

# CONTRACTING WITH TORTFEASORS: MANDATORY ARBITRATION CLAUSES AND PERSONAL INJURY CLAIMS

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## I

### INTRODUCTION

Once upon a time, the Federal Arbitration Act (FAA)<sup>1</sup> was a procedural statute for the federal courts, designed for commercial arbitration between business entities.<sup>2</sup> Then, about twenty years ago, the Supreme Court began to transform the FAA into a substantive provision as powerful as any fairy tale monster.<sup>3</sup> As long as a contract comes within the reach of the Commerce Clause, the FAA creates a preference for arbitration over litigation no matter what the cause of action.<sup>4</sup> States may not carve out areas in which arbitration is thought to be inappropriate or in need of special regulation; any state law that is specifically directed at arbitration, as opposed to contracts generally, is preempted by the FAA.<sup>5</sup> The Court tends to look at arbitration as if it were merely a change of venue, comparable to moving a dispute from Virginia to Maryland.<sup>6</sup>

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1. 9 U.S.C. §§ 1-16 (2000). The FAA is also known as the United States Arbitration Act.

2. For general discussions of the evolution of the Supreme Court's treatment of the FAA, see IAN R. MACNEIL, *AMERICAN ARBITRATION LAW* 134-55 (1992); Richard M. Alderman, *Pre-dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1243-46 (2001); Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039, 1045-47 (1998); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 644-74 (1996).

3. 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, 36 ("The Supreme Court has created a monster.").

4. *Id.* at 36-37 (citing Supreme Court cases).

5. See, e.g., *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 686-88 (1996) (holding that the FAA preempts a Montana statute requiring that notice of be given on the first page of contracts containing arbitration clauses); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (holding that section 2 "declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration"); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 & n.31 (1983) (holding that FAA section 2 "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state's substantive or procedural policies to the contrary") (emphasis added).

6. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (analogizing an "agreement to arbitrate before a specified tribunal" to a "specialized kind of forum-selection clause").

Even if the arbitration clause is contained in an adhesion contract, it must be enforced unless it can be invalidated under general principles of state contract law.<sup>7</sup> With the support of this legal framework, banks, insurance companies, phone companies, Internet service providers, e-commerce merchants, and sellers of consumer goods and services routinely include mandatory arbitration clauses in their standard-form contracts.<sup>8</sup>

Less well known is the tort law chapter of this story: Mandatory arbitration clauses have come to be used to compel arbitration of personal injury claims arising between contracting parties.<sup>9</sup> Such clauses have long been used in the context of personal injury claims arising from medical malpractice,<sup>10</sup> claims in which the underlying relationship between the contracting parties is based primarily on tort duties. More recently, mandatory arbitration clauses encompassing personal injury claims have begun to appear in situations in which the parties' primary relationship is governed by contract rather than tort law. The dispute to be arbitrated is therefore further from the core of the anticipated relationship between the parties. Arbitration clauses appear in contracts for employment, for the sale of goods, and for the provision of services. In each

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7. See 9 U.S.C. § 2 (2000) (declaring that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"). The state law in question cannot be aimed specifically at arbitration, so it is the doctrines of contract formation, interpretation, and unconscionability that courts use (or stretch) when they have concerns about particular arbitration clauses.

8. See, e.g., Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate Through Pre-dispute Arbitration Clauses: The Average Consumer's Experience, 67 LAW & CONTEMP. PROBS. 55 (Winter/Spring 2004) (identifying and evaluating industries in which arbitration clauses are used). In this Article, the phrase "mandatory arbitration" is used as shorthand for mandatory, predispute, binding arbitration. A mandatory arbitration clause thus should be understood as one that is contractually imposed before any actual dispute between the parties has arisen, requires arbitration resulting in a binding award, and is subject to only cursory appellate review.

9. See Schwartz, *supra* note 3, at 36 ("It is the nature of adhesive form terms, if unchecked by courts, to expand within and across entire markets. Given the Supreme Court's blessing in the name of a 'national policy favoring arbitration,' adhesive pre-dispute arbitration clauses should expand beyond their current strongholds in consumer contracts in health insurance, banking, and securities investing to other areas of the economy and society.") (citations omitted).

