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Bargaining in the (Murky) Shadow of Arbitration

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Bargaining in the (Murky) Shadow of Arbitration

Jill I. Gross*

Disputing parties who are unable to settle their differences will end up before an adjudicator (typically a judge or jury) who will decide their dispute for them. Dispute resolution scholars have long theorized that disputants bargain in the shadow of this adjudicated outcome, predicting what would happen in court substantively and procedurally, and negotiating based on an assessment of the strength of “bargaining endowments” derived from applicable legal norms. The increasing use of arbitration to resolve commercial disputes in the U.S. means that more and more disputants are negotiating in the shadow of arbitration, not litigation. This Article explores how procedural differences between arbitration and litigation impact disputants who bargain in arbitration’s shadow, and adds an entirely new critique to the robust scholarship criticizing the fairness of mandatory arbitration. Because arbitration awards are often not public and are not considered precedent, the law does not develop in areas where virtually all disputes are arbitrated. Disputants can only murkily predict the likely outcome in arbitration, and thus can neither negotiate from an anchoring premise nor manage the risk of a failed negotiation. Ultimately, this leads to a reduction in value of the bargaining endowments the shadow of the law would otherwise grant. In turn, this weakens the legitimacy of these settlements and of arbitration as a dispute resolution process.

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I. INTRODUCTION

Most civil disputes settle.¹ When negotiating settlements, disputing parties make and respond to offers, try to persuade counterparties why demands should be met, perhaps posture and bluff, and reach impasse or agreement. Looming in the background and casting a shadow over all negotiations is what could happen if the parties do not settle.

Modern negotiation theorists agree that, during a bargaining process,² disputants negotiate in the shadow of the law: they identify legal rules and procedures that govern the dispute, assess the likely outcome a binding adjudicative process (typically a civil case in court) would yield if the parties are unable to settle, and shape their bargaining strategy based on those legal rules and procedures.³ Negotiated outcomes then reflect, in part, the parties' assessments of the

1. Modern estimates of settlement rates for civil court cases range from 60 percent to 90 percent, with variations across case categories. See, e.g., Benjamin Sunshine & Victor Abel Pereyra, *Access-to-Justice v. Efficiency: An Empirical Study of Settlement Rates After Twombly & Iqbal*, 2015 U. ILL. L. REV. 357, 372 (2015) (gathering prior empirical studies of settlement rates and concluding that "they all agree that the settlement rate of federal civil cases is somewhere between 60% and 70%"); Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIR. L. STUD. 111, 111 (2009) (estimating aggregate settlement rate across case categories in district courts studied to be 66.9 percent and concluding "no reasonable estimate of settlement rates supports an aggregate rate of over 90 percent of filed cases, despite frequent references to 90 percent or higher settlement rates"). But see *The Landscape for Civil Litigation in State Courts*, NATIONAL CENTER FOR STATE COURTS, CIVIL JUSTICE INITIATIVE (2015), <https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx> (last visited Jan. 19, 2019) (reporting only 10 percent settlement rate of cases filed in courts studied). Of course, this data cannot take into account civil disputes that never make it to a court filing.

2. The bargaining process may be direct negotiation between parties, or mediation, where a third-party neutral (the mediator) assists parties in settling their dispute. See Jill I. Gross, *Securities Mediation: Dispute Resolution for the Individual Investor*, 21 OHIO ST. J. ON DISPUTE RESOL. 329, 331 (2006).

3. See Yuval Sinai & Michal Alberstein, *Expanding Judicial Discretion: Between Legal and Conflict Considerations*, 21 HARV. NEGOT. L. REV. 221, 241 (2016) ("The parties bargain 'in the shadow' of that prediction [as to the formal application of

strength of their “bargaining endowments”—the legal rights of bargaining parties that are created by legal norms that the court otherwise would apply in their favor.⁴

Although, historically, most dispute negotiations took place in the shadow of the law as applied and developed by courts, the increasing use of arbitration to resolve commercial disputes means that more and more disputants negotiate in the shadow of arbitration, not litigation.⁵ If the parties do not settle the dispute, a panel of arbitrators rather than a judge or a jury will impose a binding decision. In particular, parties who are *required* to arbitrate disputes based on a pre-dispute arbitration clause in an adhesive consumer, employment, or brokerage account agreement negotiate in the shadow of “mandatory” (sometimes called “forced”) arbitration.⁶

Critique of the state of modern U.S. commercial arbitration—both adhesive and non-adhesive—abounds.⁷ Criticism revolves around both the courts’ strict enforcement of the agreement to arbitrate as well as an arguably unfair arbitration process resulting from that agreement. Because arbitration awards typically are neither public nor precedential, one school of thought has expressed alarm over the privatization and lack of public development of (or “freezing” of) the law for decades.⁸ Critical arbitration theorists argue that a

law] and their ‘private ordering’ is a market of rulemaking in which new sub-rules and arrangements constitute the law in action.”); CARRIE J. MENKEL-MEADOW ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* 322 (2d ed. 2011). For an analysis of how the shadow of arbitration impacts negotiators in practice, see Jill I. Gross, *Negotiating in the Shadow of Adhesive Arbitration*, in *THE NEGOTIATOR’S DESK REFERENCE* (Chris Honeyman & Andrea Kupfer Schneider eds., 2017) [hereinafter Gross, *Negotiating in the Shadow of Adhesive Arbitration*].

4. See generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950 (1979) [hereinafter Mnookin & Kornhauser, *Bargaining in the Shadow of the Law*].

5. See *infra* Section III.

6. In this context, “mandatory” arbitration is defined as arbitration resulting from a predispute arbitration clause in an adhesive agreement between parties of unequal bargaining power.

7. See Thomas J. Stipanowich, *The Arbitration Fairness Index: Using a Public Rating System to Skirt the Legal Logjam and Promote Fairer and More Effective Arbitration of Employment and Consumer Disputes*, 60 *U. KAN. L. REV.* 985, 988–91 (2012) (identifying fairness concerns surrounding the growth of mandatory arbitration clauses); Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, *N.Y. TIMES* (Nov. 1, 2015) (first in a series of three articles attacking arbitration).

8. See, e.g., Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 *U. ILL. L. REV.* 371, 376–77 (2016) (arguing that, because arbitration awards lack “[t]he stuff of the common law—*stare decisis*, publicity, and preclusion principles, . . . common law doctrinal development will cease” for many types of cases); Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124

system of mandatory arbitration, which has resulted from the Supreme Court's improper preference for binding arbitration over litigation,⁹ delegates to private parties the power to alter substantive rights,¹⁰ forces parties to prospectively waive substantive rights,¹¹ suppresses valid claims of parties with little to no bargaining power,¹² and strips parties of rights—including the right to pursue claims as class or collective actions.¹³ Some of these same scholars

YALE L.J. 3052, 3057 (2015) (“Through the procedural device of private arbitration, private parties have the quasi-lawmaking power to write substantive law largely off the books by precluding or severely impeding the assertion of various civil claims.”); Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803, 807 (2009) (warning that “[t]o the extent that we are considering wholesale acceptance of arbitration as a mandatory substitute for litigation, we must come to terms with the fact that we are sacrificing the public interpretation of public laws”); Stephen Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 704 (1999) (considering “the extent to which the creation of law has been privatized through arbitration” and suggesting that “under Supreme Court cases and other current legal doctrine, vast areas of law are privatizable and that this degree of privatization is possible only through arbitration”); Barbara Black & Jill I. Gross, *Making It Up As They Go Along: The Role of Law in Securities Arbitration*, 23 CARDOZO L. REV. 991, 1013–26 (2002) (expressing concern over freezing of law governing broker-dealers’ obligations to customers).

9. See, e.g., Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1809–14 (2014) (contending that Supreme Court decisions in arbitration “regularly rely on the Court’s view that arbitration is to be preferred to adjudication”); see generally Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996).

10. See generally, e.g., David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437 (2011); see also Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court’s Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 13 n.38 (1997).

11. See, e.g., David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 110–21 (1997).

12. See, e.g., Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 684 (2018) (citing “mounting evidence that effectively enables employers to nullify employee rights and to insulate themselves from the liabilities that back up crucial public policies”); Jean R. Sternlight, *Disarming Employees: How American Employers are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1310 (2015) (critiquing employers’ use of mandatory arbitration to decrease employees’ access to justice); Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 90 (2014) (“[R]ather than enhancing equality, mandatory arbitration exacerbates inequality in access to justice in the workplace.”); Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 704 (2012); David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 240 (2012).

13. See, e.g., Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SW. L. REV. 87, 87–88 (2012); Nancy A. Welsh & Stephen J. Ware, *Ross et al. v. American Express et al.: The*

repeatedly argue that arbitration is not appropriate for public disputes, and is even unconstitutional.¹⁴ Empirical studies have yielded the critique that the repeat-player advantage garnered by parties with superior bargaining power harms those with weaker bargaining power.¹⁵ Finally, scholars examining arbitration procedures contend that today's arbitration process has become too litigation-like, eliminating the advantages of arbitration as a speedy and economical alternative dispute resolution process.¹⁶

This Article adds an entirely new critique to the mounting concerns over mandatory arbitration in the United States.¹⁷ If the law is indeed underdeveloped, or even frozen in industries where virtually all account agreements include an arbitration clause (such as securities and app-based ride-sharing), parties trying to settle disputes arising out of those account agreements are negotiating in the shadow of murky legal norms and a "black hole" of arbitration outcomes. In turn, this reduces the power of any legal rights that a

Story Behind the Spread of Class Action-Barring Arbitration Clauses in Credit Card Agreements, 21 DISP. RESOL. MAG. 18, 18–19 (2014) (detailing case in which court found concerted actions, including twenty-eight group meetings of issuer banks across the credit card industry, to include PDAAAs in customer agreements to suppress consumers' ability to bring class action suits against the industry).

