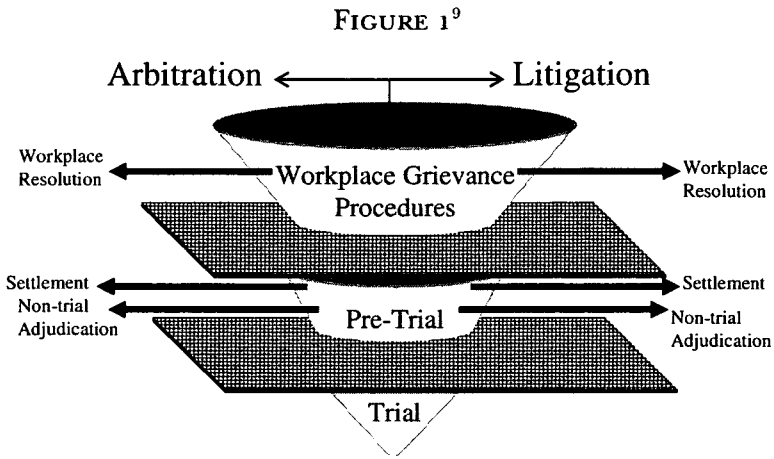
To illustrate the limitations of the existing research, Figure 1 represents the process of dispute resolution as a funnel. Employee claims originate within the workplace and are often resolved there by relatively informal grievance procedures; those that remain unresolved may be filed as formal legal claims either in arbitration or litigation.⁸ After being filed, claims may be abandoned, settled, or resolved by some form of pre-trial adjudication, such as by summary judgment. Only a small minority of claims result in a trial or an arbitration award.

ployment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities, 37 U.C. DAVIS L. REV. 511, 516 (2003) (reviewing 1998 and 1999 California wrongful discharge and employment discrimination jury verdicts).

6. See St. Antoine, *supra* note 3, at 792; Bales, *supra* note 3, at 349; Sherwyn et al., *supra* note 3, at 1576.

7. For more exhaustive treatment of some of the methodological concerns, see Bales, *supra* note 3, at 347–51; Sherwyn et al., *supra* note 3, at 1564–66.

8. Of course, this is not to say that all employee grievances that remain unresolved after being raised within the workplace will be asserted as formal legal claims. Many employees will simply “lump it.” See Miller & Sarat, *supra* note 1, at 527; see also David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 85–87 (1983) (reporting survey results that lawsuits were filed in only 11.2% of disputes involving over \$1,000 in 1983).



As Figure 1 suggests, various “filtering” mechanisms are in play that may produce systematic differences between arbitration and litigation. Employers who arbitrate may be more or less effective at resolving employee claims within the workplace. If so, claims filed in arbitration may differ systematically from those filed in litigation. Even if there are no systematic differences in the kinds of claims that are filed in each system, pre-trial filtering mechanisms may produce systematic differences in the claims that reach trial (or a merits hearing in arbitration).¹⁰ If comparable claims do reach trial, the question arises whether arbitration and litigation produce different results. The existing outcome research is concerned with this last question. As the following discussion suggests, however, there is reason to interpret this research with caution.

1. Workplace Structures as Internal Filters

Arbitration is not the only form of “alternative” dispute resolution relevant to employment disputes. Instead, arbitration is often the last step in an employer-structured and largely informal process for resolving employee grievances.¹¹ Most employee grievances are

9. Figure 1 inverts the usual disputing pyramid, which places the filing of a lawsuit and ensuing trial at the top of the pyramid. See David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 86–87 (1983–1984).

10. Unless the context demands otherwise, I will use the terms “trial” and “pre-trial” in both their ordinary sense and to refer, respectively, to the merits hearing in arbitration and to the period between the filing of the arbitration demand and the merits hearing.

11. See, e.g., Sherwyn et al., *supra* note 3, at 1565–66.

resolved through informal means within the workplace.¹² Thus, the debate over arbitration's fairness as a disputing forum—that is, the debate over the *privatization* of dispute resolution—obscures an equally and perhaps more important development: the *internalization* of dispute resolution within the workplace.¹³

Not all employers have formalized, internal grievance procedures, and those that have them do not follow a common template.¹⁴ Nevertheless, some basic generalizations are possible. Workplace grievance procedures are generally sequenced so that employees first assert grievances informally and locally, then gradually invoke more formal internal processes if dissatisfied with the results of earlier stages, and then involve external actors like mediators and arbitrators only if internal processes fail to provide a satisfactory resolution.

12. See *infra* note 26. Again, note that many of these grievances may not constitute legally cognizable claims. *E.g.*, Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 502 (2001) (noting one company's telephone complaint process encourages employees "to call the call-center for anything from, 'I want a parking spot' to 'I think my performance review was unfair' to 'I am being harassed.'").

13. The significance of workplace grievance procedures has not gone unremarked. See, *e.g.*, Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 337 (2005) (referring to internal compliance and grievance procedures as "front-line" mechanisms for enforcing important public norms). Nor has the significance of workplace structures in implementing (or perhaps subverting) important public norms. For treatments assessing the promise and perils of legal regulation of (and deference to) workplace structures, see, *e.g.*, Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 20–47 (2006) (expressing skepticism that the law can promote workplace structures that will effectively promote equality); Estlund, *supra*, at 387–402 (exploring the promise of a system of "monitored self-regulation"); Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate*, 60 VAND. L. REV. 849, 857–65 (2007) (emphasizing the need to change organizational context by obliging employers not to facilitate or enable bias in workplace decision-making); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 510–15, 522–41 (2003) (critically evaluating the empirical foundation for the view that internal compliance structures deter prohibited conduct and emphasizing the problematic incentives of regulated firms and legal compliance professionals); Sturm, *supra* note 12, at 522 (envisioning a "dynamic and reciprocal relationship between judicially elaborated general legal norms and workplace-generated problem-solving approaches").

14. For example, these internal procedures (and potentially even mediation and arbitration) are designed to handle the full range of workplace grievances, including grievances that are not legally cognizable claims. See, *e.g.*, Katherine Van Wezel Stone, *Dispute Resolution in the Boundaryless Workplace*, 16 OHIO ST. J. ON DISP. RESOL. 467, 487 (2001). Where employees do have legally cognizable claims—especially involving sexual or racial harassment—employees may be able to skip early phases of the process. See, *e.g.*, Alexander J.S. Colvin, *The Relationship Between Employment Arbitration and Workplace Dispute Resolution Procedures*, 16 OHIO ST. J. ON DISP. RES. 643, 652 (2001). In short, organizations have varied approaches to managing both internal and external conflict. For a survey of organizational approaches to conflict management, see David B. Lipsky et al., *An Uncertain Destination: On the Development of Conflict Management Systems in U.S. Corporations*, in ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF THE NEW YORK UNIVERSITY 53RD ANNUAL CONFERENCE ON LABOR, *supra* note 5, at 109.

