

ARBITRAL AND JUDICIAL PROCEEDINGS:  
INDISTINGUISHABLE JUSTICE  
OR JUSTICE DENIED?

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INTRODUCTION

The year 1991 was a watershed year for the development of alternative dispute resolution (“ADR”). Section 118 of the 1991 Civil Rights Act (“1991 Act”)<sup>1</sup> encouraged ADR for civil rights disputes, including employment discrimination complaints. This statutory endorsement of ADR, in combination with the Supreme Court’s decision in *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>2</sup> helped fuel its popularity.

Today, employers use ADR extensively; some companies even use mandatory arbitration for the resolution of all employment disputes.<sup>3</sup> At the same time, legislators, employers, employees, and academics debate the advantages and disadvantages of ADR. Supporters note the many benefits of ADR, such as time and cost savings; skeptics point to substantial concerns, especially the fairness of mandatory arbitration agreements for employees. Given the pervasive use of ADR in the workplace, this debate is not merely theoretical.

This Article contributes to the debate by exploring the contributions of empirical research on ADR, made increasingly feasible because of large emerging databases on arbitrations.<sup>4</sup> In particular, researchers have been comparing outcomes of ADR processes and judicial processes. If the research indicates employee-plaintiffs are faring poorly in ADR processes in comparison to how they fare in court cases, then ADR is comparatively disadvantageous

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1. Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1081, 1081 (codified as amended at 42 U.S.C. § 1981 (2006)).

2. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

3. *See infra* Part II.A.

4. *See infra* Part III.

to employees. If, instead, employees are more successful in arbitration than in litigation, then ADR is comparatively advantageous to plaintiffs. Earlier research indicated that employees were more successful in arbitrations, but more recent and comprehensive research reaches contrary conclusions.

This Article posits that the next stage of empirical research should add a careful analysis of arbitral opinions to a study of outcomes.<sup>5</sup> This qualitative analysis illuminates the reasoning processes that lead to judges' and arbitrators' decisions. This Article offers an original exploratory study of racial harassment cases, an important subset of employment discrimination cases, comparing both the outcomes in arbitration and litigation with the arbitrators' and judges' decision-making processes. Consistent with more recent research on employment arbitration, this study finds that employees fare worse in arbitration than in litigation of racial harassment disputes. It also discovers that arbitrators' and judges' decision making is strikingly similar, at least as indicated by their written opinions. This discovery is ironic given that ADR, as its name suggests, was envisioned as a substantive and procedural alternative to litigation—that is, a truly distinguishable form of justice.

Part I reviews *Gilmer v. Interstate/Johnson Lane Corp.* and section 118 of the 1991 Act. The Supreme Court's endorsement of ADR in *Gilmer* and Congress's expressed support for ADR in employment discrimination cases under section 118 together provided significant impetus to ADR's development. Part II explains the debate over ADR. While there are clear efficiency benefits, ADR also presents substantial fairness concerns for employees. Part III discusses how empirical research can contribute to this debate, particularly considering existing studies on outcomes in arbitration as compared to litigation. Part IV turns to the core of the Article—an innovative quantitative and qualitative analysis of racial harassment arbitrations and judicial proceedings.

#### I. SIGNIFICANT LEGAL EVENTS IN 1991

While it may not have been apparent at the time, the combination of a landmark Supreme Court case and the inclusion of an ADR provision in major civil rights legislation became a powerful impetus for the growth of ADR. *Gilmer v. Interstate/Johnson Lane Corp.*<sup>6</sup> was a judicial invitation and section 118 of the 1991 Act<sup>7</sup> was a legislative invitation to employers to use ADR. As discussed in Part II, these invitations were enthusiastically accepted.

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5. See *infra* Part IV.

6. 500 U.S. 20.

7. Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1081, 1081 (codified as amended at 42 U.S.C. § 1981 (2006)).

A. *Gilmer v. Interstate/Johnson Lane Corp.*

Roger Gilmer, a manager at a financial corporation, was fired at the age of sixty-two.<sup>8</sup> He claimed age discrimination under the Age Discrimination in Employment Act of 1967<sup>9</sup> (“ADEA”) and tried to sue his employer in federal court.<sup>10</sup> His employer argued that he had waived his right to judicial process and had instead agreed to arbitrate the dispute.<sup>11</sup> As part of his job, Gilmer had been required to register as a securities representative with the New York Stock Exchange (“NYSE”).<sup>12</sup> The registration application included a provision providing that any employment dispute would be resolved in arbitration under NYSE rules.<sup>13</sup>

Gilmer had some strong arguments for nonenforceability of the arbitration agreement.<sup>14</sup> His dispute was based on a federal antidiscrimination statute, and thereby reflected important national policy objectives.<sup>15</sup> It was unclear whether he was even aware of the arbitration agreement until he tried to bring his claim in court. As an employee, he had less bargaining power than his employer, and that disparity in power would likely continue in arbitral proceedings. Gilmer also argued that since his employer had unilaterally drafted the agreement, the arbitration’s procedures unfairly favored the employer.<sup>16</sup>

Despite Gilmer’s arguments, the Supreme Court concluded that the agreement was enforceable and that Gilmer was not allowed to proceed in the courts.<sup>17</sup> It indicated that these generalized arguments against ADR and arbitration were “insufficient” to override the arbitration provision.<sup>18</sup> The Court made clear that statutory claims would be arbitrable, unless legislators expressly indicated that the claims should only be resolved in the courts.<sup>19</sup> Indeed, the Court heralded the benefits of arbitration, signaling the presumption of enforceability of these arrangements in the future.<sup>20</sup> As stated by Justice White: “[B]y agreeing to arbitrate, a party ‘trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.’”<sup>21</sup>

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8. *Gilmer*, 500 U.S. at 23.

9. Pub. L. No. 90-202, § 2, 81 Stat. 602, 602 (codified as amended at 29 U.S.C. § 621 (2006)).

10. *Id.* at 23–24.

11. *Id.*

12. *Id.* at 23.

13. *Id.*

14. *Id.* at 27–35.

15. *Id.* at 27–28.

16. *Id.* at 32–33.

17. *Id.* at 35.

18. *Id.* at 30.

19. *Id.* at 26.

20. *See id.*

21. *Id.* at 31 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*,

Thus, the Supreme Court affirmed that a mandatory arbitration agreement constituted a waiver of an employee's right to a judicial forum.<sup>22</sup> Furthermore, while *Gilmer*'s claim dealt with age discrimination, the Court's holding has been widely applied to all kinds of claims, including other employment discrimination disputes.<sup>23</sup>

*B. Section 118 of the 1991 Act*

While *Gilmer* was winding its way through the judicial system, the 1991 Act and its 1990 predecessor were similarly winding their way through intense congressional debates.<sup>24</sup> The Supreme Court decided *Gilmer* on May 13, 1991, when the 1991 Act was in committee.<sup>25</sup> While public and scholarly attention were focused on the substantive provisions of the 1991 Act, the legislation also included a provision on ADR. Section 118 of the 1991 Act provides: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title."<sup>26</sup> While the 1991 Act's overall purpose was to strengthen employees' rights,<sup>27</sup> section 118's purpose was to accommodate those parties concerned with the prospect that the legislation's substantive provisions would open the floodgates to litigation.<sup>28</sup> In retrospect, the passage of section 118 and the federal courts' interpretation of its meaning had important consequences on the development of ADR.