14. See Deborah R. Hensler & Damira Khatam, *Re-Inventing Arbitration: How Expanding the Scope of Arbitration is Re-Shaping its Form and Blurring the Line Between Private and Public Adjudication*, 18 NEV. L.J. 381, 381 (2018) (arguing that "re-inventing arbitration to adhere to public justice norms risks undermining its value for private actors with private disputes, while at the same time undermining courts as institutions for public contest over public policy issues"); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2804 (2015) (arguing that the "cumulative impact of recent Supreme Court decisions on arbitration also produces an unconstitutional system, providing insufficient oversight of the processes it has mandated as a substitute for adjudication").

15. See Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1650–51 (2005) ("Whereas a given company will tend to arbitrate many consumer disputes, a given consumer or employee will typically arbitrate, at most, one. Thus, the companies have far greater experience with and exposure to the arbitration process than do the consumers or employees. There is some limited empirical evidence that the repeat player does somewhat better in arbitration than the nonrepeat player."); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 190–91 (1997).

16. See Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1, 12–19 (2010) (describing changes in the nature of arbitration that made the process more like litigation).

17. International arbitration is typically not subject to the same critiques, as most European countries prohibit arbitration clauses in contracts of adhesion. See Amy J. Schmitz, *American Exceptionalism in Consumer Arbitration*, 10 LOY. U. CHI. INT'L L. REV. 81, 83 (2012) (reporting that "other nations do not extend strict enforcement of pre-dispute arbitration clauses to [business to consumer] or employment agreements").

disputant otherwise could leverage in negotiation. If parties' legal rights are reduced when negotiating in arbitration's shadow, what impact does that have on disputants' perceptions of arbitration as a dispute resolution process?

This Article proceeds in five parts. Section II explores the original theory and subsequent literature on bargaining in the shadow of the law, highlighting its focus on litigation as the alternative to settling. Section III briefly summarizes the Supreme Court's jurisprudence regarding the enforceability of arbitration agreements, which led to an explosion in the use of commercial arbitration in the U.S. in the late twentieth and early twenty-first centuries. Section IV considers how process differences between litigation and arbitration impact dispute negotiators in the respective forums. Section V argues that at least two of these differences—the privacy of arbitration awards and the absence of precedent—result in uncertainty for parties who negotiate in arbitration's shadow. Ultimately, this uncertainty leads parties to settle a dispute for an amount that does not fully reflect the value of bargaining endowments the shadow of the law would otherwise grant. Section VI concludes that this discounting of bargaining endowments weakens both the legitimacy of these settlements and the legitimacy of arbitration as a dispute resolution process.

II. BARGAINING IN THE SHADOW OF THE LAW

Decades ago, dispute resolution scholars theorized about the impact of legal principles on the negotiation process. In 1976, Melvin Eisenberg explained that the “normative model of dispute-negotiation posits that principles, rules, and precedents” play a prominent role in negotiating disputes, even if against a party's self-interest, resulting in norm-centered settlements.¹⁸ Professor Eisenberg further posited:

Dispute-negotiation has a *graduated* and *accommodative* character: In reaching and rationalizing outcomes, any given norm or any given factual proposition can be taken into account according to the degree of its authoritativeness and applicability (in the case of a norm) or probability (in the case of a factual proposition). In contrast, traditional adjudication tends to have a *binary* character: In reaching, and even more clearly in rationalizing outcomes, any given proposition of fact is normally found to be either true or false, colliding norms are generally

18. See Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 649–50 (1976).

treated as if only the more compelling norm were applicable, conflicting norms are generally treated as if only the dominant norm were applicable, and each disputant is generally determined to be either “right” or “wrong.”¹⁹

Thus, disputants might resort to a dispute-negotiation if they want legal norms to play *some* role in the outcome, rather than an *absolute* role. Professor Eisenberg’s insights reflect an early attempt to conceptualize negotiation as part of an interactive dynamic between formal legal systems and private institutions.²⁰

Three years later, Robert Mnookin and Lewis Kornhauser applied Professor Eisenberg’s theories to divorce settlements.²¹ Professors Mnookin and Kornhauser argued that parties who negotiate the terms of a divorce in the shadow of matrimonial law rather than pursue their respective rights in the courtroom engage in a form of “private ordering.”²² Mnookin and Kornhauser argued that private ordering is desirable in the context of divorce settlements to minimize the financial cost and emotional pain of divorce litigation,²³ and identified five factors that are “important influences or determinants of the outcomes of bargaining for a divorce.”²⁴

Notably, one critical element for parties to factor into their negotiation strategy is “the bargaining endowments created by legal rules that indicate the particular allocation a court will impose if the parties fail to reach agreement.”²⁵ In the context of negotiating child custody and financial terms, Mnookin and Kornhauser explained that “the outcome that the law will impose if no agreement is reached gives each parent certain bargaining chips—an endowment of sorts.”²⁶ These bargaining chips, or endowments, can also be thought

19. *Id.* at 654.

20. *Id.* at 637–38 (“The purpose of this Article is to explore the operation of one of these private institutions, negotiation, and to develop the extent to which elements characteristically associated with distinctively legal processes—principles, rules, precedents, and reasoned elaboration—may be expected to determine outcomes reached through that institution.”).

21. See Mnookin & Kornhauser, *Bargaining in the Shadow of the Law*, *supra* note 4, at 950.

22. *Id.* at 950. As distinguished from the legal rules imposed on the parties by a court’s judgment of divorce, “private ordering is ‘law’ that parties bring into existence by agreement.” *Id.* at 950 n.1.

23. *Id.* at 956–58.

24. *Id.* at 966.

25. *Id.* at 968. The other four factors are “the preferences of the divorcing parents”; “the degree of uncertainty concerning the legal outcome if the parties go to court, which is linked to the parties’ attitudes towards risk”; “transaction costs and the parties’ respective abilities to bear them”; and “strategic behavior.” *Id.* at 966.

26. *Id.* at 968.

of as substantive and procedural legal rights that a party voluntarily waives or chooses not to pursue by settling a dispute.²⁷

In essence, parties who attempt to leverage as much value as possible from those legal rights by arguing to counterparties that those underlying norms will favor the party asserting it in an adjudicative phase are engaging in what is now known as a strategy of principles-based negotiating. To extract more value from a settlement, parties justify via procedural and substantive norms their settlement demands that the counter-negotiator increase the value of the offer.²⁸ Indeed, the notion that dispute negotiators should incorporate principles-based bargaining as part of their strategy is a well-accepted canon of modern negotiation theory.²⁹

Mnookin and Kornhauser's article spawned a vast array of scholarship applying and extending the theme that negotiators engage in private ordering and proceed in the shadow of norms developed during courtroom processes.³⁰ However, this "shadow of the law" progeny thus far has focused on bargaining endowments generated by courts of law, not by other adjudicative processes.³¹ The next Section

27. See Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703, 741–42 (1997) (conceptualizing bargaining endowments from legal norms in mediation as entitlements or rights to be asserted by parties).

28. See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 10 (1983).

29. See Hal Abramson, *Fashioning an Effective Negotiation Style: Choosing Between Good Practices, Tactics, and Tricks*, in THE NEGOTIATOR'S DESK REFERENCE 60–61 (Chris Honeyman & Andrea Kupfer Schneider eds., 2017).

30. See, e.g., Noa Ben-Asher, *In the Shadow of A Myth: Bargaining for Same-Sex Divorce*, 78 OHIO ST. L.J. 1345, 1349 (2017) (arguing that bargaining in the shadow of a myth of egalitarianism may cause adverse effects in same-sex divorces); Grant Strother, *Resolving Cultural Property Disputes in the Shadow of the Law*, 19 HARV. NEGOT. L. REV. 335, 339 (2014) (exploring how legal rules governing certain cultural property disputes impact negotiations); Andrea K. Schneider, *Bargaining in the Shadow of (International) Law: What the Normalization of Adjudication in International Governance Regimes Means for Dispute Resolution*, 41 N.Y.U. J. INT'L L. & POL. 789, 818–19 (2009) (analyzing the impact of international law on design of dispute resolution processes in international systems); Christopher A. Whytock, *Litigation, Arbitration and the Transnational Shadow of the Law*, 18 DUKE J. COMP & INT'L L. 449, 450 (2008) (discussing the influence of courts on transnational arbitration); Stewart Macaulay, *Klein and the Contradictions of Corporations Law*, 2 BERKELEY BUS. L.J. 119, 130–31 (2005) (discussing how negotiators of corporate law dispute bargain in the shadow of the law); Glenn Cohen, *Negotiating Death: ADR and End of Life Decision-Making*, 9 HARV. NEGOT. L. REV. 253, 260 (2004) (discussing the "shadow of the law" in context of disputes over end-of-life decisions); Daniel Q. Posin, *Mediating International Business Disputes*, 9 FORDHAM J. CORP. & FIN. L. 449, 464 (2004) (discussing the impact of shadow of law on mediation of international business disputes).