For example, open door policies encourage employees first to raise grievances with managers and may also establish channels for appealing the manager's decision to a superior or to someone outside the chain of command.¹⁵ These basic workplace grievance procedures essentially "formalize the employee's ability to present complaints to management."¹⁶ An employee who does not receive a satisfactory resolution may sometimes invoke more formal internal dispute resolution procedures.¹⁷ These more formal procedures may include peer review panels, in which other employees or a combination of employees and human resources personnel render a decision on the employee's claim, senior managers charged with investigating the employee's claim, or company ombudspersons who attempt to facilitate a resolution to the employee's claim.¹⁸ If internal procedures fail, many employers require or permit mediation using third party neutrals.¹⁹ Only claims that remain unresolved are likely to be asserted as formal legal claims in arbitration or litigation.²⁰

As mentioned previously, employers' internal dispute resolution procedures do not follow a common template.²¹ Nevertheless, it is common for employers to utilize some combination of the foregoing procedures.²² The existing evidence suggests two important facts about the relationship between arbitration and other employer-designed procedures.²³ First, employers who arbitrate may be more likely to have robust internal dispute resolution proce-

15. See, e.g., Colvin, *supra* note 14, at 646.

16. *Id.*

17. See David Lewin, *Dispute Resolution in Nonunion Organizations: Key Empirical Findings*, in ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF THE NEW YORK UNIVERSITY 53RD ANNUAL CONFERENCE ON LABOR, *supra* note 5, at 379, 381-82.

18. See, e.g. Colvin, *supra* note 14, at 647-48.

19. See *id.* at 648.

20. For additional descriptions of employer dispute resolution procedures, see Sherwyn et al., *supra* note 3, at 1565-66, 1586; Lewin, *supra* note 17, at 381-83; Stone, *supra* note 14, at 480-82.

21. See *supra* note 14.

22. See, e.g., Lewin, *supra* note 17, at 379 (estimating that one in two non-union employers may have in place a formal system to resolve employee grievances).

23. Although I use the term "employer-designed," I do not mean to suggest that each employer customizes arbitration or other dispute resolution procedures for itself. As with any other contract, professional intermediaries—lawyers, human resources professionals, arbitrators and arbitral organizations—play an important role in designing and disseminating contract terms. Indeed, the question whether we should expect substantial variation in how employers design these procedures taps into a deeper debate over the impact of standardization on contract innovation. See, e.g., Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting* (Or "The Economics of Boilerplate"), 83 VA. L. REV. 713 (1997). For a discussion of these issues in the arbitration context, see Steven J. Choi, *The Problem With Arbitration Agreements*, 36 VAND. J. TRANSNAT'L L. 1233 (2003).

dures in place.²⁴ For example, in a survey of telecommunications industry employers, Alexander Colvin found that employers that elected to use arbitration were significantly more likely also to have in place workplace dispute resolution procedures like management appeal boards, peer review panels, ombudspersons, and mediation procedures.²⁵ Second, where internal disputing procedures are in place, the evidence suggests that they resolve the vast majority of employee grievances—perhaps 95% or more—before they reach arbitration.²⁶

The link between employers' use of arbitration and their adoption of internal dispute resolution procedures has significant implications for empirical research into arbitration outcomes. For one thing, employers may use internal dispute resolution processes to identify and resolve potentially valid legal claims within the workplace. Although it is far too early to draw firm conclusions, there is some indirect evidence that this occurs. For example, a study by Elizabeth Hill found that "repeat-player" employers who maintained an internal dispute resolution process won at arbitration much more frequently than repeat-player employers who did not maintain such a process.²⁷

If internal dispute resolution procedures indeed work as a filter, and if employers who require arbitration more often have such

24. See, e.g., Colvin, *supra* note 14, at 649 (describing prior survey of telecommunications industry employers and finding that employers using arbitration were significantly more likely to also use other workplace dispute resolution procedures).

25. See *id.* at 649–50.

26. See, e.g., Alexander J.S. Colvin, *Adoption and Use of Dispute Resolution Procedures in the Nonunion Workplace*, 13 *ADVANCES INDUS. & LAB. REL.* 71, 75–87 (2004) (studying the internal dispute resolution process of one manufacturing company and noting that, of the seventy-two total disputes that went to mediation or arbitration between 1995 and 1997, only three resulted in an arbitration); Lewin, *supra* note 17, at 386 (indicating that for nonunion employers with arbitration as the last step of a dispute resolution system, between 4–5% of employee grievances are resolved in arbitration); Sherwyn et al., *supra* note 3, at 1587–88 (reporting that, for the employer they studied, only 5% of the claims submitted to the dispute resolution program went to arbitration). Again, not all of the claims resolved by internal procedures will be legally cognizable. See *supra* note 14.

27. Hill, *supra* note 5, at 15. Hill found that twenty-five of the thirty-four "repeat-player" cases in her sample also involved an employer with other internal dispute resolution procedures, and that the win/loss ratio in arbitration for these employers was much higher (3.2:1) than the ratio for employers generally (1.3:1) or for repeat-player employers who did not have in-house dispute resolution procedures (1.25:1). *Id.*

Even if replicated, these findings may be due to other factors. For example, because workplace grievance procedures may provide a defense to certain discrimination claims, employers with such procedures in place may win more frequently when these claims reach arbitration. For discussion of these defenses, and of the relative paucity of discrimination cases in the arbitration samples that have been studied, see *infra* notes 43 & 72. Alternatively, internal grievance procedures may allow employers to gather information about the employee's claim and thus better prepare for disputes that reach arbitration.

procedures in place, then claims filed in arbitration might have less merit than those filed in court.²⁸ But the research appears to reveal the opposite pattern, at least with respect to win-rates.²⁹ This may be evidence that arbitration is a superior forum for employees, or it may simply cast doubt on the notion that employers who arbitrate have more effective internal filters in place. To complicate matters further, other differences between arbitrating and litigating employers may affect the relative merits of the claims filed in each system. For example, it is conceivable that discrimination-prone employers benefit the most from arbitration and that other employers prefer to litigate.³⁰ If so, employees who arbitrate should have *more* meritorious claims and (all else equal) should appear to fare better in arbitration. In that case, the higher win rates reported in arbitration would reveal little if anything about the relative merits of arbitration as a disputing forum.³¹

Perhaps the most that can be said is that there are legitimate reasons to suspect that claims filed in arbitration may differ systematically from those filed in litigation. But we do not know *how* they are likely to differ. This makes it exceedingly difficult to draw firm conclusions from the outcome research.

2. Settlements and Pre-Trial Motions as Filters

Even if employees file identical claims in arbitration and litigation, the two systems may differ in how they “filter” cases after filing but before trial.³² One possibility is that there are systematic

28. See, e.g., Sherwyn et al., *supra* note 3, at 1566.

29. See *supra* text accompanying notes 3–7.

30. See Scott Baker, *A Risk-Based Approach to Mandatory Arbitration*, 83 OR. L. REV. 861, 864 (2004). It is possible (though certainly contestable) that employers who do not discriminate pay a premium for arbitration—either in the form of increased wages or increased disputing costs—and therefore may prefer to resolve employee claims in court. See *id.* at 882–88.

31. For a related point about potential differences between employers who require arbitration and those who do not, see Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735, 756–57 (2001) (listing, as potential differences, that employers who use arbitration might (1) have better (or worse) lawyers or human resources departments, (2) have more experience defending employment discrimination claims, (3) have better (or worse) reputations for how they treat their employees, or (4) be more or less capable of paying a large verdict).