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Inc., 473 U.S. 614, 628 (1985)).

22. *Id.* at 23.

23. *See, e.g.*, *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 364–65 (7th Cir. 1997) (employment discrimination claims); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 880–82 (4th Cir. 1996) (disability discrimination claim); *Johnson v. Hubbard Broad., Inc.*, 940 F. Supp. 1447, 1457 (D. Minn. 1996) (race discrimination claim).

24. *Gilmer* was argued on January 14, 1991, and decided on May 13, 1991. *Gilmer*, 500 U.S. at 20. The 1991 Act was enacted on Nov. 21, 1991. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2, 4, and 16 U.S.C.).

25. Angelito Remo Sevilla, *The End of Duffield and the Rise of Mandatory Arbitration: How Courts Misinterpreted the Civil Rights Act's Arbitration Provision*, 93 CALIF. L. REV. 323, 350 (2005).

26. Civil Rights Act § 118.

27. H.R. REP. NO. 102-40, pt. 2, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 694 (stating that the purpose of the 1991 Act is to "strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination").

28. *See id.* at 78 (recognizing that the 1991 Act would increase litigation and encourage ADR under section 118).

The Supreme Court in *Gilmer* explained that Congress could overcome the presumption of the enforceability of an ADR agreement by expressly indicating that claims brought under a statute could not be resolved in ADR.<sup>29</sup> Section 118 did not expressly preclude ADR for the resolution of employment discrimination claims. On the contrary, the plain language of section 118 encouraged ADR. Substantial evidence in the legislative history, however, shows that section 118 only had *voluntary* ADR in mind.<sup>30</sup> In other words, legislators were not endorsing *mandatory* arbitration agreements.<sup>31</sup> In addition, as Judge Reinhardt observes in *Duffield v. Robertson Stephens & Co.*,<sup>32</sup> it is inherently inconsistent to read section 118 as allowing involuntary waivers of jury trial when it is part of a statute intended to provide plaintiffs with a greater choice of forums and remedies.<sup>33</sup>

Despite the variation in possible readings of the statute, federal courts, however, focused on section 118's plain language.<sup>34</sup> In *Benefits Communication Corp. v. Klieforth*,<sup>35</sup> for instance, the court considered the effect of section 118 on *Gilmer*'s holding of the enforceability of a mandatory arbitration agreement: "We find nothing in [section 118] which can be construed as modifying or undermining the holding of *Gilmer*. Indeed, if anything, the opposite is true; i.e., arbitration is an alternative to litigation expressly encouraged by the statute."<sup>36</sup> Numerous other courts

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29. *Gilmer*, 500 U.S. at 26.

30. Sevilla, *supra* note 25, at 345–49. There is ample legislative history indicating that Congress's encouragement of ADR was intended to supplement and not to supplant legal rights and remedies, and that parties' use of ADR was intended only to be voluntary. *Id.*; see also *EEOC v. Luce, Forward, Hamilton, & Scripps*, 303 F.3d 994, 1011–12 (9th Cir. 2002) (Pregerson, J., dissenting) (discussing the legislative history of section 118).

31. Sevilla, *supra* note 25, at 345.

32. 144 F.3d 1182 (9th Cir. 1998), *overruled by* *EEOC v. Luce, Forward, Hamilton, & Scripps*, 345 F.3d 742 (9th Cir. 2003) (en banc).

33. *Id.* at 1192–93.

34. See *Seus v. John Nuveen & Co.*, 146 F.3d 175, 182–83 (3d Cir. 1998) (relying on section 118 to find that Title VII claims are arbitrable, and concluding that the text defeats some contrary legislative history); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 881–82 (4th Cir. 1996) (stating that despite the legislative history of section 118, plaintiff failed to show that Congress intended to preclude mandatory arbitration of Title VII claims); *EEOC v. Frank's Nursery & Crafts, Inc.*, 966 F. Supp. 500, 503–04 (E.D. Mich. 1997) (enforcing compulsory arbitration of Title VII claims "notwithstanding the legislative history of [the 1991 Act]" because the plaintiff failed to show Congress intended to preclude voluntary agreements to arbitrate such claims), *rev'd*, 177 F.3d 448 (6th Cir. 1999); *Johnson v. Hubbard Broad., Inc.*, 940 F. Supp. 1447, 1457 (D. Minn. 1996) (concluding that section 118 "reveals express congressional approval for the use of arbitration to resolve Title VII disputes").

35. 642 A.2d 1299 (D.C. 1994).

36. *Id.* at 1304.

followed the same reasoning.<sup>37</sup> Thus, while section 118 might have been viewed as a legislative barrier to the enforcement of mandatory arbitration agreements, it was interpreted instead as legislative reinforcement of the strong endorsement of mandatory arbitration agreements in *Gilmer*. Rather than chilling the growth of ADR, section 118 of the 1991 Act, in combination with *Gilmer*, helped fuel its expansion.

## II. EXPANSIVE USE OF ADR AND THE ENSUING DEBATE

### A. ADR Development and Use

While no study has fully documented the extent of ADR in the United States, its use has increased steadily in recent decades, and it is now widely used in resolving all kinds of disputes, including employment disputes.<sup>38</sup> The most common forms of ADR are arbitration and mediation.<sup>39</sup> This Article focuses on the employment arbitration process because there the most substantial amount of information exists about its outcomes, although as subsequently discussed,<sup>40</sup> that information is not comprehensive of all arbitrations.

To illustrate businesses' current and extensive use of arbitration, consider that an estimated six million employees are covered by American Arbitration Association ("AAA") arbitration plans.<sup>41</sup> Approximately one-third of nonunion employees use arbitration rather than litigation as the primary means for resolving their employment disputes.<sup>42</sup> As a comparison, the number of nonunion employment arbitration proceedings is reportedly greater than those covered by union representation.<sup>43</sup>

In addition, while the exact numbers are not known, many

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37. See sources cited *supra* note 34.

38. Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 2 (2011) [hereinafter Colvin, *Case Outcomes*]; Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 408–12 (2007) [hereinafter Colvin, *Sound and Fury*]; David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. PA. J. LAB. & EMP. L. 133, 134–36 (1998); Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J.L. & PUB. POL'Y 549, 553–55 (2008).

39. Caroline Harris Crowne, Note, *The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice*, 76 N.Y.U. L. REV. 1768, 1772 (2001); see also *Dispute Resolution Services*, AM. ARB. ASS'N, <http://www.adr.org/drs> (last visited Apr. 4, 2011) (describing its mediation and arbitration services).

40. See *infra* Part III.

41. The AAA report includes over 61,000 employer and consumer cases administered by the AAA since 2003. *Consumer Statistics*, AM. ARB. ASS'N, <http://www.adr.org/sp.asp?id=22042> (last visited Apr. 4, 2011).

42. Colvin, *Case Outcomes*, *supra* note 38, at 2.

43. *Id.*

companies presumably use mandatory ADR plans.<sup>44</sup> As illustrated in *Gilmer*, these plans compel employees to use ADR to resolve their disputes, even if those employees prefer judicial adjudication. Furthermore, the terms of the ADR process are typically determined by employers unilaterally, with the employees' acceptance of these terms being a requirement of employment.<sup>45</sup>

*B. Debate over ADR, Given Both Its Benefits and Concerns*

ADR's popularity is not surprising, given its many benefits. ADR is commonly perceived to be cheaper and faster than litigation, and that perception turns out to be generally true.<sup>46</sup> ADR thus saves both employers' and employees' time and money. The increased use of ADR also diverts disputes that would otherwise go to the courts, thus unclogging crowded judicial dockets and saving taxpayers' dollars.