31. One exception is Professor Fuller's seminal article (published posthumously in the same year as the Mnookin/Kornhauser article but based on his earlier writings)

of the Article explores what principles-based bargaining means when it takes place in the shadow of arbitration, and starts with a brief history of the law enforcing arbitration agreements.

III. A BRIEF HISTORY OF ARBITRATION AGREEMENTS

Arbitration, a binding dispute resolution process in which parties consent to submit their dispute to a third-party neutral who hears from all parties and imposes a binding decision, or award, on the disputants,³² has been used to resolve commercial disputes in the United States since the country's founding.³³ Arbitration is generally considered a faster and cheaper form of dispute resolution than litigation,³⁴ as it uses streamlined procedures to reach an outcome based

in which he included in his theories on the "permissible forms and the proper limits of adjudication" a consideration of arbitrators as adjudicators. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 355, 407 (1978) (recognizing that, if an arbitrator is the adjudicator, "the substance of the negotiations can scarcely escape being influenced by the parties' conceptions of what a resort to arbitration would probably produce" and that "[e]xpectations as to the way in which an arbitrator would view the case affect the relative bargaining power of the parties, and hence the outcome of the negotiations"). While recognizing that disputants negotiate in the shadow of arbitration, Professor Fuller did not explore further what that means in light of the procedural differences between arbitration and litigation. In addition, the writings on which this essay was based predate by decades the rise of modern commercial arbitration in the U.S. and the Supreme Court's endorsement of the use of mandatory arbitration arising out of adhesive contracts.

32. See Imre Stephen Szalai, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* 7 (2013); Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 NEV. L.J. 427, 435-36 (2007).

33. For a comprehensive history on the use of arbitration to resolve commercial disputes in England and the U.S., see Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 973-74 (1999) [hereinafter Stone, *Rustic Justice*].

34. Though the empirical evidence is not conclusive, and arbitration parties today incur substantial costs in the proceeding, including the costs of limited discovery, experts, motion practice, travel, filing fees, and payments to neutrals, most studies confirm that, on average, arbitration is still less expensive to pursue to an award than litigation. See Stephen J. Ware, *Is Adjudication A Public Good? "Overcrowded Courts" and the Private Sector Alternative of Arbitration*, 14 CARDOZO J. CONFLICT RESOL. 899, 907 n.31 (2013) (stating that "[t]he evidence indicates that arbitration tends to have lower process costs than litigation" and that "[a]rbitration's process costs may be so much lower than litigation's as to more than make up for arbitration's higher adjudicator costs"); Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST. J. ON DISP. RESOL. 843, 850 (2010). *But see* Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J. L. REFORM 813, 815-16 (2008) (concluding that arbitration may be as costly or even more costly than litigation for certain types of disputes, and less costly for other types); *see also* Lisa A. Nagele-Piazza, *Unaffordable Justice: The High Cost of Mandatory Employment Arbitration for the Average Worker*, 23 U. MIAMI BUS.

on principles of law, equity, custom, and practices unique to a particular industry.³⁵ Arbitration derives from the parties' consent to trade the formal process of court-based adjudication for a process promising efficiency and equity.³⁶

However, nineteenth and early twentieth century American judges were hostile to arbitration and followed the English practice of treating pre-dispute arbitration agreements (PDAAs) as revocable, refusing to enforce them.³⁷ This made it difficult for one party to a contract to arbitrate a dispute arising out of a PDAA.³⁸

Increased court congestion in the early twentieth century and the growing popularity of arbitration as a cheaper and faster means of resolving disputes arising out of commercial transactions led merchants to lobby for an arbitration statute.³⁹ In 1925, Congress enacted the U.S. Arbitration Act, commonly known as the Federal Arbitration Act,⁴⁰ to reverse the judicial hostility towards arbitration.⁴¹ The FAA's key substantive provision, Section 2, declares that a written agreement to arbitrate existing or future disputes arising out of a "maritime transaction or a contract evidencing a transaction involving commerce" is "valid, enforceable and irrevocable, save upon

L. REV. 39, 42 (2014) (arguing that costs of employment arbitration for workers prevent workers from vindicating their statutory rights).

35. See Jill I. Gross, *Justice Scalia's Hat Trick and the Supreme Court's Flawed Understanding of Twenty-First Century Arbitration*, 81 BROOK. L. REV. 111, 116–17 (2015) [hereinafter Gross, *Justice Scalia's Hat Trick*].

36. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate . . . , [a party] trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.").

37. This "revocability doctrine," which declared PDAAs unenforceable and invalid, stemmed from two grounds. First, courts viewed arbitrators as improperly ousting courts of their jurisdiction. Second, courts were reluctant to compel parties to participate in a process they could not ensure to be fair and equitable. See Stone, *Rustic Justice*, *supra* note 33, at 975–76.

38. *Id.* at 973–74 ("[A] party seeking to arbitrate had no effective remedy against a party who refused to abide by an arbitration agreement.").

39. *Id.* at 979. The drafters of the 1920 New York Arbitration Act (Arbitration Law, 1920 N.Y. Laws 803 (codified as amended at N.Y. C.P.L.R. 7501–14 (McKinney 2017))), the first arbitration statute in the country, intended it to reverse the common law revocability doctrine. *Id.* at 979–82.

40. 9 U.S.C. §§ 1 *et seq.* Congress modeled the FAA on New York's arbitration law.

41. See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); see also *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (explaining that Congress passed the FAA "to ensure judicial enforcement of privately made agreements to arbitrate"). For a thorough exploration of the legislative history and reasons for passage of the FAA, see generally IMRE STEPHEN SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* (2013).

such grounds as exist at law or in equity for the revocation of any contract.”⁴² By declaring pre-dispute arbitration agreements as enforceable as any other kind of contract, Section 2 eliminated lower courts’ ability to refuse to compel a party reluctant to arbitrate to proceed in arbitration.⁴³

Since the 1980s, the Supreme Court has interpreted Section 2 expansively, holding that the FAA reflects both “an emphatic federal policy in favor of arbitral dispute resolution” (the process),⁴⁴ and a “liberal federal policy favoring arbitration agreements” (the contract to use the process).⁴⁵ The Court has held that: (1) lower courts must apply a presumption of arbitrability when deciding challenges to an arbitration agreement;⁴⁶ (2) the FAA applies in state and federal court to arbitration clauses in all agreements “involving commerce”;⁴⁷

42. 9 U.S.C. § 2 (1947). Section 2 provides, in full:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Id. Although courts may not invalidate arbitration agreements under state laws applicable *only* to arbitration agreements, the last clause of Section 2, known as the “saving clause,” permits *general* contract defenses, such as fraud, duress, or unconscionability, to invalidate arbitration agreements. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

43. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270–71 (1995) (noting that Congress passed the FAA to place arbitration agreements upon the same footing as other contracts).

44. *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) (quoting *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011) (per curiam) (internal quotation marks omitted)); *see also Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (declaring that the FAA reflects a “national policy favoring arbitration”).

45. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see also CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (citing *Moses H. Cone*, 460 U.S. at 24); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stan. Junior Univ.*, 489 U.S. 468, 476 (1989); *Perry v. Thomas*, 482 U.S. 483, 489 (1987); *Gross*, *Justice Scalia’s Hat Trick*, *supra* note 355.

46. *Moses H. Cone*, 460 U.S. at 24–25 (Blackmun, J., concurring). “Arbitrability” refers to whether a particular dispute can, as a legal matter, be resolved through arbitration.

47. By its terms, the FAA governs agreements to arbitrate “transaction[s] involving commerce.” 9 U.S.C. § 2 (2012). The Supreme Court has interpreted this phrase broadly to include any transaction that *in fact* involves interstate commerce, even if the parties did not anticipate an interstate impact. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273–74, 281 (1995). Section 1 of the FAA excludes from the Act’s coverage “contracts of employment of . . . any . . . class of workers engaged in foreign or interstate commerce,” and this includes independent contractors as well as employees. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539–44 (2019).

(3) the FAA preempts conflicting state law;⁴⁸ (4) federal statutory claims are arbitrable as a matter of public policy unless Congress explicitly states they are not;⁴⁹ and (5) parties are free to delegate to the arbitrators the question of arbitrability.⁵⁰ These Supreme Court decisions have had the cumulative effect of eliminating virtually all defenses to arbitrability⁵¹ and converting PDAs into “super contracts.”⁵²

With such strong court support for the enforceability of arbitration agreements, parties to private commercial transactions included arbitration clauses in their contracts with increasing frequency in the late twentieth and early twenty-first centuries.⁵³ In particular, pre-dispute arbitration clauses now appear with some regularity in

48. See generally *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). Under the FAA preemption doctrine, the FAA preempts any state law that “actually conflicts with federal law—that is, to the extent that it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *Volt Info. Scis.*, 489 U.S. at 477 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); see also *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683 (1996) (preempting a Montana statute requiring specific type of notice in contract containing arbitration clause); *Allied-Bruce Terminix*, 513 U.S. at 272–73 (preempting Alabama statute invalidating PDAs in consumer contracts); *Perry*, 482 U.S. at 488–89 (preempting California statute requiring wage collection actions to be resolved in court).