32. For different assessments of settlement dynamics and their implications for how cases are selected for trial, see Lucian Ayre Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404 (1984) (focusing on impact of information asymmetries in settlement decisions); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. EMP. LEG. STUD. 1 (1984) (modeling settlement process in which, given symmetric stakes, plaintiff win-rates will approach 50% regardless of the overall merit of filed cases). See also Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About*

differences in the kinds of disputes that settle.³³ The vast majority—perhaps 70% or more—of cases filed in court settle.³⁴ Although it is sometimes assumed that few disputes settle after being filed as formal legal claims in arbitration,³⁵ the limited empirical evidence suggests otherwise. For example, one study found that 45.5% of the cases filed in arbitration over a two year period resulted in a settlement.³⁶ So it is possible that cases filed in arbitration may be less likely to settle than cases filed in court. Lower settlement rates, of course, do not necessarily imply systematic differences in the *kinds* of cases that settle. Nevertheless, it is at least possible that such differences exist.³⁷

Pre-trial adjudication—for example by summary judgment—is a more significant filtering mechanism. A substantial percentage of employment disputes filed in court are resolved by pretrial motion. One study, for example, reported that 19.2% of employment discrimination lawsuits filed in federal court over a twenty-year period were resolved by non-trial adjudication.³⁸ Employees lost the vast majority of these adjudications.³⁹ Although there is no reliable evidence on the frequency with which arbitrators grant pre-hearing, dispositive motions, most observers quite reasonably assume such rulings to be infrequent.⁴⁰ If that is so, many arbitration hearings may result in an employer victory for reasons that would have

the Legal System? Win-Rates and Removal Jurisdiction, 83 CORNELL L. REV. 581 (1998) (exploring the impact of case selection effects on win-rate data).

33. Filed claims are not always settled or resolved on the merits. Some are simply abandoned by the claimant. Differences in the kinds of cases abandoned in each system may also produce a different pool of cases for trial.

34. See, e.g., Charles Silver, *Does Civil Justice Cost Too Much?*, 80 TEX. L. REV. 2073, 2107–09 (2002). See also Clermont & Schwab, *supra* note 5, app. at 457 (reporting settlement rates of 69.10% for discrimination claims and 71.09% for contract and tort claims from 1979–2000).

35. See Howard, *supra* note 5, at 45.

36. Eisenberg & Hill, *supra* note 5, at 52 (computed by aggregating the data for both 1999 and 2000).

37. See *id.* It is unclear what mechanism might produce differential settlement patterns in arbitration and litigation. One possibility is that litigation may present asymmetric stakes for plaintiffs and defendants. For many defendants, an adverse court judgment not only will impose direct financial costs but also may create a precedent with reputational or future legal consequences. Under these conditions, some theories predict both relatively higher settlement rates and relatively higher defendant win-rates. See Priest & Klein, *supra* note 32, at 25–26; Daniel Kessler et al., *Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation*, 25 J. LEGAL STUD. 233, 242 (1996). The evidence does not allow a definitive assessment but is consistent with this prediction.

38. See Clermont & Schwab, *supra* note 5, app. at 457.

39. See *id.* (reporting that employees won only 4.23% of pretrial adjudications in federal employment discrimination cases from 1979–2001); see also Maltby, *supra* note 5, at 47 (reporting from 1994 data that employers won 98% of the pre-trial dispositive motions in federal employment discrimination cases).

40. See, e.g., Baker, *supra* note 30, at 887–88; Sherwyn et al., *supra* note 3, at 1566.

prevented the dispute from reaching trial in court.⁴¹ This possibility suggests that focusing only on trial outcomes can make arbitration appear less favorable to employees. A more appropriate comparison of arbitration outcomes to litigation outcomes might take into account all forms of adjudication, including pre-trial as well as trial rulings.⁴²

3. Different Claims and Claimants: Other Differences Between Arbitrated and Litigated Disputes

Given differences in workplace and pre-trial filtering, it is reasonable to suspect that samples of arbitrated and litigated disputes may differ in the relative merits of the claims being asserted. Moreover, samples of arbitrated and litigated disputes are known to differ in additional ways. The following discussion explores two of these differences—the prevalence of civil rights claims and the prevalence of lower-pay employees. The research has made some headway in accounting for these latter differences, but it has yet to account for the impact of workplace and pre-trial filtering.

Civil rights claimants comprise only a small minority of samples of arbitrated disputes, generally in the range of 2.5–19.5%.⁴³ By contrast, civil rights claimants appear much more frequently in samples of employment litigation.⁴⁴ This difference in sample composition matters: employees asserting civil rights claims fare relatively poorly compared to other civil litigants.⁴⁵ Civil rights claimants are less likely to receive a favorable award than are employees asserting other kinds of claims, although successful civil rights claimants may receive larger damages awards.⁴⁶ Thus, if researchers do not control for the presence of civil rights claims, it

41. See, e.g., Eisenberg & Hill, *supra* note 5, at 52; Sherwyn et al., *supra* note 3, at 1566.

42. See Sherwyn et al., *supra* note 3, at 1566.

43. See, e.g., Bingham, *Emerging Due Process Concerns*, *supra* note 5, at 115 tbl.5 (2.5% of a sample of 1993 AAA arbitration awards involved discrimination claims; I computed this figure by excluding the fifty-two cases for which Bingham lacked information about case type); Eisenberg & Hill, *supra* note 5, at 49 (19.5% of sample involved civil rights claims); Hill, *supra* note 5, at 12 (noting that civil rights claims are relatively infrequent in arbitration; only 7% of Hill's sample involved such claims); U.S. Gen. Accounting Office, *Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes*, GAO/HEHS-94-17, at 7 (1994) (noting that, of the 572 employment disputes arbitrated in 1991 and 1992 by NYSE or by NASD's New York office, only 18 (3.1%) were discrimination cases).

44. See, e.g., Eisenberg & Hill, *supra* note 5, at 49 (52.5% of state court sample). Samples of federal employment litigation often involve only civil rights claims. See Maltby, *supra* note 5, at 47.

45. See Clermont & Schwab, *supra* note 5, at 455, fig. 12.

46. See Eisenberg & Hill, *supra* note 5, at 47, 49–51.

may appear that employees win more often, but win less money, in arbitration than in court. (This is, of course, exactly what the research shows.⁴⁷) But this will be due to the different claims being adjudicated, not to differences in the disputing systems themselves.

Studies of arbitration and litigation may also differ in the prevalence of lower-pay employees in the relevant samples.⁴⁸ On occasion, information about employee income can be gleaned from arbitration records and awards.⁴⁹ Researchers have also identified lower-pay employees by proxy, as those employees who are subject to a broadly applicable arbitration plan promulgated by their employer—for example, in an employee handbook or personnel manual—rather than those employees who have individually negotiated employment contracts containing an arbitration clause.⁵⁰ As Professor St. Antoine notes, these lower-pay employees appear with some frequency in arbitration.⁵¹ Indeed, lower-pay employees have generally comprised between one-third and two-thirds of the sample in studies of arbitration.⁵²

It is not easy to determine employee income from standard sources of information about court filings and judgments. Nevertheless, there is reason to believe that lower-pay employees appear infrequently in court.⁵³ Because employee salary is likely to correlate positively with award size, this means that awards to successful employees may appear smaller in arbitration than in court.⁵⁴ Once

47. See *supra* text accompanying notes 3–7.

48. These differences may be due to the relatively low cost of arbitration, or to its accessibility as a forum for pro se claimants, rather than to any pre-trial or workplace filtering mechanism. See Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 MICH. J.L. REFORM 833–35 (2008); Sherwyn et al., *supra* note 3, at 1575.

49. See, e.g., Hill, *supra* note 5, at 11 & 17 n.14 (determining income data from the content of arbitration awards).

50. See, e.g., Lisa Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 237 (1998); Eisenberg & Hill, *supra* note 5, at 47.

51. St. Antoine, *supra* note 3, at 796.

52. See, e.g., Bingham, *supra* note 50, at 239 tbl.4 (35.9% of sample, computed from the table); Bingham, *Unequal Bargaining Power*, *supra* note 5, at 39 (reporting the same results); Bingham & Sarraf, *supra* note 5, at 323 tbl.2 (31.1% of sample, computed from the table); Eisenberg & Hill, *supra* note 5, at 48 tbl.1 (61.9%, computed from the table).