ADR's theoretical appeal goes beyond these efficiencies. As its name suggests, ADR was conceived as an alternative to litigation, with its own distinct substantive and procedural characteristics.<sup>47</sup> The intention was to create a less formal forum than litigation. Arbitrators, subject to the instructions of the parties, analyze the dispute and reach a solution that should reflect the actual needs and interests of the parties. In other words, unless the parties specify otherwise, arbitrators are not bound to resolve the dispute according to legal precedents or principles. They can, for instance, apply

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44. See Lipsky & Seeber, *supra* note 38; Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1635–42 (2005); *supra* note 34 (citing cases in which employers are seeking enforcement of their mandatory arbitration policies).

45. State courts have recognized very limited contractual attacks on these agreements. See *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 679 (Cal. 2000) (stating that arbitration agreements in employment contracts may only be challenged on the same grounds as other contracts); *Melena v. Anheuser-Busch, Inc.*, 847 N.E.2d 99, 107–08 (Ill. 2006) (stating that arbitration agreements must be held to a standard no higher than other contracts).

46. See, e.g., Richard A. Bales, *Normative Consideration of Employment Arbitration at Gilmer's Quinceañera*, 81 TUL. L. REV. 331, 342–46 (2006) (summarizing research on speed and costs of arbitration); Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813, 815–16 (2008) (discussing the costs of arbitration compared to litigation); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 55 (1998) (noting that arbitration is faster than litigation).

47. Professor Carrie Menkel-Meadow is an eloquent spokesperson for this vision of ADR. See Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 12 (1996); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 763–64 (1984); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2664–65 (1995).

standards of the industry, their contractual understanding, or simply what they consider appropriate and fair. Arbitration procedures also are intended to be less burdensome than judicial procedures. Arbitrations are generally not subject to the discovery or evidentiary rules of federal courts. Likewise, legal representation of the parties is optional. Therefore, in theory, the parties can shape the process and the arbitrators can tailor the outcome, instead of subjecting everyone to the rigid procedural rules and limited remedies of the judicial system.

Skeptics of ADR, however, have identified myriad concerns that have prompted considerable scholarly and political debate.<sup>48</sup> Employees' agreements to arbitrate all disputes with their employers may be contained in seldom-read company policy manuals or imbedded in multipage employment contracts. Employees may have "agreed" to ADR without deliberate consideration or even conscious knowledge of the terms. Even if employees are aware of an ADR agreement, they may not fully appreciate that they are effectively waiving their future rights to a judicial resolution of all employment disputes.

Skeptics also suggest that ADR processes, given their informality, may result in inherent disadvantages for the less powerful party.<sup>49</sup> In the typical employer-employee dispute, an employee would have fewer resources, less bargaining power, less expertise, and less experience in arguing his or her positions. At the same time, the impact of these disadvantages is exacerbated by the absence of formal rules of civil procedure designed to assure a fair hearing and consideration of each party's position.<sup>50</sup> The selection

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48. See Richard A. Bales, *Beyond the Protocol: Recent Trends in Employment Arbitration*, 11 EMP. RTS. & EMP. POL'Y J. 301, 303 (2007) (discussing "contract-formation issues, barriers to entry, access issues, remedies issues, and judicial review" related to employment arbitration); Bales, *supra* note 46, at 359–90 (describing arguments against arbitration); Maltby, *supra* note 46, at 32–34 (describing employer manipulation of the arbitration process for employers' advantage); David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1252 (2009) (describing mandatory employment arbitration as inherently unfair); David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1563–64 (2005) (summarizing policy concerns for and against arbitration); Sternlight, *supra* note 44, at 1648–58 (describing both attacks and defenses of mandatory arbitration); Darren P. Lindamood, Comment, *Redressing the Arbitration Process: An Alternative to the Arbitration Fairness Act of 2009*, 45 WAKE FOREST L. REV. 291, 294–95 (2010) (describing legislative attempt to invalidate predispute employment arbitration agreements).

49. Classic pieces espouse this position. See Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1400; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1586–88 (1991).

50. However, various model procedural rules have been offered in response to these concerns. See, e.g., *Employment Arbitration Rules and Mediation*

process for arbitrators and information on their particular qualifications are also not easily determinable, in contrast to the extensive judicial selection process and widely available information about the judges themselves. Finally, arbitration awards are generally final and binding, and judicial review of arbitral proceedings is very rare.<sup>51</sup>

### III. EMPIRICAL RESEARCH ON ARBITRATIONS

Two decades ago, when section 118 was promulgated and *Gilmer* was decided, little empirical information existed on arbitrations. Now, while research on arbitrations is still limited, a rich initial body of information is emerging that can be empirically studied.<sup>52</sup> Since researchers are also actively analyzing litigation outcomes,<sup>53</sup> basic comparisons between the two forms of dispute resolution are feasible.

#### A. *Challenges of Arbitration Studies*

Judicial proceedings of employment disputes are ordinarily public, and judicial opinions are widely reported.<sup>54</sup> In contrast, employment arbitrations are ordinarily private proceedings in which the parties have agreed to confidentiality about the identities of the parties, the issues, and the outcome.<sup>55</sup> In fact, privacy and confidentiality are key attractions for ADR users.<sup>56</sup> Furthermore, arbitrators may not document their analysis and reasoning at all, or may do so only in a cursory fashion. Therefore, historically, a

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*Procedures*, AM. ARB. ASS'N (Nov. 1, 2009), <http://www.adr.org/sp.asp?id=32904> [hereinafter *AAA Rules*].

51. Monica J. Washington, *Compulsory Arbitration of Statutory Employment Disputes: Judicial Review Without Judicial Reformation*, 74 N.Y.U. L. REV. 844, 848–55 (1999) (discussing limited judicial review of arbitral awards); see also 9 U.S.C. § 10 (2006) (enumerating the limited grounds on which arbitral awards may be vacated).

52. See *infra* Part III.A.

53. E.g., Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1121 (2009) [hereinafter Chew & Kelley, *Color-Blind Judge*]; Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKELEY J. EMP. & LAB. L. 49, 53–55 (2006) [hereinafter Chew & Kelley, *Unwrapping*]; Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 103 (2009); Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 893 (2006).

54. Judicial opinions have long been readily accessible through published federal reporter systems and electronic information sources such as LexisNexis and Westlaw. Utilizing these resources, researchers have conducted numerous studies of employment law litigation cases, including employment discrimination cases. See *supra* note 53.

55. See *AAA Rules*, *supra* note 50. In contrast, some accounts of non-employment law arbitrations, such as labor arbitrations, are accessible.