49. See *CompuCredit Corp.*, 565 U.S. at 100–01 (declaring federal statutory rights to be arbitrable absent a “contrary congressional command”).

50. See *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528 (2019) (“When the parties’ contract delegates the arbitrability question to an arbitrator, the courts must respect the parties’ decision as embodied in the contract.”); see generally *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010).

51. See *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013) (noting that arbitration agreements are enforceable even if they strip a party’s ability to vindicate its federal statutory rights, as long as they do not take away the right of a party to bring a claim).

52. Gross, *Justice Scalia’s Hat Trick*, *supra* note 35. See Richard Frankel, *The Arbitration Clause as Super Contract*, 91 WASH. U. L. REV. 531, 533 (2014); Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 U. ILL. L. REV. 1, 9 (2010) (“In the twentieth century, pre-dispute (or ‘executory’) arbitration agreements evolved from disfavored status to judicially denominated ‘super-clauses.’”).

53. See Jeff Sovern et. al., “*Whimsy Little Contracts with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*,” 75 MD. L. REV. 1, 11 (2015) (stating that “[t]he business community has responded to the Supreme Court’s expansive arbitration jurisprudence by adding arbitration clauses to many common consumer contracts” and gathering empirical studies); Theodore Eisenberg et. al., *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J. L. REFORM 871 (2008) (reporting on prevalence of arbitration clauses in consumer as compared to nonconsumer contracts).

consumer, franchise, employment, and financial services contracts.⁵⁴ For example, one recent study found that fifty-five percent of private sector, nonunion workers are now subject to a mandatory arbitration provision in their employment agreements.⁵⁵ Virtually all broker-dealers require their customers to arbitrate disputes arising out of their investment accounts.⁵⁶ And all major ride-sharing apps in the U.S. now include a PDAA in their agreements with both drivers and passengers.⁵⁷

These agreements typically are non-negotiable, take-it-or-leave-it clauses in a broader contract of adhesion governing the relationship between an individual and an institution with far greater legal resources and bargaining power. These PDAAs might also include a class action waiver, pursuant to which individuals waive their right to pursue any claims collectively with others similarly situated.⁵⁸ Many PDAA signatories are not even aware that they waived their right to pursue claims in court.⁵⁹

To resolve disputes that arise in this context of binding pre-dispute arbitration clauses, parties negotiate in the shadow of arbitration, not court proceedings. And no doubt most of these disputes

54. See *Arbitration Study: Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a), Section 2*, CONSUMER FINANCIAL PROTECTION BUREAU (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf (reporting on frequency of PDAAs in consumer financial services industry).

55. See Alexander Colvin, *The Growing Use of Mandatory Arbitration*, ECONOMIC POLICY INSTITUTE (Apr. 6, 2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/>; see also Imre Szalai, *The Widespread Use of Workplace Arbitration Among America's Top 100 Companies*, THE EMPLOYEE RIGHTS ADVOCACY INSTITUTE FOR LAW AND POLICY, <http://employeeightsadvocacy.org/publications/wide-spread-use-of-workplace-arbitration/> (reporting the results of a study that found that “80 of the top 100 largest companies in America, including subsidiaries or related affiliates, have used arbitration agreements in connection with workplace-related disputes since 2010”).

56. See Jill I. Gross, *The Customer's Non-Waivable Right to Choose Arbitration in the Securities Industry*, 10 BROOK. J. CORP. FIN. & COM. L. 383, 384 (2016) (reporting that virtually all broker-dealers include an arbitration provision in their customer agreement).

57. See *infra* note 106 and accompanying text.

58. See Colvin, *supra* note 55 (finding that 41 percent of surveyed arbitration clauses surveyed included a class action waiver); Szalai, *supra* note 55 (finding that 39 out of 80 companies used arbitration clauses that included a class action waiver).

59. See Jeff Sovern et al., “*Whimsy Little Contracts*” with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements, 75 MD. L. REV. 1, 55 (2015) (reporting that 91 percent of consumers surveyed did not know there was an arbitration clause in their contract that prevented them from bringing their claims in court).

never see the inside of an arbitration hearing room. In fact, settlement rates for cases filed in arbitration are reasonably similar to those for litigation.⁶⁰ The next Section considers how differences between the litigation and arbitration process might impact these negotiations.

IV. IMPACT OF PROCESS OF ARBITRATION ON DISPUTE NEGOTIATORS

Though the process can vary slightly from forum to forum, most commercial arbitrations share common procedural characteristics.⁶¹ To initiate a case, a claimant need not adhere to strict pleading requirements. Rather, a short and simple statement of the basis for relief and the remedies requested is sufficient.⁶² Pre-hearing procedures are more limited in arbitration than in court, as most procedural rules restrict the scope of discovery and dispositive motions that can be filed.⁶³ Because many fora allow parties to agree on alterations of any forum rule, arbitration procedures are more flexible.⁶⁴ If parties can select subject-matter experts as their neutrals, expert discovery and expert witnesses are less necessary.⁶⁵ Commercial arbitrators follow the rules of evidence only loosely at the hearing.⁶⁶ In most settings, commercial arbitration awards, which often do not

60. See *AAA Arbitration: Faster, More Cost Effective than Litigation*, AMERICAN ARBITRATION ASSOCIATION, https://www.adr.org/sites/default/files/document_repository/AAA189_Arbitration_Myths.pdf (last visited Jan. 13, 2019) (reporting that 66 percent of arbitration filings across five different industries settle before a hearing); Thomas J. Stipanowich & Zachary P. Ulrich, *Commercial Arbitration and Settlement: Empirical Insights into the Roles Arbitrators Play*, 6 Y.B. ON ARB. & MED. 1, 17 (2014) (reporting that roughly 25 percent of surveyed commercial arbitrators stated that more than half of their cases settled before a formal hearing). At the Financial Industry Regulatory Authority (FINRA) Office of Dispute Resolution, which administers virtually all securities industry arbitrations, approximately two-thirds of filed cases settle. See *FINRA Dispute Resolution Statistics*, FINRA, <http://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics#arbitrationstats> (last visited May 30, 2019).

61. Most pre-dispute arbitration agreements designate a particular arbitration forum, such as the AAA, JAMS, or FINRA, all of which have well-developed Codes of Procedure, to administer the case. AAA rules cited in this Article refer to the AAA Commercial Arbitration Rules and Mediation Procedures (as of May 2018) (“AAA Rules”). FINRA Rules referenced in this Article are from the FINRA Code of Arbitration Procedure for Customer Disputes (“FINRA Customer Code”).

62. See, e.g., AAA Rule 4(e); FINRA Customer Code 12302.

63. See, e.g., AAA Rule 33; FINRA Customer Code 12504.

64. See, e.g., AAA Rule 1(a) (“The parties, by written agreement, may vary the procedures set forth in these rules.”) At FINRA, parties may alter any deadline by agreement. See FINRA Rule 12207.

65. See AAA Rule 13 (providing for direct appointment of an arbitrator by the parties).

66. See FINRA Rule 12604.

contain reasons and may not be publicly available,⁶⁷ are not considered precedent.⁶⁸ Finally, the grounds to appeal from an arbitration award are strictly limited by the FAA.⁶⁹

Some of these procedural differences between litigation and most forms of arbitration impact the bargaining strategy of negotiators who attempt to settle a dispute in arbitration's shadow. First, unlike public court proceedings, arbitration is private and somewhat confidential.⁷⁰ An institution or individual concerned about its public image or reputation has less at stake in arbitration than in court, as details underlying the dispute as well as any outcome are likely to be treated confidentially. Proceeding to arbitration does not risk the same level of adverse publicity as in court, thus reducing the incentive to settle, relative to the same case going to court.⁷¹ Therefore, in situations where a dispute will proceed to arbitration absent a settlement, a disputing party cannot leverage the power of adverse publicity for the opposing party when negotiating. The loss of that power reduces the value of the settlement for that party.

Relatedly, a party negotiating in the shadow of litigation has to manage the risk of setting an unfavorable precedent, particularly for

67. Most commercial fora do not publish or release their awards publicly. FINRA Dispute Resolution is one exception; it publishes all awards on its website on a searchable database. See *Arbitration Awards Online*, FINRA, <https://www.finra.org/arbitration-and-mediation/arbitration-awards> (last visited May 30, 2019).

68. See Barbara Black & Jill Gross, *The Explained Award of Damocles: Protection or Perl in Securities Arbitration*, 34 SEC. REG. L.J. 17, 21 (2006).

69. See 9 U.S.C. § 10(a)(1)–(4); see also *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568 (2013) (“Under the FAA, courts may vacate an arbitrator’s decision ‘only in very unusual circumstances.’”) (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995)). As the Supreme Court has noted, narrow judicial review is consistent with the federal policy favoring arbitration, as it “‘maintain[s] arbitration’s essential virtue of resolving disputes straightaway.’ If parties could take ‘full-bore legal and evidentiary appeals,’ arbitration would become ‘merely a prelude to a more cumbersome and time-consuming judicial review process.’” *Oxford Health Plans*, 569 U.S. at 568–69 (citing *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008)).