53. See Eisenberg & Hill, *supra* note 5, at 27–28 (noting a link between provable damages and salary); Howard, *supra* note 5, at 44 (discussing responses to survey in which plaintiffs' lawyers indicated that they required, on average, minimum provable damages of \$60,000 or more and a retainer of \$3,000 to \$3,600 before accepting an employment discrimination claim).

54. See Eisenberg & Hill, *supra* note 5, at 47. The relative speed of arbitration further complicates any comparison between trial outcomes and the outcomes of merits hearings in arbitration. This is because some elements of an employee's claim for damages, like back pay, are time-sensitive. For these elements, quicker dispute processing should yield lower awards. See Sherwyn et al., *supra* note 3, at 1589.

again, however, this difference may have nothing to do with the relative merits of arbitration and litigation.

Beyond lowering the mean award to successful employees, the relative prevalence of lower-pay employees in arbitration may reduce the overall win-rate for employee claimants. Studies have consistently shown lower win-rates for employees who arbitrate pursuant to a personnel manual—and who therefore are likely to have a standardized employment agreement—than for employees with individually-negotiated employment contracts.⁵⁵ Although it is not clear that these lower win-rates are problematic,⁵⁶ including lower-pay employees in samples of arbitrated disputes produces a lower win-rate than would otherwise be the case. Without more specific information on employee income, it is at least arguable that comparisons between arbitration and litigation should focus on the higher-pay employees who are likely to appear in both systems.

C. The Outcome Research (Briefly) Revisited

As the foregoing discussion indicates, there are both theoretical and empirical reasons to believe that meaningful differences exist between arbitration and litigation in the kinds of claimants and legal claims involved, and also in the relative merits of the claims being adjudicated. Fortunately, a few studies do account for some of these concerns, for example by separating higher- from lower-pay employees, distinguishing civil-rights from other employment claims, or attempting to account for pre-trial dispositions. By and large, however, the research does not account for the possibility that workplace and pre-trial filtering mechanisms may produce differences in the relative merits of the claims adjudicated in the two systems.⁵⁷

55. See, e.g., Bingham, *On Repeat Players*, *supra* note 50, at 239 tbl.4; Bingham & Sarraf, *supra* note 5, at 323 tbl.2; see also Colvin, *supra* note 3, at 418–19 (finding win-rate of 19.7% in study of employment arbitrations pursuant to employer-promulgated agreements); Eisenberg & Hill, *supra* note 5, at 48 tbl.1 (reporting a 39.6% win-rate for lower-pay employees asserting non-civil rights claims, compared to 64.9% for higher-pay employees).

56. Recall that these are primarily contract claims, not civil rights claims. Lower-pay employees who base their claims on a standardized employment contract—perhaps alleging that an employee handbook converts an apparently at-will employment relationship into one where employees may be terminated only for cause—may have rather different claims than employees with individually-negotiated employment contracts. The differential success rates for lower- and higher-pay employees in arbitration is worthy of further study.

57. See *supra* text accompanying notes 27–29 for the impact of workplace dispute resolution procedures.

For example, Ted Eisenberg and Elizabeth Hill compared American Arbitration Association employment awards to state and federal court trial outcomes, reporting separate results for civil-rights and non-civil-rights claimants and for higher- and lower-pay employees.⁵⁸ They found no statistically significant differences between arbitration and litigation in terms of win-rates or award amounts for higher-pay employees asserting non-civil-rights claims.⁵⁹ Another study, by Michael Delikat and Morris Kleiner, focused solely on employment discrimination disputes, comparing a sample of securities-industry arbitration awards to trial verdicts rendered in one federal district.⁶⁰ Employees won significantly more often in arbitration but the mean award was substantially higher in court.⁶¹ A third study, by Lewis Maltby, found that although employees won 44% of the time at trial, they won only 14.9% of all definitive judgments rendered by courts.⁶² And although the mean award—measured as a percentage of the amount demanded by employees—was higher for employees who won at trial than for those who won in arbitration, the mean award was lower in court once pre-trial adjudications were taken into account.⁶³

58. Eisenberg & Hill, *supra* note 5.

59. *Id.* at 48, 50. Directionally, the differences between the arbitration and court samples were consistent with the conventional understanding of arbitration outcome research. Higher-pay employees asserting non-civil-rights claims won more often in arbitration than in state court (64.9% versus 56.6%), and the median award was also higher in arbitration (\$94,984 versus \$68,737), but the mean award was higher in state court (\$462,307 versus \$211,720). There were too few higher-pay employees asserting civil-rights claims in arbitration to permit meaningful comparisons to civil-rights plaintiffs in court. *Id.* Lower-pay employees, by contrast, won less often and less money in arbitration than did plaintiffs in court. *Id.* For non-civil-rights claimants, these differences were statistically significant when compared to state court outcomes for both win-rates and award amounts. *Id.* The authors assumed, plausibly, that higher-pay employees dominated the court cases. *Id.* at 47.

60. Delikat & Kleiner, *supra* note 5.

61. *See id.* at 57. Employees won 46% of the time in arbitration and 36% of the time at trial. This difference was statistically significant. The difference between the mean award in court (\$377,030) and in arbitration (\$237,703) was marginally significant, with a sample comprised of 125 trial verdicts and 186 arbitration awards. *Id.* at 56–57.

62. Maltby, *supra* note 5, at 47, 49. Maltby compared this to a 63% win-rate reported in a prior study of AAA arbitrations, although it is unlikely that the AAA sample contained many civil rights claims. (All of the trial outcomes reported by Maltby were federal civil-rights claims.)

63. Maltby, *supra* note 5, at 47–49 (reporting mean award of 70% of demand for trial outcomes versus 25% for arbitration awards, but that, once all merits adjudications were taken into account, employees won only 10.4% of the amount demanded in court, versus 18% in arbitration). At the time of the Maltby study, the up-front fee due from arbitration claimants increased with the size of the claimant's demand. Court filing fees, by contrast, generally do not increase with the amount demanded. *See Drahozal, supra* note 48, at 817. Thus, the arbitration claimants studied by Maltby had an incentive to moderate their demands, and the apparently greater recoveries in arbitration may simply reflect the fact that

The results of these studies are generally consistent with the conventional understanding noted above.⁶⁴ That is, they report that employees win as often or more often in arbitration, especially when pre-trial dispositions are taken into account, but they also suggest that employees who win at trial may receive higher awards, at least when asserting civil rights claims. Nevertheless, the research does not permit us to assess the impact of workplace and pretrial filters on the relative merits of the claims being adjudicated. This severely complicates any attempt to compare arbitration to litigation outcomes. The relative frequency of pre-trial adjudication in court may mean that weaker claims are less likely to reach trial.⁶⁵ And if employers who use arbitration differ from those who do not—in their propensity to discriminate,⁶⁶ in their ability to “filter” out legally meritorious claims within the workplace,⁶⁷ or for some other reason—these differences are likely to affect the relative merits of the cases that reach the stage of formal adjudication.

Perhaps more importantly, the existing research focuses principally on traditional outcome measures like disposition time, win-rate, and award amount. Yet because most employee claims are resolved within the workplace,⁶⁸ the research illuminates only a small corner of the world of employment dispute resolution. Indeed, it may be that workplace dispute resolution is a more important dispute resolution phenomenon than arbitration itself. There is, in fact, a significant body of research examining workplace compliance and grievance procedures. By and large, however, that research engages a different set of questions than the arbitration research engages. The remainder of this Article explores why that might be, and what the arbitration research can learn from research into internal dispute resolution.

arbitration claimants made more realistic demands. Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, 67 LAW & CONTEMP. PROBS. 105, 129 n.143 (2004). Major arbitration providers no longer apply graduated fee schedules to arbitrations conducted pursuant to employer-promulgated plans. *E.g.*, Drahozal, *supra* note 48, at 818.