56. Lipsky & Seeber, *supra* note 38, at 139 tbl.1.

comprehensive body of employment arbitrations and arbitral opinions has not been publicly available. Thus, conducting any kind of comprehensive research of employment arbitrations, including their outcomes, had not been possible. Accounts of employment arbitration proceedings instead tended to be anecdotal or based on select convenience samples.<sup>57</sup> Until recently, empirical research by necessity was also limited to these select samples.<sup>58</sup>

As of 2003, California Civil Procedure Code section 1281.96 significantly altered the situation by requiring providers of ADR services to report basic information about consumer arbitrations and other forms of ADR.<sup>59</sup> Employee-employer disputes that are subject to employer-promulgated ADR programs are considered “consumer” arbitrations. California 1281.96 requires that ADR providers file the following information: the employer, arbitrator, filing date and date of decision, amounts of claims, amounts awarded, and fees.<sup>60</sup> Providers do not have to identify the employee, the state, the legal basis of the claim, the basis of the arbitrator’s decision, or the arbitral opinion if one was written.<sup>61</sup> The AAA responded to the law with extensive filings on all its employment arbitration cases under employer-promulgated procedures.<sup>62</sup> Its filings include all employment cases administered nationally, not just those in California. As the largest ADR provider in the country, AAA filings contain a remarkable database of cases, consisting of over 61,000 disputes.<sup>63</sup> Other providers of arbitration services in California are also subject to these filing requirements, and their reports are valuable sources of information.<sup>64</sup>

Keep in mind, however, that these California 1281.6 reports do not capture the universe of employment arbitration cases, although they do represent a huge number of employment arbitrations. These reports only cover employer-promulgated arbitrations, typically under company-wide grievance programs. Arbitrations occurring under ADR agreements negotiated between individual employees and their employers are not included in this database. (Presumably, these individually negotiated agreements are with higher-salaried executive employees with some bargaining power,

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57. Colvin, *Case Outcomes*, *supra* note 38, at 2 (noting the limited databases available in conducting past research).

58. *See* discussion *infra* Part III.B (discussing examples of past research).

59. CAL. CIV. PROC. CODE § 1281.96 (Deering 2011).

60. *Id.*

61. *See id.*

62. Colvin, *Case Outcomes*, *supra* note 38, at 3.

63. *Consumer Statistics*, AM. ARB. ASS’N, *supra* note 41.

64. For examples, see *Arbitration Disclosures*, JUDICATE W., <http://www.judicategwest.com/library/disclosures> (last visited Apr. 4, 2011), and *California CCP 1281.96 Reports*, NAT’L ARB. F., <http://www.adrforum.com/main.aspx?itemID=563&hideBar=False&navID=188&news=3> (last visited Apr. 4, 2011).

while the employer-promulgated ADR agreements are with all remaining employees with lower salaries who do not have the same individual bargaining power.)<sup>65</sup> Finally, some arbitrations are not administered by an ADR provider and therefore are not subject to California 1281.6.<sup>66</sup>

Given this new source of information, researchers are studying arbitrations in more detail. Most relevant to this Article, researchers have begun to study the outcomes of employment arbitrations.<sup>67</sup> They are also comparing employment arbitration outcomes to employment litigation outcomes,<sup>68</sup> and inferring from those findings whether arbitration is advantageous or disadvantageous to employees.<sup>69</sup> Note, however, that there are caveats to comparing arbitration outcomes to litigation outcomes.<sup>70</sup> For instance, employees' "wins" or "losses" in arbitration studies are distinguishable from their "wins" or "losses" in litigation studies. Arbitrations are typically final resolutions of the dispute. In contrast, most judicial opinions in litigation studies are resolutions of employers' motions for summary judgment or other pretrial motions.<sup>71</sup> Employees' "wins" or "losses" in these judicial proceedings do not technically mean a final resolution of the dispute, although the court's granting of employers' motions for summary judgment precludes employees from a trial.

### B. *Illustrative Studies*

Earlier arbitration studies were based on data obtained before California 1281.6 existed.<sup>72</sup> These studies found that employees

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65. See Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, DISP. RESOL. J., May/July 2003, at 1, 3.

66. CIV. PROC. § 1281.96 provides that "any private arbitration company that administers or is otherwise involved in, a consumer arbitration" is subject to the reporting requirement.

67. E.g., Colvin, *Case Outcomes*, *supra* note 38; Colvin, *Sound and Fury*, *supra* note 38, at 412–37.

68. Colvin, *Sound and Fury*, *supra* note 38, at 414–27.

69. If employees are more likely to lose in arbitration than in litigation, the inference is that arbitration is disadvantageous to employees and less protective of their rights. Similarly, if employees are more likely to win in arbitration than in litigation, the inference is that arbitration is not disadvantageous, and is perhaps even beneficial, to employees.

70. See Bales, *supra* note 46, at 342 (reviewing studies on outcomes, costs, etc., plus normative analysis, although there also are acknowledged caveats to using such analysis); Colvin, *Case Outcomes*, *supra* note 38, at 6–7; Schwartz, *supra* note 48, at 1284–86.

71. See, e.g., Chew & Kelley, *Unwrapping*, *supra* note 53, at 78 tbl.10 (showing that 79.1% of the district court opinions and 73.6% of the appellate court opinions in their study of racial harassment cases were issued on motions for summary judgment).

72. E.g., Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Vindicate Their Rights?*, DISP. RESOL. J., Nov. 2003/Jan. 2004, at 56, 56 (comparing outcomes in

fares well in arbitrations, winning employment disputes between 40% and 75% of the time.<sup>73</sup> Based on these results, researchers concluded that arbitration was not disadvantageous for employees. In fact, some extolled the virtues of the arbitral process for employees.<sup>74</sup> However, these pre-California 1281.6 data sets were often selective, rather than comprehensive or random samples of cases, thus limiting the extent one could generalize from these studies. These studies also tended to combine arbitrations pursuant to individually negotiated ADR agreements and arbitrations pursuant to employer-promulgated ADR plans.

Professor Elizabeth Hill's research illustrates the transition to more randomly selected data sets, but still contains caveats regarding its generalizations.<sup>75</sup> Working under the auspices of the AAA, she studied 200 arbitration awards randomly selected from 356 employment dispute cases decided between January 1, 1999, and November 5, 2000.<sup>76</sup> While Hill randomly selected her cases, it was not clear if the 356 cases from which she drew were all the AAA employment arbitration cases or a subset. She found a 43% overall employee success rate.<sup>77</sup> Employees in employer-promulgated mandatory arbitrations had a 34% success rate, compared to employees' 57% success rate in individually negotiated arbitrations.<sup>78</sup> Hill's overall conclusion was that "AAA employment arbitration is affordable and substantially fair to employees, including those employees at the lower end of the income scale."<sup>79</sup>

The results of Hill's study can also be compared to results of studies of employment law litigation.<sup>80</sup> Employee success rates in litigation vary depending on the characteristics of the study. In one study of 1430 employment discrimination cases heard in the federal courts from 1999 to 2000, the researchers found an employee success

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employment cases in New York federal courts and securities arbitrations). Articles summarizing past empirical research include: Bales, *supra* note 46; Maltby, *supra* note 46; Schwartz, *supra* note 48; Sherwyn et al., *supra* note 48; Sternlight, *supra* note 44; Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735 (2001).

73. See Colvin, *Case Outcomes*, *supra* note 38, at 4.

74. See, e.g., Delikat & Kleiner, *supra* note 72, at 58; Hill, *supra* note 65, at 4-5.

75. Hill's research study has been reported in the following sources: Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003/Jan. 2004, at 44; Hill, *supra* note 65; Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777 (2003).

76. Hill, *supra* note 65, at 3.

77. *Id.* at 4.