70. Arbitrators as well as arbitration forum staff have an ethical obligation to keep arbitration proceedings confidential under the Code of Ethics for Commercial Arbitrators, but parties and their lawyers have no such obligation, absent a confidentiality stipulation among the parties or order from the panel. See Steven C. Bennett, *Confidentiality Issues in Arbitration*, 68 DISP. RESOL. J. 1, 1 (2013) (“Arbitration proceedings are, paradoxically, both typically private and not necessarily confidential.”)

71. See Gross, *Negotiating in the Shadow of Adhesive Arbitration*, *supra* note 3, at 705.

a high-dollar-value claim.⁷² For example, a pharmaceutical manufacturer might settle a products liability lawsuit with one individual allegedly harmed by side effects of a drug rather than risk having a court set a precedent that would expand liability of the company to plaintiffs in such suits in the future. Because arbitration awards are not considered precedent, that risk does not exist in commercial arbitration. When developing a negotiation approach, parties can no longer leverage the power derived from the opposing party's strong interest in avoiding setting an adverse precedent.

In addition, arbitrators do not have to follow the law strictly in reaching awards.⁷³ Rather, as long as they do not manifestly disregard the law, they can base their decision on custom and practice in an industry or on principles of equity, or even a combination of law and equity.⁷⁴ Moreover, if the law is not clear and facially applicable to a dispute, then the arbitrators can ignore it.⁷⁵ As a result, arbitrators are widely perceived to "split the baby," i.e., achieve a more equitable, compromised outcome, even if strict application of legal principles would dictate a different outcome.⁷⁶ Arbitrators might feel

72. See Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1161 (1990) (discussing how the risk of setting adverse precedent influences negotiators).

73. Barbara Black & Jill I. Gross, *Making It Up As They Go Along: The Role of Law in Securities Arbitration*, 23 CARDOZO L. REV. 991, 997, 1047 (2002) (concluding that "arbitrators—limited in their ability to understand and apply the law—are trained to grant paramount consideration to questions of fairness and equity").

74. Gross, *Scalia's Hat Trick*, *supra* note 35, at 117 (arguing that arbitrators "reach an outcome based on principles of law, equity, and custom and practices unique to a particular industry").

75. Some federal circuits interpret Section 10 of the Federal Arbitration Act as permitting a losing party to move to vacate an award for manifest disregard of the law. Most circuits that permit this standard apply a two-prong test for manifest disregard, which has both a subjective and objective component: (1) the arbitrators knew "about 'the existence of a clearly governing legal principle but decided to ignore it or pay no attention to it,'" and (2) the law ignored by the arbitrators was "well-defined, explicit, and clearly applicable" to the case. *Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 452 (2d Cir. 2011) (internal citations omitted); see also *Whitehead v. Pullman Grp., LLC*, 811 F.3d 116, 121 (3d Cir. 2016); *More Light Invs. v. Morgan Stanley DW, Inc.*, 415 Fed. Appx. 1, 22 (9th Cir. 2011); *LaPrade v. Kidder, Peabody & Co., Inc.*, 246 F.3d 702, 706 (D.C. Cir. 2001). The Supreme Court has left open the question whether manifest disregard of the law is a valid ground for vacatur. See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672 n.3 (2010).

76. See Gross, *Negotiating in the Shadow of Adhesive Arbitration*, *supra* note 3, at 705–06; but see Alexander Colvin & Kelly Pike, *Beyond Baby-Splitting: Arbitrator Decision-Making Patterns in Employment Cases*, 68 DISP. RESOL. J. 57, 57 (2013) (studying employment arbitration outcomes and finding little evidence that arbitrators "split the baby"); see generally Christopher R. Drahozal, *Busting Arbitration Myths*, 56 KAN. L. REV. 663 (2008) (claiming to discredit the myth that arbitrators split the baby); Stephanie E. Keer & Richard W. Naimark, *Arbitrators Do Not "Split*

sympathy, even subconsciously, for the weaker party.⁷⁷ The perceived risk that arbitrators might base their award on non-legal considerations makes it far more difficult for a negotiator to predict with any degree of certainty the likely outcome if the dispute proceeds to a hearing and award.⁷⁸

Finally, because parties have very limited grounds on which to appeal an award, awards are more final than jury verdicts and thus adverse awards are more consequential to the losing party. The risk of not settling for both parties is higher than for a litigation claim, which, in turn, encourages settlement in the shadow of arbitration without consideration of the strength of bargaining endowments. Disputants with a strong interest in managing risk—regardless of whether they have weaker or stronger bargaining power as compared to the counterparty—will be forced to settle on terms less advantageous than a party who is less risk-averse. These procedural differences between litigation and arbitration affect negotiators regardless of whether the dispute is “B2B” or “B2C” (“business to business” or “business to consumer”), and shape negotiated outcomes of any type of commercial arbitration in the U.S.

V. NEGOTIATING IN ARBITRATION’S MURKY SHADOW

In addition to process differences between litigation and arbitration, a critical substantive difference affects disputants who are negotiating in the shadow of some types of arbitration. In industries where arbitration has become the dominant forum for dispute resolution and very few disputes have made their way through the courts in recent decades, the public law is underdeveloped and possibly even

the Baby”: *Empirical Evidence from International Business Arbitrations*, 18 J. INT’L ARB. 573, 574 (2001).

77. See Gross, *Negotiating in the Shadow of Adhesive Arbitration*, *supra* note 3, at 706.

78. Of course, juries are also unpredictable. See Dru Stevenson, *The Function of Uncertainty Within Jury Systems*, 19 GEO. MASON L. REV. 513, 513 (2012) (arguing that “current jury selection methods all but guarantee that jury trial outcomes are uncertain and unpredictable” and exploring impact of that uncertainty). Moreover, typically litigants cannot inquire into a jury’s deliberative process just as losing disputants cannot inquire into arbitrators’ deliberations. See *Tanner v. United States*, 483 U.S. 107, 117–18 (1987) (discussing history of and policies underlying common law prohibition on admission of juror testimony to impeach a jury verdict). However, unlike arbitrators, juries are instructed on legal issues by a court of law, and those jury instructions are public and can be challenged by a losing litigant. See FED. R. CIV. P. 51(d). Additionally, jury verdicts can be challenged for inconsistency, insufficiency of evidence, or any other grounds relating to the merits. See FED. R. CIV. P. 59.

frozen.⁷⁹ Disputants trying to determine what the current law is in a particular area might try to comb through the few arbitration awards that are publicly available, and analyze any hints to what legal norms arbitrators applied. In other words, the shadow of substantive outcomes in arbitration is a dark, murky shadow—unknown, hard to ascertain, and unpredictable.⁸⁰ As Professor Edwards writes,

Industry-wide adoption of pre-dispute arbitration agreements now plunges entire fields of law into shadow. As arbitrators resolve these disputes in the shadow of the law, the public loses sight of critical information and arbitrators gradually lose sight of the law.⁸¹

Some ADR scholars have argued that this “shadow law” as applied through ADR processes “result[s] in both the obscuring and distorting of law,” and, in fact, signals the “end of law.”⁸²

Being able to assess the risks of pursuing an adjudicatory process is crucial for disputants who are negotiating settlements of their disputes.⁸³ Unable to predict and thus manage the downside risk of

79. See generally, e.g., James P. Nehf, *The Impact of Mandatory Arbitration on the Common Law Regulation of Standard Terms in Consumer Contracts*, 85 GEO. WASH. L. REV. 1692 (2017) (exploring impact of prevalence of mandatory arbitration in consumer context on the freezing of the common law of unconscionability and good faith and in the dearth of authority interpreting and applying consumer statutes); Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371 (2016); Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052 (2015); see also Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803, 806–07 (2009); Barbara Black & Jill I. Gross, *Making It Up As They Go Along: The Role of Law in Securities Arbitration*, 23 CARDOZO L. REV. 991, 1013–26 (2002).

80. See Benjamin P. Edwards, *Arbitration’s Dark Shadow*, 18 NEV. L.J. 427, 427 (2018) (“Today, arbitration casts a long, dark shadow that obscures information that otherwise would available.”).

81. *Id.* at 430.

82. Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 31–32 (2004) (“[P]articularly with the rise in arbitration, the balance is tipping away from open judicial resolution of disputes—and is tipping instead toward the creation of private processes law [in which] non-judicial decision-makers are applying a spectrum of legal norms, ranging from near law (or shadow law) to private law (as in arbitration) to non-law (such as reaching a resolution contrary to existing legal rules) . . .”).