64. *See supra* text accompanying notes 3–7.

65. *See supra* text accompanying notes 38–42.

66. *See supra* text accompanying notes 30–31.

67. *See supra* text accompanying notes 27–29.

68. *See supra* text accompanying notes 26.

II. THE DIFFERING CONCEPTIONS OF WORKPLACE AND “EXTERNAL” DISPUTE RESOLUTION

Because this Article has focused so far on the limits of arbitration outcome research, I have characterized workplace dispute resolution as a “filter” that influences the relative merits of claims resolved *outside* the workplace. This characterization, however, suggests that workplace dispute resolution is important primarily as a variable to be controlled by researchers interested in studying arbitration outcomes. Yet workplace dispute resolution is also an important dispute resolution phenomenon that has generated a significant amount of research.⁶⁹ Importantly, that research engages questions that are both substantively different from, and more varied than, the traditional outcome measures that have been central to arbitration research.

By and large, researchers have conceptualized workplace dispute resolution and arbitration in entirely different ways, and these differing conceptions have produced different research agendas. Many researchers conceptualize grievance procedures and other workplace structures as regulatory tools capable of implementing and generating norms within the workplace. By contrast, the arbitration outcome research implicitly conceptualizes arbitration as a court surrogate—that is, as an external forum for rights enforcement and for ensuring that employers’ practices conform to external law.⁷⁰ After describing these differing conceptions and research agendas, I close by suggesting that the divide is somewhat artificial. Indeed, conceptualizing arbitration as a regulatory phenomenon opens up a number of important inquiries into the regulatory capacity of arbitrators and into arbitration’s potential to generate and enforce norms.

A. Workplace Structures as Regulatory Tools

The fact that most employee grievances are resolved internally through employer-designed dispute resolution procedures arguably heralds a broader transformation of workplace regulation, one in which “the locus of enforcement is moving inside the workplace and away from direct public oversight.”⁷¹ Thus, regulatory agencies

69. See *infra* notes 87–93.

70. Certainly, some scholars have conceptualized arbitration as a tool of regulation (or of self-regulation). See, e.g., Estlund, *supra* note 13, at 338–40; Stone, *supra* note 14, at 470–71. This conception, however, has not meaningfully shaped the empirical research agenda.

71. Estlund, *supra* note 13, at 325–26.

and courts have gradually deferred to workplace structures designed to facilitate compliance with external laws. Employment discrimination law, for example, allows employers with internal compliance and grievance procedures to avoid liability or punitive damages in certain cases, typically those involving workplace harassment.⁷² As a result, internal compliance and grievance procedures have become “front-line mechanisms for enforcing” important public norms such as anti-discrimination.⁷³

This development has attracted a great deal of scholarly attention and debate.⁷⁴ That debate implicates a rich vein of regulatory theory that seeks to enhance the efficacy of regulation by allowing regulated firms to participate in shaping the content of regulatory rules, to monitor their own compliance, and even to correct and punish instances of noncompliance.⁷⁵ The debate also reveals unique aspirations for workplace structures among some scholars.⁷⁶ For example, it may be that employers can utilize local, workplace-specific knowledge effectively to embed regulatory norms and respect for individual rights into the workplace, to identify and correct violations, and, in the process, to lend further content to governing external norms.⁷⁷ Moreover, because workplace relations are sometimes governed by context-specific norms “that are not presently embodied in law,” workplace-centered procedures may be superior to public actors like courts at elaborating and implementing those norms.⁷⁸

Professor Susan Sturm, for example, posits a dynamic relationship between public, norm-generating actors like courts and the regulated firms responsible for implementing those norms in specific local contexts. The goal is for accountable workplace structures to embed public norms into the workplace—something public regulators, who lack the local knowledge necessary to tailor context-appropriate solutions, may fail to do⁷⁹—and, in the process, lend further content to the public norms themselves.⁸⁰ For exam-

72. See, e.g., Bagenstos, *supra* note 13, at 21–26; Estlund, *supra* note 13, at 336–40; Krawiec, *supra* note 13, at 503–10.

73. Estlund, *supra* note 13, at 337.

74. See *supra* note 13.

75. See, e.g., IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION* 101–32 (1992). See generally Colin Scott, *Regulation in the Age of Governance: The Rise of the Post-Regulatory State*, in *THE POLITICS OF REGULATION* 145 (Jacint Jordana & David Levi-Faur eds., 2004) (exploring theoretical approaches to regulation and the range of mechanisms through which state control might be asserted).

76. See, e.g., Sturm, *supra* note 12, at 553–66; Estlund, *supra* note 13, at 387–402.

77. See Sturm, *supra* note 12, at 463.

78. Stone, *supra* note 14, at 470.

79. See Bagenstos, *supra* note 13, at 18–20; Sturm, *supra* note 12, at 522–23.

80. See Sturm, *supra* note 12, at 522.

ple, rather than “enforce predefined compliance standards” for public norms like anti-discrimination, courts might seek “to induce employers to participate in the development of effective internal systems that give meaning to the general norm ... in context.”⁸¹ In turn, employers’ efforts to implement the anti-discrimination norm in specific workplace contexts would enrich courts’ understanding of the general norm and perhaps “enable the articulation of rolling standards” of compliance.⁸² Workplace structures might pursue similar aspirations in areas not governed by external law. For example, workplaces may generate internal fairness norms to resolve conflicts between co-workers, or disputes over allocation of resources, that do not give rise to formal legal claims.⁸³

Some question whether these goals are achievable.⁸⁴ Internal grievance procedures, for example, may recast violations of employee rights as issues of interpersonal conflict.⁸⁵ It is possible, moreover, that excessive judicial deference to employers’ internal procedures will subordinate public norms to managerial concerns as courts come to accept employers’ visions of compliance.⁸⁶ The point, however, is that most observers conceptualize internal grievance procedures as one of many workplace structures that can internalize (or subvert) public norms and generate private norms to govern in the absence of external law. And the empirical research into internal compliance and grievance procedures reflects their unique aspirations and concerns.

For example, a number of researchers have explored the process by which external legal norms like anti-discrimination are internalized within the workplace. This research has various goals, among them to identify structures associated with effective norm implementation, to assess the risk of symbolic compliance, and to investigate how public norms may influence, and be influenced by,

81. *Id.* at 560.

82. *Id.* at 562–63. Likewise, Professor Cynthia Estlund has explored the potential of a system of “monitored self-regulation” in which limited public and private enforcement tools “induce or coerce firms’ entry into and faithful implementation of a system of [monitored] self-regulation.” Estlund, *supra* note 13, at 402.

83. Stone, *supra* note 13, at 487–89 (exploring the role of arbitration in implementing workplace norms and in policing structural employment discrimination).

84. See, e.g., Bagenstos, *supra* note 13, 20–40; Krawiec, *supra* note 13, 541–44.

85. See Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC’Y REV. 497, 511–19 (1993); Lauren B. Edelman & Mark C. Suchman, *When the “Haves” Hold Court: Speculations on the Organizational Internalization of Law*, 33 LAW & SOC’Y REV. 941, 967 (1999).