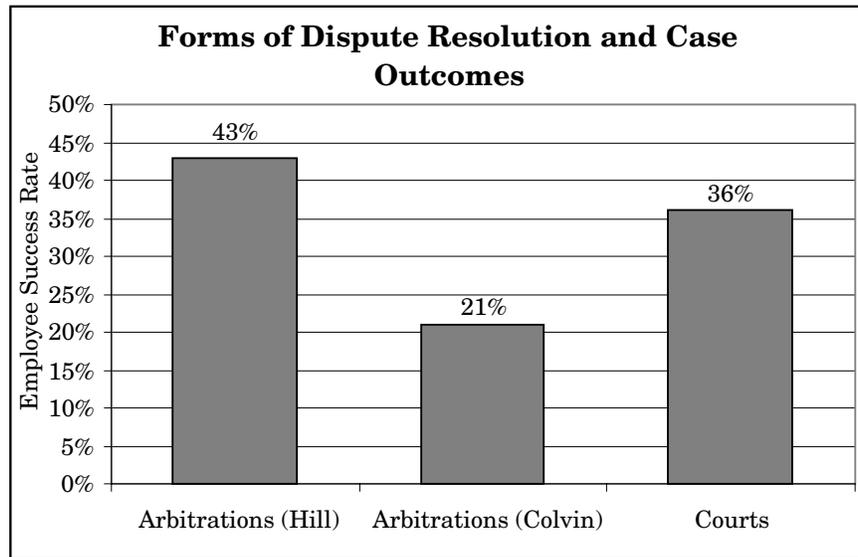
78. *Id.*

79. *Id.* at 1.

80. See, e.g., Clermont & Schwab, *supra* note 53; Colvin, *Case Outcomes*, *supra* note 38, at 5-7; Parker, *supra* note 53.

rate of 36.4%.<sup>81</sup> In contrast, their study of 160 state court employment discrimination cases in 1996 found a 43.8% employee success rate.<sup>82</sup> Finally, in a recent study of U.S. district court cases, plaintiffs won 28% of employment discrimination cases that went to trial.<sup>83</sup> An average employee success rate of 36% from these three studies gives us a reference point for employees' success rate in litigation.

FIGURE 1



Professor Alexander Colvin's work represents the emerging research based on the vast comprehensive database of AAA cases made possible since the passage of California 1281.6.<sup>84</sup> He analyzed all cases of employer-promulgated arbitrations from 2003 through 2007, consisting of 3945 arbitration cases covering an array of employment disputes.<sup>85</sup> Removing cases that were settled or withdrawn left 1213 cases that resulted in awards.<sup>86</sup> This study captures a large storehouse of information.

Colvin found that employees did not fare well, winning in only 21.4% of the cases.<sup>87</sup> This finding was distinctive in at least two ways. First, this rate is a lower employee success rate than was

81. Eisenberg & Hill, *supra* note 75, at 48 tbl.1.

82. *Id.*

83. Clermont & Schwab, *supra* note 53, at 129.

84. *See generally* Colvin, *Case Outcomes*, *supra* note 38.

85. In 82.4% of the cases, employees made less than \$100,000 per year. *Id.* at 10.

86. One thousand six hundred and forty-seven mediation cases were not studied. *Id.* at 4.

87. *Id.* at 6.

found in prior studies on employment arbitrations, including the one by Elizabeth Hill.<sup>88</sup> Second, this 21.4% employee success rate is less than the employee success rate in litigation studies.<sup>89</sup> Thus, Colvin's research does not suggest that arbitrations are advantageous for employee plaintiffs, at least as measured by the outcomes of the proceedings. Instead, the inference is that arbitration may be disadvantageous to employees.

To the benefit of both parties, Colvin did find that arbitrations resolved disputes in a timelier manner than litigation.<sup>90</sup> To the benefit of employees, arbitration fees were also typically paid by employers.<sup>91</sup> However, the amount of the awards was substantially lower than the amounts reported in employment litigation.<sup>92</sup> Colvin also found strong evidence of repeat player effects.<sup>93</sup> Employees' success rate and award amounts were significantly lower when employers had previously been involved in multiple arbitration cases. Employers presumably benefit from their accumulated expertise and experience, in contrast to the comparable lack of expertise and experience of the one-time employee claimant. Furthermore, Colvin found significant repeat employer-arbitrator pairing effects. Employees on average have lower success rates and award amounts when the same arbitrator is selected in more than one case involving the same employer.

In summary, earlier empirical research on arbitrations of employment disputes indicated that employees fared well in arbitration, relative to employees in litigation. More recent research based on data acquired after the passage of California section 1281.6, however, questions the generalizations of these earlier studies. Colvin's large-scale study of employer-promulgated arbitrations found that employees have worse success rates in employment arbitrations than in litigation. As the following discussion explores, the type of employment claim can also make a significant difference.

#### IV. FOCUS ON RACIAL HARASSMENT CASES

Empirical research can be either quantitative or qualitative, with each type producing valuable but distinctive scholarship.<sup>94</sup> The

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88. *See supra* notes 72–73, 76–78, and accompanying text. Recall, however, that these other studies' results may have been affected by their inclusion of both employer-promulgated and individually negotiated ADR agreements.

89. *See supra* text accompanying notes 80–83.

90. Colvin, *Case Outcomes*, *supra* note 38, at 8.

91. *Id.* at 9.

92. *Id.* at 21.

93. *Id.*

94. NORMAN K. DENZIN & YVONNA S. LINCOLN, *Introduction: The Discipline and Practice of Qualitative Research*, in HANDBOOK OF QUALITATIVE RESEARCH 1, 10–12 (2002). For characteristics of both methods, see generally JOHN W. CRESWELL, *RESEARCH DESIGN: QUALITATIVE, QUANTITATIVE, AND MIXED METHODS*

empirical research of both arbitration and litigation, as described above, has tended to be quantitative, focusing on readily identifiable variables that can be objectively and numerically measured,<sup>95</sup> such as the outcome of cases (whether the claimant is successful or not), the amount of the remedy (in dollars), or the race and gender of the judge. The goal is to test hypotheses about the relationship between variables.<sup>96</sup>

Qualitative empirical research instead systematically analyzes the content of the arbitrations and judicial proceedings, identifying patterns or themes.<sup>97</sup> The qualitative method investigates the *why* and *how* of judicial and arbitral *decision making*.<sup>98</sup> Smaller samples also can be used in qualitative analysis, so long as the samples are representative.

The qualitative empirical research of judicial decision making can be based on a very methodical analysis of the content of judicial opinions.<sup>99</sup> In arbitrations, the arbitrators' reasoning and decision

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APPROACHES (3d ed. 2009) and KEITH F. PUNCH, INTRODUCTION TO SOCIAL RESEARCH: QUANTITATIVE AND QUALITATIVE APPROACHES (2d ed. 2005).

95. As described by PUNCH, *supra* note 94, at 237: "The quantitative approach conceptualizes reality in terms of variables, and relationships between them. . . . Samples are typically larger than in qualitative studies. . . . It does not see context as central, typically stripping data from their context." It is more focused on "making standardized and systematic comparisons, sketching contours and dimensions. . . ." PUNCH, *supra* note 94, at 239.

96. For example, the hypothesis that the judges' race is related to the outcome of cases can be statistically tested. Examples include the research of Hill, *supra* text accompanying notes 75–79, and Colvin, *supra* text accompanying notes 84–93. They identify the rate at which employees win or lose in arbitration proceedings to test hypotheses about whether employees are more or less successful in arbitrations than in court proceedings. See Hill, *supra* text accompanying notes 75–79; Colvin, *supra* text accompanying notes 84–93. As recommended for standard forms of statistical analysis, larger samples are typically used in quantitative analysis. PUNCH, *supra* note 94, at 237.