83. See Michaela Keet, *Informed Decision-Making in Judicial Mediation and the Assessment of Litigation Risk*, 33 OHIO ST. J. ON DISP. RESOL. 65, 68–73 (2018) (discussing basics of litigation risk assessment by negotiators); Michaela Keet, *Litigation Risk Assessment: A Tool to Enhance Negotiation*, 19 CARDOZO J. CONFLICT RESOL. 17, 17 (2017) (“Without clear projections about where the path of litigation is most likely to lead, clients can be anchored in unrealistic expectations about the outcome and the costs of getting there.”).

arbitration, negotiators will be more willing to settle a claim in arbitration as opposed to that same claim in court.⁸⁴

Below are two illustrations of the problem of negotiating in the shadow of unpredictable law. The first considers the impact of mandatory securities arbitration on the development of the “suitability rule,” and the second considers the liability to passengers of relatively young ride-sharing apps companies (e.g., Lyft, Uber, and Via). Each illustrates that both bargaining parties—the individual investor and the broker, the ride-sharing passenger and the TNC—enter a negotiation with less power to enforce legal rules that would otherwise have inured to their benefit in court.

A. *The Suitability Rule*

One of the most fundamental duties broker-dealers and their employees (collectively, “brokers”) owe to their customers is the duty not to recommend unsuitable securities or investment strategies.⁸⁵ Securities regulators have long required that brokers recommend securities transactions to their customers *only* if those recommendations are consistent with the customer’s investment objectives, risk tolerance, and financial condition.⁸⁶ Where the doctrine applies, it in effect shifts the responsibility for making inappropriate investment decisions from the customer to the broker.⁸⁷ The suitability doctrine,

84. Notably, Professors Mnookin and Kornhauser also explored the effect of uncertain legal rules on bargaining. Through the example of the amorphous and unpredictable “best interests of the child” standard for custody decisions, the authors illustrated that “the relatively more risk-averse party is comparatively disadvantaged.” Mnookin & Kornhauser, *Bargaining in the Shadow of the Law*, *supra* note 4, at 978 (“Under the best interests principle the outcome in court will often be uncertain: each spouse may be able to make a plausible claim for custody, and it may be impossible to predict how a court would decide a disputed case.”). In addition, they posited that unpredictable rules may impose additional transaction costs on negotiators and advantage a more able negotiator. *Id.* at 979–80.

85. See James A. Fanto et al., *BROKER-DEALER LAW AND REGULATION* § 16.01 (Wolters Kluwer 5th ed. 2018).

86. See Robert Mundheim, *Professional Responsibilities of Broker-Dealers: The Suitability Doctrine*, 1965 DUKE L.J. 445, 448 (1965) [hereinafter Mundheim, *Professional Responsibilities*]; see generally Lewis D. Lowenfels & Alan R. Bromberg, *Suitability in Securities Transactions*, 54 BUS. LAW. 1557 (1999).

87. See Mundheim, *Professional Responsibilities*, *supra* note 86, at 449; see also *Erdos v. SEC*, 742 F.2d 507, 508 (9th Cir. 1984); *In the Matter of Venters*, 51 S.E.C. 292, 1993 WL 44649, n.8 (1993) (“[T]he issue is not whether or not the client considers the transactions in her account suitable, but whether the salesman, when he undertakes to counsel the client, fulfills the obligation he assumes to make only such recommendations as would be consistent with the client’s financial situation and needs”); *Philips & Co. and Gerald G. Bernheimer*, 37 S.E.C. 66, 70 (1956).

originally a purely ethical standard of conduct, has evolved into a legal rule, the violation of which can give rise to disciplinary action by the Financial Industry Regulatory Authority (FINRA),⁸⁸ or civil liability to customers.⁸⁹

Rule 2111 of FINRA, formerly NASD Rule 2310 (the “Suitability Rule”),⁹⁰ codifies the duty of broker-dealers to make only suitable recommendations of securities transactions to customers.⁹¹ The Suitability Rule provides:

(a) A member or an associated person must have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the member or associated person to ascertain the customer’s investment profile. A customer’s investment profile includes, but is not limited to, the customer’s age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance, and any other information the customer may disclose to the member or associated person in connection with such recommendation.⁹²

FINRA divides the suitability requirement into three categories: (1) “reasonable basis” suitability, which requires a broker to have a reasonable basis for believing that a recommendation is suitable for at least *some* investors; (2) “customer specific” suitability, which requires a broker to have a reasonable basis to believe that a recommendation is suitable for *the particular customer* to whom it is recommended, based on that customer’s investment profile; and (3) “quantitative” suitability, or “churning,” which requires a broker who has control of an account to have a reasonable basis to believe that a

88. FINRA, formerly known as the National Association of Securities Dealers (NASD), is the most prominent self-regulatory organization (SRO) in the securities industry.

89. See generally Norman S. Poser, *Civil Liability for Unsuitable Recommendations*, 19 REV. SEC. & COMM. REG. 67 (1986).

90. FINRA adopted Rule 2111 in January 2011, to be effective July 2012.

91. Rule 2111 codifies interpretations of NASD 2310 and also adds new criteria and requirements. Numerous FINRA Regulatory Notices about Rule 2111 provide additional guidance to members. FINRA consolidated the guidance from critical Regulatory Notices into a “Frequently Asked Questions” webpage. See *FINRA Rule 2111 (2014) (Suitability) FAQ*, FINRA, <http://www.finra.org/industry/faq-finra-rule-2111-suitability-faq> [hereinafter *FINRA Suitability FAQ*].

92. FINRA Rule 2111 (2014). Rule 2111.01 states in part that “[t]he suitability rule is fundamental to fair dealing and is intended to promote ethical sales practices and high standards of professional conduct.” *Id.*

series of transactions is *not excessive* for a particular customer in light of the customer's investment profile.⁹³

Customers can seek to impose liability on brokers for unsuitable recommendations by alleging a variety of causes of action, including breach of fiduciary duty, negligence, breach of contract, fraudulent or negligent misrepresentation, constructive fraud, a violation of a state securities act, and securities fraud under section 10(b) of the Securities Exchange Act of 1934.⁹⁴ However, since FINRA adopted a new version of the suitability rule, Rule 2111, the courts have had virtually no opportunity to interpret this rule because virtually all customer complaints that a broker violated the rule and is civilly liable to a customer as a result are heard in FINRA arbitration.⁹⁵ In fact, since July 11, 2012, when Rule 2111 became effective, only four decisions by a court have been published that interpret the substance of Rule 2111 in the context of a broker's liability to a customer.⁹⁶ Approximately twenty more involve a broker's duty to make suitable recommendations and whether civil liability results from a violation of that duty but do not explicitly reference Rule 2111.⁹⁷ In contrast, in a much shorter time frame (January 1, 2016 to December 31, 2018), FINRA arbitrators have issued about 650 awards in cases where a customer alleged a suitability violation, and approximately 10 percent of those involved an explained decision.⁹⁸ None of these

93. FINRA Suitability FAQ, *supra* note 91.

94. 15 U.S.C. § 78j(b). See J. Fanto et al., *BROKER-DEALER LAW & REGULATION* § 16.04 (5th ed. 2018).

95. FINRA administrative law judges have issued at least nineteen opinions interpreting Rule 2111 since it was adopted, but none of those opinions apply directly to the issue of whether a customer can sue a broker-dealer for damages based on an alleged unsuitable recommendation that violates Rule 2111 (list of decisions on file with author). The author located one SEC No-Action Letter on the subject of Rule 2111. See NYLIFE Secs., LLC, 2015 WL 1148379 (S.E.C. No-Action Letter Mar. 12, 2015).

96. See generally *Fernandez v. UBS AG*, No. 15-CV-2859 (SHS), at *3–*5 (S.D.N.Y. Sept. 17, 2018); *Milliner v. Mut. Sec., Inc.*, No. 15-CV-03354-TEH, 2017 WL 1064978 (N.D. Cal. Mar. 18, 2017), *vacated in part on reconsideration*, No. 15-CV-03354-TEH, 2017 WL 3453340, at *4 (N.D. Cal. Aug. 11, 2017); *Fulton Bank v. Nat-City Investments, Inc.*, No. CV 09-4855, 2017 WL 277670, at *5 (E.D. Pa. Jan. 19, 2017); *Peters v. Smith*, No. E058163, 2015 WL 4776126, at *1 (Cal. Ct. App. Aug. 13, 2015) (non-citable in Calif. Courts).

97. A January 6, 2019 search of Westlaw's "Allstates" and "Allfeds" databases yielded 129 court opinions from this query: advanced: (unsuitability unsuitable! suitable! suitable) & DA(aft 01-01-2016) & (FINRA or NASD). Of those 129 results, fewer than twenty of those cases included a substantive legal decision on a broker's suitability duty (analysis on file with author).

98. This information was provided in reports to the author from the Securities Arbitration Commentator, which maintains a database of all FINRA awards. A list of these awards are from Nov. 27, 2018 and Feb. 3, 2019, and are on file with the author.

awards, including those with an explanation,⁹⁹ constitute precedent. A far larger number of suitability claims have settled either by direct negotiation or mediation.¹⁰⁰

As a result, a customer negotiating the settlement of a dispute involving an allegation that the broker recommended unsuitable securities transactions or investment strategies cannot look to well-reasoned decisions interpreting Rule 2111 or imposing tort liability on a broker for breach of the duty to recommend only suitable transactions or strategies. It would be very hard to predict how that claim would fare if it proceeded to arbitration, with little precedent to consult, analyze, or argue to an arbitration panel. Thus, trying to settle a suitability claim in the uncertain and unpredictable backdrop of FINRA arbitration adds a murkiness to arbitration's shadow that makes it very difficult to determine the likely outcome. Investors concerned they might recover nothing at a hearing might be forced to settle at a lower amount than they might get if they knew the likelihood of prevailing in arbitration under similar facts and circumstances. Likewise, brokers might agree to pay a larger settlement than they otherwise would if they knew the limits of their liability. Both parties end up ceding the full value of their legal rights, as the bargaining endowments that the legal rules otherwise would grant to parties are non-existent.