86. See Edelman & Suchman, *supra* note 85, at 963–64; see also Bagenstos, *supra* note 13, at 28–31.

managerial imperatives.⁸⁷ The underlying premise is that the workplace is a “law-making bod[y],”⁸⁸ one that can generate workplace-specific norms in areas not governed by external law⁸⁹ and elaborate (or perhaps subvert) public norms through the process of implementing those norms in the workplace. Given that premise, questions about how workplace structures generate and implement norms become fundamental. Likewise, scholars pay close attention to the dynamic between courts and the workplace, investigating whether judicial oversight enhances employer compliance efforts or merely subverts courts’ understanding of external law.⁹⁰

Another example illustrates how conceptualizing workplace dispute resolution as a regulatory phenomenon shapes the empirical agenda. The study of workplace compliance and dispute resolution treats as fundamental questions of how professional intermediaries such as lawyers and human resources personnel can facilitate (or subvert) organizational compliance with external legal norms.⁹¹ This emphasis reflects the central role of intermediaries “in mediating the relationship between legal institutions and workplaces.”⁹² Ideally, intermediaries’ close ties to the workplace permit them to fashion context-appropriate solutions to compliance problems,

87. E.g., Edelman et al., *supra* note 85 (examining how internal complaint handlers conceptualize and implement civil rights law); Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247 (2006) (exploring organizational structures and strategies for increasing participation of women in university faculty); see also Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531 (1992) (examining structural responses to antidiscrimination law within organizations); Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406 (1999) (exploring evolution of organizational beliefs concerning need for and value of workplace grievance procedures); Alexandra Kalev & Frank Dobbin, *Enforcement of Civil Rights Law in Private Workplaces: The Effects of Compliance Reviews and Lawsuits Over Time*, 31 LAW & SOC. INQUIRY 855 (2006) (examining impact of compliance reviews by the Office of Federal Contract Compliance Programs, and of lawsuits, on women and minority representation in management).

88. E.g., Sturm, *supra* note 12, at 463. See also Edelman et al., *supra* note 87, at 407 (“That organizations are both responding to and constructing the law that regulates them renders law ‘endogenous’ . . .”).

89. See Stone, *supra* note 14, at 487–88.

90. For critical assessments of courts’ deference to workplace grievance procedures and compliance efforts, see Bagenstos, *supra* note 13, at 21–26; Krawiec, *supra* note 13, at 508–09. See also Edelman & Suchman, *supra* note 85, at 961–64 (exploring consequences of shifting lawmaking activity from public actors to the workplace).

91. See, e.g., Lauren B. Edelman et al., *Legal Ambiguity and the Politics of Compliance: Affirmative Action Offices’ Dilemma*, 13 LAW & POL’Y 73 (1991) (exploring the organizational role of affirmative action officers); Sturm, *supra* note 87, at 327–33. For a critical evaluation of professional intermediaries’ roles and incentives, see, e.g., Bagenstos, *supra* note 13, at 26–34; Krawiec, *supra* note 13, at 522–41.

92. Sturm, *supra* note 12, at 523.

while their connections to broader professional communities provide incentives to vindicate external legal norms and allow the pooling of information about effective practices across different workplace settings.⁹³ Whether and under what conditions intermediaries in fact play this salutary role is a fundamental research question.⁹⁴

None of this is to say that research into workplace dispute resolution entirely eschews traditional “outcome” measures. For example, researchers have examined workplace grievance procedures to determine how often employee claims are sustained and what kinds of relief employees obtain.⁹⁵ Like the arbitration literature, research into workplace dispute resolution also has emphasized the need for due process in resolving employee claims.⁹⁶ Nevertheless, questions of “who wins and how much” have been less fundamental to the study of workplace dispute resolution than they have been to the study of arbitration. This difference in empirical focus follows directly from the conception of workplace compliance and grievance procedures as tools that harness the employer’s own regulatory capacity.

B. Alternative Conceptions of Arbitration, and Their Implications for Research

Implicitly or explicitly, the arbitration outcome research described in Part I is premised on the notion that arbitration should serve as a court surrogate, ideally yielding equivalent outcomes at

93. *E.g.*, Sturm, *supra* note 12, at 523–24.

94. *See, e.g.*, Edelman, *supra* note 90; Sturm, *supra* note 87.

95. For relevant research, *see* Alexander J.S. Colvin, *Adoption and Use of Dispute Resolution Procedures in the Nonunion Workplace*, 13 *ADV. IN INDUS. & LAB. REL.* 69, 86 (2004) (finding that one employer paid relatively modest monetary settlements (\$2,000 on average) through mediation, although some employees also received significant non-monetary relief); Lewin, *supra* note 17, at 383–401 (summarizing existing and original research); Sherwyn et al., *supra* note 3, at 1589–90 (finding that the per-claim settlement in disputes resolved through an employer’s internal process was one-fourth of the average amount received through EEOC conciliation and attributing the difference to the shorter disposition time for the employer’s process and to the fact that only legally cognizable claims are eligible for EEOC conciliation).

96. *See, e.g.*, Colvin, *supra* note 14, at 660–61. There is a broader literature examining the importance of procedural justice within the workplace, *e.g.*, Tom R. Tyler, *Using Procedure to Justify Outcomes: Testing the Viability of a Procedural Justice Strategy for Managing Conflicts and Allocating Resources in Work Organizations*, 12 *BASIC & APPLIED SOC. PSYCH.* 259 (1991), and an analogous body of work focusing on procedural justice in arbitration and alternative dispute resolution more generally, *e.g.*, Richard A. Posthuma et al., *Arbitrator Acceptability: Does Justice Matter?*, 39 *INDUS. REL.* 313 (2000). *See also* Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution*, 10 *PSYCH. PUB. POL’Y & LAW* 211 (2004) (summarizing research).

lower cost. For a number of reasons, this is a perfectly legitimate aspiration. U.S. law relies heavily on private litigation to supplement external monitoring by public agencies. Employee lawsuits promise not only to vindicate employee rights but also to engage external actors—the courts—in policing the efficacy of workplace compliance and grievance procedures. Arbitration agreements, however, greatly reduce the role courts play in enforcing rights and monitoring employers.⁹⁷ When an employee agrees to binding arbitration, the arbitrator will resolve the employee's claim, and under existing law the arbitrator's interpretation and application of law will be entitled to near-total deference.⁹⁸ In this sense, arbitration is quite literally a surrogate for the court system: it is the closest thing to an external forum that many employees are likely to see.⁹⁹ Thus, it is hardly surprising that the empirical research most relevant to "mandatory" consumer and employment arbitration attempts to compare the outcomes of arbitrated disputes to litigated disputes,¹⁰⁰ or to catalogue the terms commonly found in consumer and employment arbitration agreements.¹⁰¹ These questions are directly relevant to arbitration's efficacy as a forum for rights enforcement.¹⁰²

I do not wish to paint too narrow a picture of arbitration research: that research extends beyond traditional outcome measures, especially in the field of labor arbitration. For example, there is a substantial body of research into whether the characteristics of arbitrators, parties, or attorneys affect arbitration

97. Of course, this is true only when an employer elects to require employees to arbitrate. Courts retain their traditional role in other cases, although they may defer in similar ways to workplace grievance procedures. *See supra* note 90.

98. 9 U.S.C. § 10 (2002) (setting forth limited grounds for vacating an arbitration award).

99. Consistent with the view of arbitration as court surrogate, the Supreme Court has repeatedly upheld arbitration agreements on the assumption that arbitration permits litigants to vindicate federal statutory rights. *See, e.g.*, *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89–90 (2000); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

100. Traditional outcome measures like win-rate and award amounts have the added advantage of being relatively easy to measure. They do, however, fail to account for some of the ways in which arbitration and litigation outcomes may differ. For example, I know of no research examining whether arbitration awards can effectively reform workplace practices, either through awards of injunctive relief or by inducing voluntary changes in workplace practices.