97. PUNCH, *supra* note 94, at 287. Traditional doctrinal analysis of judicial opinions is similar to qualitative empirical research in the sense that it closely studies the content of opinions for the judges' reasoning and decision-making pattern. Qualitative empirical research, however, is distinct from traditional doctrinal analysis because it randomly samples judicial opinions to obtain a representative pool, determines in advance the particular research inquiries and measures for coding the content, and reaches conclusions based on objective standards. See CRESWELL, *supra* note 94, at 190–93 (describing standards for reliability, validity, and generalizability in well-designed qualitative empirical research).

98. As described by PUNCH, *supra* note 94, at 238: "[T]he qualitative approach deals more with cases. It is sensitive to context and process, to lived experience and to local groundedness, and the researcher tries to get closer to what is being studied." It focuses on "phenomenon or situation in detail, holistically and in its context, finding out about the interpretations it has for the people involved, and about their meanings and purposes, or trying to see what processes are involved." PUNCH, *supra* note 94, at 240.

99. These opinions reveal, sometimes in great detail, the judges' analysis of

making are presumably embodied in arbitral opinions. However, arbitrators do not always write opinions. They are not legally required to do so, and the parties may not want or need them. Even if the arbitrators do write opinions, the opinions are difficult to access given the typically confidential nature of arbitral proceedings. As described below, an important recent database of arbitral opinions of employment disputes has opened the door to qualitative analysis of the arbitral process.

A. *Analysis of Racial Harassment Disputes*

Existing empirical research, such as Colvin's research described earlier, has studied employment arbitrations as a whole and provides a very useful overview of the outcomes of all these cases. It has not, however, distinguished between the different types of employment disputes, so any differences between types of disputes are unknown. To illustrate how outcomes of a particular employment discrimination claim might differ from claims as a whole and to illustrate quantitative versus qualitative empirical methodology, this Article now presents an exploratory study of racial harassment disputes. Specifically, this Article compares the outcomes of these disputes in arbitration versus the outcomes in the courts, and analyzes the decision-making processes of arbitrators and judges. Finally, these results are related back to the debate about ADR's benefits and potential harms.

Racial harassment disputes are a subset of employment discrimination cases brought under the Civil Rights Act of 1964, as amended by the 1991 Act.<sup>100</sup> Similar to sexual harassment claims, racial harassment claims are based on Title VII's prohibitions of discrimination based on a protected status.<sup>101</sup> In racial harassment cases, employee plaintiffs must show that they were harassed "because of their race" (rather than some non-race-based reason), and that the harassment was sufficiently "severe or pervasive" to alter their job circumstances so that it became a hostile work environment.<sup>102</sup> Employers have affirmative defenses to these claims.<sup>103</sup>

B. *Racial Harassment Court Cases*

The author's earlier quantitative and qualitative study of racial

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the facts and applicable legal principles. They are the authoritative source of the judges' reasoning and decision making.

100. See Chew & Kelley, *Unwrapping*, *supra* note 53, at 55–60 (describing development of racial harassment jurisprudence). See generally Pat K. Chew, *Seeing Subtle Racism*, 6 STAN. J. C.R. & C.L. 183 (2010) (explaining Supreme Court principles on the harassment doctrine).

101. Chew, *supra* note 100, at 187.

102. *Id.* at 191.

103. *Id.* at 187.

harassment cases in the federal courts revealed a range of information.<sup>104</sup> The study included randomly selected cases from six representative federal circuits over a twenty-two-year time period.<sup>105</sup> It found that employee plaintiffs were successful 22% of the time,<sup>106</sup> indicating that employees fared poorly in these lawsuits. In addition, some judge and case characteristics were related to case outcomes. In particular, the judges' race (but not the judges' gender), the judges' political affiliation, and whether supervisors and coworkers "ganged up" on employees were predictive of whether employees were successful.<sup>107</sup> Furthermore, the study found that most plaintiffs were African Americans and represented a broad range of professional and occupational fields.<sup>108</sup>

A qualitative empirical analysis of judicial opinions in these racial harassment cases revealed patterns in judicial decision making.<sup>109</sup> As expected, judges routinely cited case precedents and legal principles, both parties commonly had legal representation, and court opinions referenced legal briefs and other documents.

TABLE 1

Qualitative Analysis: Comparing Decision-Making Patterns
Judges
<ul style="list-style-type: none"> <li>▪ Citing of legal standards, precedents</li> <li>▪ Paradigm of Racial Harassment as only "old-fashioned racism"—discounting modern, subtle racism</li> <li>▪ Staging with lawyer, legal documents</li> </ul>

The author's study of judicial opinions also revealed some striking patterns in how judges interpreted legal principles.<sup>110</sup> These patterns helped explain why employees were so likely to lose. Social scientists have found that racism in the contemporary American workplace can be explicit and blatant (sometimes called "old-fashioned racism") or more subtle, implicit, even unconscious bias (sometimes called "modern racism").<sup>111</sup> Examples of old-fashioned racism are blatant racial slurs or racist objects (such as nooses, white robes, or pointed hats). Examples of modern racism are

104. See Chew & Kelley, *Color-Blind Judge*, *supra* note 53; Chew, *supra* note 100; Chew & Kelley, *Unwrapping*, *supra* note 53.

105. Chew & Kelley, *Color-Blind Judge*, *supra* note 53, at 1138.

106. *Id.* at 1143 tbl.3. A plaintiff "win" means the plaintiff was successful in the proceeding before the court, which most typically was based on the employer's motion for summary judgment. *Id.* at 1138 n.119.

107. *Id.* at 1143 tbl.3. Plaintiffs were also significantly more likely to win when judges were African-American than when they were white. *Id.*

108. Chew & Kelley, *Unwrapping*, *supra* note 53, at 66 tbl.3.

109. Chew, *supra* note 100, at 281 n.210.

110. *Id.*

111. *Id.* at 216–17.

exclusion from professional and social networks, unconscious stereotyping, or intimidation and insults that do not contain blatant racist slurs.<sup>112</sup> An analysis of the content of judicial opinions indicates that judges generally associate legally cognizable racial harassment only with old-fashioned racism.<sup>113</sup> Moreover, even when employees have evidence of old-fashioned racism, many courts impose further requirements, a kind of “racism-plus” requirement.<sup>114</sup> For example, for plaintiffs to succeed in many courts the racism must be in the employees’ presence and directed at them, particularly egregious and offensive (including physical confrontation), and very persistent and frequent. While some judges do recognize modern racism, they are in the vanguard.<sup>115</sup>

### C. Racial Harassment Arbitration Cases

Unlike federal court judicial opinions, no formal comprehensive reporting system of arbitral opinions for employment disputes exists. The AAA and LexisNexis, however, now offer a searchable and comprehensive database of AAA employment arbitral opinions (“AAA-Lexis Database”).<sup>116</sup> Given the otherwise confidential world of arbitral opinions, this source provides an invaluable window into arbitral proceedings. The opinions do not reveal the identities of the parties or other identifying information, but are otherwise complete. These arbitral opinions are a valuable supplement to the AAA reports filed in compliance with California 1281.6.<sup>117</sup>

Given the availability of the AAA-Lexis Database, an exploratory quantitative *and* qualitative study of arbitral decision making in racial harassment disputes is now possible. Searching the database, nineteen cases were identified.<sup>118</sup> Given the relatively small number of opinions, the quantitative analysis is limited, and its results should be generalized with considerable caution. In

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112. *Id.* at 206.