The next subsection explores the second example of a scenario in which a disputant is negotiating in the murky shadow of arbitration.

B. *Ride-Sharing Apps/Transportation Network Companies*

Uber Technologies, Inc. (Uber), founded in 2008 and known as a "transportation network company" (TNC), develops, markets, and operates the Uber app to allow individuals with smartphones to submit a transportation request.¹⁰¹ The Uber app then sends the request to one of Uber's subsidiaries, also known as "third-party Transportation

99. Under FINRA's Code of Arbitration Procedure for Customer Disputes, an explained decision is a "fact-based award stating the general reason(s) for the arbitrators' decision. Inclusion of legal authorities and damage calculations is not required." FINRA Rule 12904(g). FINRA arbitrators are not required to issue an explained decision absent a joint request by the parties at least twenty days in advance of the first scheduled hearing session. FINRA Rule 12514(d).

100. *FINRA Dispute Resolution, Dispute Resolution Statistics*, FINRA, <https://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics#arbitration> stats (reporting that 67 percent of cases filed settled by negotiation or mediation) (last visited Jan. 31, 2019).

101. See *Company Overview of Uber Technologies, Inc.*, BLOOMBERG, <http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapid=144524848> (last visited Jan. 1, 2019).

Companies,” which, in turn, forwards the request to the Uber driver nearest to the requester, alerting the driver to the location of the customer.¹⁰² The driver can then accept the request and pick up the rider. The Uber app automatically calculates the fare, charges the rider’s credit card pre-linked to the account, and transfers payment to the driver.¹⁰³ Other TNCs operating in the United States include Juno, Lyft, and Via.¹⁰⁴

The emergence of this app-based variation on the traditional taxi service raises novel legal issues. For example, because the three parties are all connected via the TNC app, are their legal relationships different from other transportation services? Alternatively, are they just inconsequential variations on the taxi service? Are Uber drivers employees of Uber or independent contractors? Are drivers protected under various employment statutes like the Fair Labor Standards Act? Is the TNC liable for tortious conduct of its drivers? Can a passenger invoke the theory of respondeat superior if courts find that drivers are not employees of the TNC?

Scholars only recently have begun to explore these issues in the TNC context.¹⁰⁵ Moreover, because Uber and virtually all of its competitors have pre-dispute arbitration clauses in their customer and driver agreements,¹⁰⁶ as well as delegation clauses delegating to the

102. See *Razak v. Uber Techs., Inc.*, CV 16-573, 2016 WL 5874822, at *1 (E.D. Pa. Oct. 7, 2016).

103. *Id.*

104. See Katrina M. Wyman, *Taxi Regulation in the Age of Uber*, 20 N.Y.U. J. LEGIS. & PUB. POL’Y 1, 42 (2017).

105. See, e.g., Agnieszka A. McPeak, *Regulating Ridesharing Platforms Through Tort Law*, 39 U. HAW. L. REV. 357, 360 (2017) (acknowledging that “unique liability concerns” arise from ridesharing platforms and concluding that existing tort law can handle those concerns); Richard A. Balesa & Christian Patrick Woo, *The Uber Million Dollar Question: Are Uber Drivers Employees or Independent Contractors*, 68 MERCER L. REV. 461, 463 (2017) (analyzing whether Uber drivers are employees or independent contractors and determining that this question must be answered case-by-case based on a series of tests); Miriam A. Cherry, *Are Uber and Transportation Network Companies the Future of Transportation*, 4 TEX. A&M L. REV. 173, 177 (2017) (explaining the emergence of TNCs and addressing how they are changing transportation and employment law disputes); Agnieszka A. McPeak, *Sharing Tort Liability In The New Sharing Economy*, 49 CONN. L. REV. 171 (2016) (exploring ways in which existing principles of vicarious liability can be applied in the ride-sharing context); Alexi Pfeffer-Gillett, *When “Disruption” Collides with Accountability: Holding Ridesharing Companies Liable for Acts of Their Drivers*, 104 CAL. L. REV. 233, 238–39 (2016) (offering novel approach to impose liability on TNCs for acts of their drivers).

106. See *Juno Services and Juno Site Terms of Service*, JUNO, <https://www.juno.com/legal/terms.html> (last updated Aug. 13, 2018); *Lyft Terms of Service*, LYFT, <https://www.lyft.com/terms> (last updated Feb. 6, 2018); *Uber Terms of Use*, UBER, <https://www.uber.com/legal/terms/us/> (eff. Dec. 13, 2017); *Via Terms of Use*, VIA, <https://ridewithvia.com/terms-of-use/> (last updated Aug. 13, 2018). Uber added a class

arbitrator the authority to resolve disputes about arbitrability,¹⁰⁷ very few courts have had the opportunity to address these legal issues.¹⁰⁸ Though Uber has been sued more than any “sharing economy” company,¹⁰⁹ most of those lawsuits ended up in arbitration as lower court after lower court rejected challenges to the enforceability of Uber’s arbitration clause and appellate courts upheld these decisions.¹¹⁰ Instead, courts enforced the arbitration clause under the

action waiver to its arbitration clause after the United States Supreme Court in *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013), enforced a class action waiver in an arbitration clause and rejected the contention that such a waiver precluded customers from vindicating their federal statutory rights. See Jill I. Gross, *The Uberization of Arbitration Clauses*, 9 Y.B. ON ARB. & MED. 43, 51–52 (2017) [hereinafter *Uberization*].

107. See David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 365 (2018) (exploring enforceability of delegation clauses, including Uber’s, as arbitrability disputes).

108. See, e.g., *Razak v. Uber Techs., Inc.*, No. CV 16-573, 2018 WL 1744467, at *1 (E.D. Pa. Apr. 11, 2018) (finding UberBLACK drivers are not employees of Uber within the meaning of the Fair Labor Standards Act and similar Pennsylvania labor laws and asserting that this case is first to grant summary judgment on that issue) (appeal filed); *Lawson v. Grubhub, Inc.*, 302 F. Supp. 3d 1071, 1072 (N.D. Cal. 2018) (finding that a Grubhub delivery driver was an independent contractor, not an employee) (appeal filed); *O’Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015) (declining to grant summary judgment on the issue of whether Uber drivers are employees or independent contractors, finding a mixed issue of law and fact as to the level of control Uber has over drivers). Cf. Daniel Wiessner, *U.S. Judge Says Uber Drivers Are Not Company’s Employees*, REUTERS (Apr. 12, 2018), <https://www.reuters.com/article/us-uber-lawsuit/u-s-judge-says-uber-drivers-are-not-companys-employees-idUSKBN1HJ31I> (recognizing that *Razak* court decided independent contractor issue as one of first impression ten years after company was founded).

109. Within only a few years of its launch, in 2012, Uber drivers filed the first of several class action lawsuits against the company. See *O’Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2014 WL 1760314, at *1 (N.D. Cal. May 2, 2014) (citing *Ehret v. Uber Techs., Inc.*, 14–cv–0113–EMC (N.D. Cal. Dec. 2, 2015), a class action originally filed by Uber drivers in 2012 in Illinois state court, which was dismissed and re-filed in federal district court, and which similarly alleged that Uber misrepresented to riders the amount of gratuity it paid its drivers). Later driver and passenger class actions against Uber have alleged (1) misrepresentations and omissions regarding safety measures, background checks, and other efforts it takes to provide safety for its customers; (2) antitrust violations in the form of a price-fixing conspiracy through its pricing algorithms; (3) overcharging or charging fictitious fees; (4) classification of drivers as independent contractors rather than employees in violation of applicable labor laws; (5) wrongfully depriving drivers of gratuities or other types of compensation; and (6) improperly using background checks in its hiring and firing decisions. See Gross, *Uberization*, *supra* note 106, at 45–46; see also Chris O’Brien, *Uber Has Reportedly Been Sued at Least 433 Times in 2017*, VENTUREBEAT (Aug. 23, 2017, 11:32 AM) <https://venturebeat.com/2017/08/23/uber-has-reportedly-been-sued-at-least-433-times-in-2017/>.