101. *See, e.g.*, Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience, 67 *LAW & CONTEMP. PROBS.* 55, 64–72 (2004).

102. Regrettably, the existing research sheds little light on whether arbitration can meaningfully fulfill the policing function courts are thought to serve. *See supra* note 2.

outcomes.¹⁰³ There is also a more limited body of research examining whether arbitrators create precedent.¹⁰⁴ And a number of studies attempt to assess the extent to which arbitrators apply—or feel bound to apply—external law.¹⁰⁵ By and large, however, the research agenda is shaped by the view that arbitration should be an effective surrogate for the courts. Thus, the research does not pay sustained attention to the structural determinants or content of arbitral law-making.¹⁰⁶ Nor does the research focus on the role of professional intermediaries like arbitrators in shaping arbitration contracts and arbitration procedure.¹⁰⁷ In short, the majority of empirical study of arbitration focuses on traditional outcome measures, and the research that extends beyond these measures does not yield a clear picture of arbitration's regulatory or norm-generating capacity.

There is something incongruous, however, about a research agenda that focuses principally on how well arbitration functions as

103. See, e.g., Brian Bemmels, *The Effects of Grievants' Gender on Arbitrators' Decisions*, 41 *INDUS. & LAB. REL. REV.* 251 (1988); Brian Bemmels, *Gender Effects in Grievance Arbitration*, 29 *INDUS. REL.* 513 (1990); Richard N. Block & Jack Stieber, *The Impact of Attorneys and Arbitrators on Arbitration Awards*, 40 *INDUS. & LAB. REL. REV.* 543 (1987); Steven B. Caudill & Sharon L. Oswald, *A Sequential Selectivity Model of the Decisions of Arbitrators*, 14 *MANAGERIAL & DECISION ECON.* 261 (1993); Herbert G. Heneman & Marcus H. Sandver, *Arbitrators' Backgrounds and Behavior*, 4 *J. LAB. RES.* 115 (1983); Nels E. Nelson & Earl M. Curry, Jr., *Arbitrator Characteristics and Arbitral Decisions*, 20 *INDUS. REL.* 312 (1981).

104. See, e.g., Christopher J. Bruce, *The Adjudication of Labor Disputes as a Private Good*, 8 *INT'L REV. L. & ECON.* 3, 9–10 (1988); Jeffrey P. Commission, *Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence*, 24(2) *J. INT'L ARB.* 129 (2007); Christopher R. Drahozal, *The Iran-US Claims Tribunal and Investment Arbitration: A Citation Analysis*, 3(2) *TRANSNAT'L DISP. MGMT.* 1 (Apr. 2006); see also Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 *LOY. L.A. L. REV.* 187, 213–14 (2006) (summarizing evidence).

105. See, e.g., Patricia A. Greenfield, *How do Arbitrators Treat External Law?*, 45 *INDUS. & LAB. REL. REV.* 683 (1992); Michelle Hoyman & Lamont E. Stallworth, *The Arbitration of Discrimination Grievances in the Aftermath of Gardner-Denver*, 39 *ARB. J.*, Sept. 1984, at 49; Benjamin W. Wolkinson & Dennis H. Liberson, *The Arbitration of Sex Discrimination Grievances*, 37 *ARB. J.*, June 1982, at 35; Margaret Oppenheimer & Helen LaVan, *Arbitration Awards in Discrimination Disputes: An Empirical Analysis*, 34 *ARB. J.*, Mar. 1979, at 12; Robert Coulson, *Title Seven Arbitration in Action*, 27 *LAB. L.J.* 141 (1976).

106. For example, although it is clear that some arbitration systems have the potential, at least, to generate precedent, see sources cited *supra* note 104, we know little about the structural features that lead to such activity.

107. Scholars have explored the regulatory capacity of arbitrators and arbitral institutions, see, e.g., Richard A. Bales, *The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest*, 21 *OHIO ST. J. ON DISP. RESOL.* 165 (2005); Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 *OHIO ST. J. ON DISP. RESOL.* 369, 401–04 (2004), and some empirical research has evaluated the impact of arbitration rules on dispute outcomes, e.g., Bingham & Sarraf, *supra* note 5. But there is little empirical evidence of how arbitrators impact the design of arbitration systems and the conduct of arbitration hearings. For preliminary discussion of these issues, see W. Mark C. Weidemaier, *The Arbitration Clause in Context: How Contract Terms Do (And Do Not) Define The Process*, 40 *CREIGHTON L. REV.* 655 (2007).

a surrogate for the courts when it is equally plausible to describe arbitration as part of the employer's own regulatory apparatus. To be sure, arbitration is different—at least *binding* arbitration is different—because the arbitrator may impose a resolution on the employer. Nevertheless, much like internal workplace procedures such as peer review panels, arbitration is an employer-funded and structured dispute resolution process that ostensibly serves the goal of ensuring compliance with external legal norms. Like internal procedures, arbitration contracts and proceedings are shaped by professional intermediaries—arbitrators and lawyers—with their own professional values and networks. And much like internal workplace procedures, public actors like courts play a limited role in policing the adequacy of arbitration procedures and outcomes.¹⁰⁸

Perhaps more importantly, arbitration's relative institutional strengths align it rather closely with the *normative* justification for allowing employers to participate in shaping and enforcing both public and private (i.e., workplace-specific) legal norms. For example, arbitration fits naturally within a vision of the workplace as a "lawmaking body," capable of "elaborating and transforming" public norms by giving them "meaning in context."¹⁰⁹ Although arbitrators are not formally bound by prior awards, arbitration has significant (though not always utilized) law-making capacity.¹¹⁰ Unlike judges, arbitrators can be selected for their sensitivity to local context, which might plausibly make them superior to courts at tailoring public norms to specific workplaces, not to mention better able to identify or create workplace-specific norms in areas not governed by external law.¹¹¹ Arbitrators' professional networks might also permit pooling of information about effective practices

108. For critical evaluation of courts' efforts to police internal workplace procedures, see citations *supra* note 90. With respect to arbitration, arbitrators' awards are subject to only minimal judicial review, 9 U.S.C. § 10 (2001), and arbitration contracts are policed largely through state law unconscionability doctrine. See Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 764–66 (2004).

109. See Sturm, *supra* note 12 at 463, 522, 555.

110. See Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 745–47 (1999). For empirical analyses of the development of precedent in arbitration, see citations *supra* note 104.