113. *Id.* at 216.

114. *Id.* at 193.

115. *Id.* at 217.

116. According to Ted Pons, Vice President, Publications and ADR Resources, American Arbitration Association, this database includes all AAA employment awards issued from 1999 through the present. The awards are full text (except for redacting to protect the confidentiality of the parties). Since employment awards are “reasoned awards,” there is an opinion written for every award that details the arbitrator’s reasoning process in arriving at the award. E-mail from Ted E. Pons, Vice President, Publ’ns & ADR Res., AAA to Pat K. Chew (Oct. 5, 2010) (on file with author).

117. *See supra* notes 59–66 and accompanying text.

118. Using the search term “racial harassment,” there were twenty-five case hits, and nineteen of these involved employees’ racial harassment claims. As a comparison, these terms had the following number of case hits: “sexual harassment,” 253; “sex discrimination,” 84; “race discrimination,” 134; “wrongful discharge,” 167; and “age discrimination,” 235. Search executed on Oct. 26, 2010.

contrast, qualitative analysis can yield meaningful information even when the sample is small, especially given that every available racial harassment opinion in the AAA-Lexis Database is included in the study. This qualitative analysis illustrates a novel form of empirical research of arbitration cases, complementing the results of the quantitative research provided below.

1. *Descriptive and Quantitative Findings*

As was the case in racial harassment court cases, the race of employees in these arbitrations was typically African American.<sup>119</sup> Furthermore, their allegations represented a wide range of harassments including old-fashioned egregious racism as well as modern racism.<sup>120</sup> In contrast to the court cases in which plaintiffs had a variety of jobs including professional and management positions,<sup>121</sup> employees in arbitrations tended to have lower-level positions.<sup>122</sup> In addition, arbitrations are typically the final resolution of the dispute, rarely reviewable, and not appealable. In contrast, the litigation studies are based on judicial opinions, which are predominantly based on employers' pretrial motions for summary judgment.<sup>123</sup>

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119. Ninety-one percent of employees whose race was identified (ten of eleven) were African American.

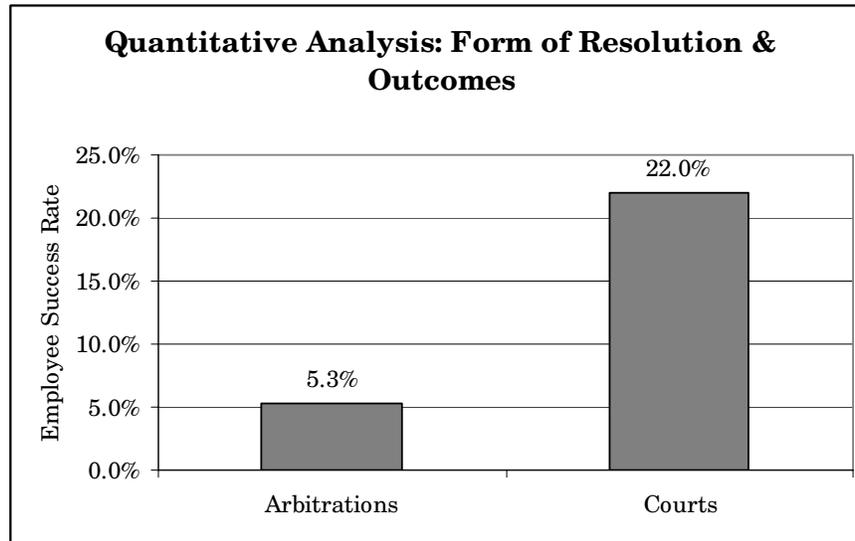
120. *See supra* notes 111–15 and accompanying text (discussing old-fashioned racism and modern racism).

121. *See* Chew & Kelley, *Unwrapping*, *supra* note 53, at 66 tbl.3.

122. Eighty-eight percent of employees whose jobs were identified (fifteen of seventeen) were in lower-level positions, including technicians, office support personnel, and salespeople.

123. *See* Chew & Kelley, *Unwrapping*, *supra* note 53, at 78 tbl.10.

FIGURE 2



The employee success rate is noteworthy, even given the previous caution about the small number of cases. Employees were very likely to lose their racial harassment disputes in arbitral proceedings, winning only one case out of nineteen, yielding a 5.3% success rate. This success rate is considerably lower than the 22% plaintiffs' success rate in court cases.<sup>124</sup> Further, it appears that racial harassment complainants are more likely to lose than are employees with other complaints. Recall, for instance, that in Colvin's study of all types of employment disputes in arbitrations, employees won 21.4% of the time.<sup>125</sup>

## 2. Qualitative Findings

As described earlier, arbitration and other ADR processes were envisioned as less formal, less costly, and timelier alternatives to the litigation process.<sup>126</sup> In addition to these procedural characteristics, ADR also had an important substantive goal: for the parties to tailor the process to their interests and needs and to allow arbitrators to shape outcomes consistent with those interests and

124. Keep in mind, however, that arbitrations are final resolutions of disputes on their merits, while the court cases in this study and other studies on employment litigation tend to be on pretrial motions such as the employers' motions for summary judgment. In addition, racial harassment plaintiffs must go through a number of administrative procedures before moving ahead with a lawsuit, while employees in arbitrations typically engage in the arbitration process subject only to the contract terms on initiating the arbitration and do not have to go through any administrative procedures. This may affect the kinds of cases that end up in arbitration versus litigation.

125. See Colvin, *Case Outcomes*, *supra* note 38, at 6.

126. See *supra* Part II.B.

needs, rather than being subject to rigid legal principles and impersonal procedural rules required in litigation.

As revealed in this qualitative analysis, however, some striking substantive and procedural similarities emerge between the judicial process and the arbitral process. Arbitration in practice may not be the procedurally or substantively differentiated process that was originally envisioned. For instance, arbitrations now frequently include legal counsel for parties, legal briefs, comprehensive records, and extensive hearings. In these ways, arbitrations mimic the formalities and lawyers’ orchestration of litigation. The AAA’s Model Employment Arbitration Rules and Mediation Procedures, for instance, suggest detailed procedures for jurisdiction, discovery, appointment of arbitrators, evidence, and confidentiality.<sup>127</sup> These procedures presumably help assure the parties of a fair process, but they also likely increase the parties’ expense and administrative burdens.

TABLE 2

Qualitative Analysis: Comparing Decision-Making Patterns	
Judges	Arbitrators
<ul style="list-style-type: none"> <li>▪ Citing of legal standards, precedents</li> <li>▪ Paradigm of Racial Harassment as only “old-fashioned racism”—discounting modern, subtle racism</li> <li>▪ Staging with lawyer, legal documents</li> </ul>	<ul style="list-style-type: none"> <li>▪ Citing of legal standards, precedents</li> <li>▪ Paradigm of Racial Harassment as only “old-fashioned racism”—discounting modern, subtle racism</li> <li>▪ Staging with lawyer, legal documents</li> </ul>

Arbitrators’ analysis of the disputes themselves also surprisingly mirror judicial analysis in fundamental ways. Although arbitrators are not bound to follow legal principles in their resolution of the dispute (unless the parties have contracted otherwise), most of the arbitrators nonetheless referred to legal standards. For instance, 79% (fifteen of nineteen opinions) of the arbitral opinions expressly referenced established legal principles, noting, for instance, whether the alleged harassment was “severe or pervasive.”<sup>128</sup> Some arbitrators went one step further, citing specific legal cases or statutes as sources of authority.<sup>129</sup> Merely 21% of cases did not refer to legal principles, relying instead only on the

127. AAA Rules, *supra* note 50.

128. *See supra* notes 101–02 and accompanying text (describing the “severe or pervasive” legal principle).