110. See, e.g., *O’Connor v. Uber Techs., Inc.*, 904 F.3d 1087, 1094 (9th Cir. 2018) (reversing a denial of a motion to compel arbitration and reversing class certification order in class action alleging Uber improperly classified its employees as independent

Supreme Court's FAA jurisprudence.¹¹¹ Only a few plaintiffs who had opted out of the clause were able to pursue lawsuits against Uber.¹¹²

Thus, critical legal issues that are new to the TNC context will not work their way through the courts as novel legal issues traditionally do.¹¹³ Most of the claims will be heard in the confidential setting of arbitration, with very few, if any, explained awards. In addition, arbitration awards are not considered precedent, as noted above. Even if a few courts decide some of these novel legal issues due to opt-out plaintiffs or other plaintiffs not subject to the arbitration clause, those legal issues will develop only sporadically through lower and appellate courts.

contractors under applicable labor laws); *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 80 (2d Cir. 2017) (finding that an arbitration agreement was enforceable against passengers but remanding to district court to determine whether defendants waived their right to arbitrate); *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1209 (9th Cir. 2016) (enforcing the delegation clause in an Uber driver agreement, which delegated arbitrability questions to the arbitrator for all claims except challenges to the class, collective, and representative action waivers); *see generally* *Mumin v. Uber Technologies, Inc.* 239 F.Supp.3d 507 (E.D.N.Y. 2017) (granting a motion to compel arbitration of a removed state court action alleging that, *inter alia*, Uber misclassified its drivers as independent contractors to avoid application of labor and employment laws). *But see* *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 64 (1st Cir. 2018) (denying a motion to compel arbitration and refusing to enforce Uber's arbitration clause in its customer contract). *See generally* Gross, *Uberization*, *supra* note 106, at 51–60 (gathering cases).

111. This jurisprudence as applied to Uber drivers was recently thrown into doubt by the Court's opinion in *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 536 (2019) (holding that drivers who are independent contractors for an interstate trucking company are exempt from the FAA's application under Section 1's exclusion for "contracts of employment of . . . workers engaged in foreign or interstate commerce"). However, even if the arbitration clauses in TNC contracts are not enforceable under federal law, they might be enforceable under state law. Additionally, *New Prime* is not relevant to arbitration clauses of Uber customers, just drivers.

112. The *Razak* court was able to address the issue of liability of the TNC precisely because the plaintiffs there timely opted out of the arbitration clause. In addition, in spring 2018, Lyft and Uber both announced that they will no longer enforce their PDAA in lawsuits by passengers against the ride-sharing company for liability for sexual assaults by drivers. *See* Laharee Chatterjee, *Uber, Lyft Scrap Mandatory Arbitration for Sexual Assault Claims*, REUTERS (May 15, 2018), www.reuters.com/article/us-uber-sexual-harassment-idUSKCN1IG1I2.

113. *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) (recognizing that "the common law adapts to modern understanding and greater experience"). *See generally* BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921) (exploring the role of courts in the development of law).

Like in the suitability claim context, a customer suing Uber will have little guidance or precedent from a court as to the scope of liability of a TNC to a passenger. Customers will be in the dark when negotiating settlements of these disputes. With far less information available to guide a principles-based negotiation, the customer will likely sacrifice a fuller recovery to avoid the costs and uncertainties of proceeding in arbitration. Customers negotiating disputes with a TNC will not be able to invoke bargaining endowments derived from legal rules because of the murky shadow of the law governing TNC liability. As a result, they will not derive the benefit of the bargaining endowments that the law otherwise would have granted to customers.

Similarly, the TNC may be risk-averse and thus may want to settle an arbitration by paying out to a customer or driver more than they otherwise would pay if the dispute were to proceed to court. Because the TNC cannot predict the outcome in arbitration, the TNC will not be able to assess its bargaining endowments and thus will be forced to give them up because of the nature of arbitration. Thus, regardless of whether the disputant “forced” arbitration on the user—here, the customer or the employee—the fact that an unsettled dispute proceeds to arbitration instead of litigation results in a loss of a party’s ability to bargain effectively or establish rights through bargaining.

VI. CONCLUSION

Disputants negotiating in the shadow of litigation can predict with some certainty the likelihood of a particular outcome if the dispute does not settle before trial, and thus maximize the value of any power granted by a legal right when bargaining. Negotiated outcomes are knowingly shaped by the parties to incorporate their informed assessment as to the force of legal rules that a court would otherwise apply absent a settlement.

In contrast, as this Article demonstrates, disputants who negotiate in the shadow of arbitration are at a comparative disadvantage. First, as discussed in Section IV, due to procedural differences between arbitration and litigation, disputants bargain with the knowledge that any arbitration award resulting from a failed negotiation would be private, not reasoned in writing, and final, and they would have little ability to seek judicial review of the award. Second, in industries where virtually all contractual relationships are subject to an arbitration clause, bargaining disputants cannot assess legal norms that would apply in an adjudicative process, as those legal

norms are undeveloped, frozen, or nonexistent. If disputants seeking to settle can neither negotiate from an anchoring or principled premise, nor manage the risk of failing to settle, the value and power of bargaining endowments they otherwise would have if the dispute proceeded to trial declines precipitously. Disputants, regardless of whether they have weak or strong economic bargaining power, lose legal rights.

If all disputants, not just those with weaker positions in economic relationships, know or even suspect that they have lost some legal rights solely because arbitration, not litigation, is the endgame, they will have another reason to perceive arbitration as unfair.¹¹⁴ Gross and Black note:

Subjective perceptions [of users of a dispute resolution process] are important because participants' views of fairness, particularly procedural fairness, are critical to the integrity of the dispute resolution process Simply put, even if the system meets objective standards of fairness, a mandatory system that is not perceived as doing so cannot maintain the confidence of its users and, in the long run, may not be sustainable.¹¹⁵

When disputants negotiate in the murky or even dark shadow of arbitration and perceive the process as unfair—whether that perception is objectively accurate or not—commercial arbitration as an alternative to court loses legitimacy and credibility. As one proceduralist scholar recently observed, “Arbitration occurs not merely in the shadow of formal adjudication; arbitrations occur under the auspices of a formal system that must be held accountable.”¹¹⁶ How can we hold the system of arbitration accountable if it casts a murky, dark shadow over disputants?¹¹⁷

114. See *supra* notes 7–16 and accompanying text (listing current critiques of the fairness of commercial arbitration); see also Jill I. Gross & Barbara Black, *When Perception Changes Reality: An Empirical Study of Investors' Views of the Fairness of Securities Arbitration*, 2008 J. DISP. RESOL. 349, 395–97 (2008) (summarizing results of survey of participants' perceptions of the fairness of securities arbitration and concluding that investors' negative perceptions stem from, in part, the lack of transparency in outcomes and investors' unrealistic expectations of the process) [hereinafter Gross & Black, *When Perception Changes*].

115. Gross & Black, *When Perception Changes*, *supra* note 114, at 400; see also Jean R. Stemlight, *ADR Is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 NEV. L.J. 289, 297–98 (2003) (stating that the “subjective perception of fairness is critical, because even assuming objective fairness, the system could not function well if it were perceived to be unfair or unjust”).

116. Thomas O. Main, *Arbitration, What Is It Good for?*, 18 NEV. L.J. 457, 475 (2018).

117. On the other hand, if arbitration is just part of the accepted trend toward private procedural ordering, we may not care whether it is accountable. For further

As a legal matter, the Supreme Court continues to enforce adhesive arbitration agreements rigidly and refers to Congress litigants who challenge the enforceability of an arbitration clause if they want relief.¹¹⁸ However, as a practical matter, arbitration is under assault.¹¹⁹ The public's perception that arbitration is unfair undermines the legitimacy of the process and promotes a "flight from arbitration."¹²⁰ In turn, weakening the legitimacy of arbitration contradicts values of "process pluralism,"¹²¹ which promotes utilizing the most appropriate dispute resolution process to enhance the delivery of substantive and procedural justice.¹²² Given all of the public pressure already on "forced" arbitration to defend itself as a legitimate alternative to court, the institution of arbitration may not be able to withstand further criticism from users.

discussion of procedural private ordering, see Robin J. Effron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion*, 98 B.U. L. REV. 127, 128 (2018); Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 725 (2011).

118. See *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528 (2019) (rejecting the judge-made "wholly groundless" exception to arbitrability under the FAA and reminding parties that "we are not at liberty to rewrite the statute passed by Congress and signed by the President"); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015) (reminding Supreme Court of California that "[t]he Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it"); *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 21 (2012) (scolding the Oklahoma Supreme Court that it "must abide by the FAA, which is 'the supreme Law of the Land,' and by the opinions of this Court interpreting that law").

119. See *supra* notes 7–16 and accompanying text.

120. Gross, *Justice Scalia's Hat Trick*, *supra* note 35, at 116.

121. "Process pluralism" is an ideology that rejects legal centrism (the notion that courts, law, and lawyers are the primary means of handling disputes) and favors a multiplicity of dispute mechanisms. See John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137, 147, 149 (2000) ("A key element of process pluralism is the belief in the legitimacy of a multiplicity of disputing mechanisms."); see also Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71, 89 (1998) ("Maintaining the integrity of the alternatives to adjudication ensures 'process pluralism' in our dispute resolution system.").

122. See Jean R. Sternlight, *Is Binding Arbitration a Form of ADR?: An Argument That the Term "ADR" Has Begun to Outlive Its Usefulness*, 2000 J. DISP. RESOL. 97, 107 (2000) (describing the evolution of the theory of "appropriate" rather than just "alternative" dispute resolution and defining it as an "array" of dispute resolution mechanisms that "are complementary to one another in the sense that they each have their own strengths and weaknesses and are therefore appropriate in some situations, and inappropriate in others").