111. For an example in the context of unionized workplaces, where collective bargaining agreements establish when and how employees may be terminated, see Benjamin Wolkinson & Mark Roehling, *The Arbitration of Weight Discrimination Grievances*, DISP. RESOL. J., Nov. 2007–Jan. 2008, at 37 (examining how labor arbitrators applying just cause standard resolve employee grievances based on alleged weight discrimination).

across workplaces.¹¹² Thus, arbitration has the institutional capacity to pursue the same norm-generating and enforcing goals held out for workplace compliance and grievance procedures.¹¹³

This is not to suggest that all arbitration systems meet this description; many will not. Nor is it to suggest that traditional outcome measures are unimportant. But it is unfortunate that arbitration's capacity as a regulatory tool remains largely unexplored. For example, arbitrators and their professional associations are potentially important regulatory actors. Major arbitration service providers have adopted due process rules designed to ensure that minimum standards of fairness are observed in arbitration hearings.¹¹⁴ These rules are an interesting regulatory phenomenon in at least two senses. First, the rules are self-regulatory tools by which the arbitration community regulates its members; the rules seek to prevent abusive arbitration practices from destroying arbitration's perceived legitimacy as a dispute resolution process.¹¹⁵ Second, the rules attempt to regulate employers, for example by inducing changes in the terms of employer-promulgated arbitration plans.¹¹⁶

Unfortunately, there is little empirical evidence as to the impact of these rules. We know very little about how widely they have been adopted.¹¹⁷ Nor do we know very much about how the rules operate in practice. At first glance, the rules purport to "screen out"

112. Cf. Sturm, *supra* note 12, at 523 (noting information pooling function performed by professional intermediaries).

113. A number of scholars have noted the regulatory and norm-generating capacity of arbitration, and alternative dispute resolution more generally, but the empirical research has by and large focused elsewhere. See, e.g., Estlund, *supra* note 13, at 400–02 (exploring how arbitration could function as a meaningful component of a system of monitored self-regulation); Harding, *supra* note 107, at 401–04 (exploring the potential and limits of arbitrator self-regulation); Stone, *supra* note 14, at 471, 487–89 (emphasizing that arbitration can fill gaps in existing regulatory systems, "blend[ing] internal workplace norms of fairness with statutory law and contractual rights," and thereby resolve workplace grievances and new forms of discrimination not yet cognizable under existing law); Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. OF DISP. RESOL. 1 (2007) (exploring ADR's potential to generate public norms).

114. See, e.g., Bales, *supra* note 3, at 341–42; Harding, *supra* note 107, at 399–404.

115. Harding, *supra* note 107, at 416–27.

116. See, e.g., AM. ARBITRATION ASS'N, AAA REVIEW OF CONSUMER CLAUSES 59 (2006), available at <http://www.adr.org/si.asp?id=4453> (asserting that if a business' arbitration clause does not comply with the Consumer Due Process Protocol, "we will return the filing information to the consumer with instructions to pursue other remedies and we will refuse to administer any other cases until your arbitration agreement is in compliance."); AM. ARBITRATION ASS'N, RESOLVING EMPLOYMENT DISPUTES, A PRACTICAL GUIDE 6 (2006), available at <http://www.adr.org/si.asp?id=4426> ("If the Association determines that a dispute resolution program substantially and materially deviates from at least the minimum of [the Employment Due Process Protocol] standards, it will decline to administer cases under that program.").

117. See Harding, *supra* note 107, at 423.

one-sided terms, such as punitive damages waivers, from the arbitration process.¹¹⁸ But their impact on individual disputes is in fact more subtle; they may induce employers to waive one-sided terms in some cases, but they do not entirely eliminate employers' incentives to include such terms in their contracts.¹¹⁹ Finally, there is little evidence about the impact these rules have had on the terms of employer-promulgated arbitration plans.¹²⁰ All of these are worthy subjects of future research.¹²¹

Beyond their interest as regulatory actors, arbitrators may also serve an important law-making function. For example, it is by now clear that at least some arbitration systems generate precedent.¹²² But we know very little about the structural determinants of arbitral law-making and even less about the content of arbitral law. These are important gaps in our knowledge of arbitration. For example, some hope that arbitrators can meaningfully redress claims based on "fairness norms that are not presently embodied in law."¹²³ Is this a realistic hope? Such claims would require arbitrators not only to recognize the "legality" of workplace-generated norms but to accord those norms primacy over traditional employer prerogatives.¹²⁴

Similar questions arise with respect to claims based on external law. Previously, I suggested that arbitrators might surpass courts in their ability to tailor public norms to specific workplace contexts.¹²⁵ As with internal grievance procedures, however, there is also a risk that arbitrators will "recast grievances in ways that downplay legal issues and that focus instead on more typically managerial con-

118. See AM. ARBITRATION ASS'N, RESOLVING EMPLOYMENT DISPUTES: A PRACTICAL GUIDE 14 (2006), available at <http://www.adr.org/si.asp?id=4426>; Harding *supra* note 107, at 404.

119. Weidemaier, *supra* note 107, at 664–73.

120. In addition to policing contracts applicable to particular disputes, providers may review arbitration plans in advance to verify compliance with due process rules. See AM. ARBITRATION ASS'N, RESOLVING EMPLOYMENT DISPUTES, A PRACTICAL GUIDE at 6, available at <http://www.adr.org/si.asp?id=4426> (instructing employers who intend to use AAA services in an employer-promulgated plan to notify the AAA of that intent and to provide a copy of the proposed plan). Such advance review is another mechanism by which providers may seek to shape the terms of arbitration contracts.

121. Questions about the role arbitration service providers play in generating and disseminating innovative contract terms may be of particular interest to contracts scholars. See Choi, *supra* note 23, at 1234–37. Here too there is little empirical work.

122. See citations *supra* note 104.

123. Stone, *supra* note 14, at 470.

124. Cf. Benjamin Wolkinson & Mark Roehling, *The Arbitration of Weight Discrimination Grievances*, DISP. RESOL. J. Nov. 2007–Jan. 2008, at 37 (examining how labor arbitrators applying just cause standard resolve employee grievances based on alleged weight discrimination).

125. See *supra* text accompanying note 111.

cerns.”¹²⁶ Traditional outcome measures like win-rates and award amounts address this possibility indirectly at best. Nor do traditional outcome measures help us to assess the scope and content of the law generated by arbitrators, or to evaluate objections to this kind of private law-making. For example, arbitrators’ primary constituents may be the lawyers who guide the arbitrator selection process, and lawyers may influence the manner in which arbitrators interpret and apply external laws.¹²⁷ Moreover, arbitrators might prefer rules that favor their interests, and those of the lawyers and parties, to socially optimal rules that confer (uncompensated) benefits on outsiders.¹²⁸ Conceptualizing arbitration—like the workplace itself—as a “law-making body”¹²⁹ yields a research agenda that focuses on these important concerns.

CONCLUSION

Conceptualizing arbitration as a surrogate for the court system has driven an important but limited research agenda. That research, which focuses on traditional outcome measures like win-rate and award amount, provides little support for the view that employees fare materially worse in arbitration. Yet it remains difficult to draw firm conclusions, in part because the research does not adequately account for the various ways in which employee claims are “filtered” both within the workplace and before trial.

More importantly, conceptualizing arbitration solely or primarily as a surrogate for the court system creates an artificial divide between arbitration and dispute resolution that takes place within the workplace. Arbitration can also be conceptualized as part of a broader, employer-structured regulatory process, and doing so

126. Edelman & Suchman, *supra* note 85, at 967.

127. For example, lawyers may have professional incentives to favor indeterminate rules. See, e.g., Krawiec, *supra* note 13, at 528–32 (discussing problematic incentives of legal compliance professionals). For that matter, lawyers’ professional interests may conflict with important public goals, like the elimination of workplace discrimination (and the conflict that discrimination generates).

128. See William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 238–39 (1979). In theory, courts might be better producers of socially optimal rules, although given the impact of lawyers on case selection and presentation there may be reason for doubt. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 620 (1992) (discussing lawyers’ interest in indeterminate rules). See also Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUD. 807, 825 (1994) (“For those bodies of law where there are no other organized parties with strong interests in the form of the law, then the law should come to favor the interests of lawyers.”).

129. Sturm, *supra* note 12, at 463 (referring to workplaces and nongovernmental institutions that influence workplace practices).

illuminates a number of important empirical questions. These questions, which include inquiries into the regulatory and law-making capacity of arbitrators, are fundamental to our understanding of arbitration's significance as a disputing phenomenon.