129. Sixty-eight percent of arbitrators cited specific legal cases or statutes in thirteen of the nineteen opinions.

arbitrators' observations, logic, or individual judgment.<sup>130</sup>

Moreover, arbitrators not only cite legal principles, they tend to interpret these principles in the same way as do judges, adhering to the same paradigm of racial harassment. Namely, they expressly focus on old-fashioned blatant and egregious racism, while discounting or ignoring modern racism as evidence of racial harassment.<sup>131</sup> Also, even when they noted the employees' allegations of old-fashioned racism, arbitrators nonetheless found them insufficient to hold for the employee. For example, in cases in which employees complained of racial slurs (supervisors or coworkers calling them "monkey," "nigger," or "black ass") or other forms of explicit racism, arbitrators nonetheless concluded that racial harassment had not occurred.<sup>132</sup> If anything, arbitrators were less persuaded than judges by employees' allegations of explicit racism.<sup>133</sup>

Arbitrators frequently reasoned that the harassment was not "severe or pervasive" enough to create a racially hostile environment for the employee.<sup>134</sup> In some of the cases, arbitrators expressly doubted the employees' credibility or questioned the employees' own subjective belief that their harassment was race based, instead being persuaded by the employers' telling of the story.<sup>135</sup>

In sum, this qualitative analysis revealed that the arbitration process is increasingly intertwined with and has similar effects to the litigation process. Arbitration is not really a distinct and alternative dispute resolution system, but instead appears increasingly coordinated with the judicial system. In some of the cases, employees originally tried to sue their employers in court, but

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130. Only four of the nineteen opinions contained no reference to legal principles.

131. See *supra* Part IV.B (describing these judicial tendencies further).

132. See, e.g., 2009 AAA Employment Lexis 217, at \*2-4 (Sept. 15, 2009); 2008 AAA Employment Lexis 275, at \*43, \*62 (Dec. 22, 2008); 2008 AAA Employment Lexis 270, at \*7-8, \*73 (Aug. 21, 2008); 2008 AAA Employment Lexis 11, at \*3, \*7 (Apr. 1, 2008); 2007 AAA Employment Lexis 134, at \*3-4, \*22 (Aug. 2, 2007); 2000 AAA Employment Lexis 34, at \*10, \*17 (Sept. 7, 2000). In the only arbitration case in which the employee won, the African American car salesperson claimed that he had to endure racial slurs ("Little Black Sambo with the shined shoes" and "nigger pimp") when he walked from the back of the dealership where he parked his car through the service department, and that African American employees were prohibited from using a grill to cook their lunch. 2006 AAA Employment Lexis 251, at \*3-4 (June 25, 2006). The company also allegedly treated African American customers differently than Caucasian customers. *Id.* at \*2-3. The arbitrator concluded that the legal requirements for racial harassment were satisfied. *Id.* at \*10.

133. Employees lost 92% of the cases (twelve of thirteen cases) when they claimed old-fashioned racism.

134. See *supra* notes 101-02 and accompanying text (discussing "severe or pervasive" harassment as the applicable legal principle in these cases).

135. Twenty-one percent of arbitrators were persuaded by the employers' story in four of nineteen opinions.

the court compelled arbitration. Arbitrators routinely cite legal principles and legal cases as precedents. Arbitrators resolve the dispute and impose that resolution on the parties, and their awards are generally not reviewable by the courts. Some arbitrators are reaching conclusions that are ordinarily reserved for judges—for instance, granting the employer’s motion for summary judgment.<sup>136</sup> This qualitative analysis provides consistent evidence that arbitrators are beginning to sound, think, and act like judges.

#### CONCLUSION

Legislators, employers, and employees continue to debate ADR’s benefits and potential harms, particularly for mandatory employee arbitrations when employees are compelled to arbitrate their disputes even though they would prefer to go the courts. Section 118 of the 1991 Act encouraged ADR’s use. The Supreme Court in *Gilmer* endorsed using arbitration to resolve workplace disputes. Empirical researchers are now exploring whether ADR, particularly arbitration, is indeed consistent with the 1991 Act’s overall purpose of further strengthening employees’ civil rights or instead is disadvantageous to employees.

This is hardly just an academic issue, given the thousands of employment arbitrations conducted each year, including mandatory arbitrations through employer ADR plans. Historically, employment arbitrations have been shrouded in secrecy, given that arbitrations are characteristically private and confidential. Emerging databases, however, provide a window into (1) employment arbitration’s basic characteristics, including its outcomes, and (2) arbitral opinions. Quantitative and qualitative empirical analyses of samples from these databases give us insight into arbitrators’ decisions and their decision-making processes.

The author’s original quantitative and qualitative analysis of racial harassment disputes contributes to this discussion, comparing arbitration and litigation outcomes in racial harassment cases. It found that employees fare poorly in courts (22% success rate), but appear to fare worse in arbitrations (5.3% success rate). While there are important differences between the cases in litigation studies and the cases in arbitration studies, this difference in employee success is nonetheless striking.

Moreover, this study of racial harassment disputes suggests that arbitration is not the truly alternative process that some envisioned—in which the parties shape the dispute process and creatively tailor the outcome to suit their particular interests and needs.<sup>137</sup> In reality, it is more similar to a court-like adjudication,

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136. See, e.g., 2008 AAA Employment Lexis 270, at \*73 (Aug. 21, 2008).

137. Perhaps mediation, another ADR process that allows the parties to shape their own solution, has more potential to fulfill these visions.

with a clear winner and a clear loser. Arbitrators' decision-making processes also mirror judges' decision-making processes, referencing legal principles and precedents and following the same interpretational norms. In these ways, the justice that employees access in litigation and in arbitration is comparable.

These ostensible similarities between the two processes, however, should not obscure inherent fundamental differences between arbitration and litigation. For example, to state the obvious: the decision makers in arbitration are arbitrators and the decision makers in litigation are judges. Less obvious is that federal judges are selected through a carefully crafted public vetting process, whereas arbitrators are selected in much more idiosyncratic and less transparent ways. Furthermore, judicial adjudications are subject to appellate review, but arbitrations are typically binding and final without recourse to judicial review. Finally, as skeptics of ADR have pointed out, arbitration is still a privately negotiated dispute resolution process not subject to the whole panoply of due process protections of the litigation system. In these ways, the justice that employees access in litigation and arbitration remains distinguishable.

In summary, while arbitrators' and judges' decision-making processes on their face appear strikingly similar, fundamental differences in who the decision makers are, and differences in procedural safeguards remain. Furthermore, the result that employees have a lower success rate in racial harassment arbitrations than in litigation is noteworthy. These findings encourage employees to carefully negotiate their arbitration agreements to the extent that they have the bargaining power to do so. They also help justify why employees would continue to contest mandatory arbitration agreements. Thus, this research does not indicate that arbitration is beneficial to employees, as some researchers have concluded. This research suggests instead that further exploration into arbitration's disadvantages to employees is merited.