10. The Ross-Loos Medical Group of Los Angeles, for example, has long included an arbitration clause in subscriber agreements for prepaid family health care. See Stanley D. Henderson, *Contractual Problems in the Enforcement of Agreements to Arbitrate Medical Malpractice*, 58 VA. L. REV. 947, 958 (1972). In 1971, the Kaiser Foundation Health Care Plan began to require arbitration of "any claim arising from the violation of a legal duty incident" to the agreement "on account of death or bodily injury arising out of the rendition or failure to render services." *Id.* (quoting 1971 amendment to Group Medical and Hospital Service Agreement, Kaiser Foundation Health Plan, Inc., Southern California Region, GR.-M & HSA-71 (ARB), at 28). Both developments owed more to California's environment of supporting arbitration than to the FAA. Later, as the FAA gave nationwide sanction to arbitration agreements, the trend expanded, and individual hospitals and doctors began to include mandatory arbitration clauses in the set of documents that patients sign at the time care is provided. *Id.* at 959. Although such arbitration clauses are not unusual, they are still not the norm in the individual doctor-patient setting. Some research indicates that this is because doctors feel that beginning a doctor-patient relationship by mentioning claims and requiring an arbitration clause "sets the wrong tone." See Elizabeth Rolph et al., *Arbitration Agreements in Health Care: Myths and Reality*, 60 LAW & CONTEMP. PROBS. 153, 181 (Winter/Spring 1997). Others suggest that there are additional obstacles to achieving more widespread acceptance of arbitration in the medical malpractice area. See, e.g., Thomas B. Metzloff, *The Unrealized Potential of Malpractice Arbitration*, 31 WAKE FOREST L. REV. 203, 210-21 (1996).

case, the parties' duties to each other are generally privately undertaken and made enforceable by the common law of contracts.<sup>11</sup> These relationships, however, can also result in ancillary tort duties, and breaches of those duties might result in personal injuries. In this way, an arbitration clause that might have been understood as governing relatively minor contract claims comes to be applied to more serious personal injury claims.

Today, many kinds of contractual relationships lead to interactions between the parties that can result in personal injuries. These relationships include those between doctors and patients, HMOs and members, landlords and tenants, employers and employees, car manufacturers and motorists, utilities and homeowners, schools and students, summer camps and campers, stores and shoppers, lawyers and clients, airlines and passengers, travel companies and travelers, and so on.<sup>12</sup> If intermediaries such as liability insurance companies or credit card issuers are allowed to impose arbitration on behalf of third parties, the list could grow even longer.<sup>13</sup>

In these and other contexts, the drafting party often requires an arbitration clause and argues that the clause applies to personal injury claims as well as to contractual ones.<sup>14</sup> Further, these relationships and their governing contracts will often be ones in which traditional safeguards of contractual fairness are missing.<sup>15</sup> A danger therefore arises that arbitration will be enforced in situations in which true consent is absent. This same danger exists outside the context of personal injury claims, but within this context it threatens the retributive, economic, and communitarian goals of tort law and exposes the tensions between the underlying norms of tort law and contract law. Moreover, the procedural shortcomings of arbitration relative to litigation are especially damaging to personal injury claimants. Thus, while mandatory arbitration clauses may be exceedingly unfair and harmful to plaintiffs generally,<sup>16</sup> mandatory arbitration of personal injury claims raises additional and more serious concerns.

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11. There may also be duties provided by statute, such as statutory regulation of the employment relationship or consumer protection statutes governing the quality or marketing of goods.

12. See, e.g., Caroline E. Mayer, *No Suits Allowed; Increasingly, Arbitration Is the Only Recourse*, WASH. POST, July 14, 2002, at H01 (citing a Florida case in which a judge found that an arbitration clause barred litigation of a claim against a travel company after the plaintiff's son was killed by hyenas while on an African safari).

13. It may seem unlikely that intermediaries would want to undertake such a project, but it is not inconceivable. Automobile insurance companies, for example, might demand arbitration of personal injury claims arising out of car wrecks involving two policyholders. Alternatively, credit card companies might require arbitration of claims involving injured cardholders and contracting merchants. The power to impose such clauses probably exists, if there were a desire to do so.

14. Already, reported cases include disputes over arbitration clauses in contracts with HMOs, hospitals, doctors, exterminators, nursing homes, mobile home dealers, employers, home builders, and used-car dealers. See *infra* Part II.

15. See, e.g., Haagen, *supra* note 2, at 1044 (“[T]he extension of mandatory arbitration to such areas as consumer transactions and non-collective bargaining employment has created a situation in which neither any effective bargaining nor adequate non-contractual forms of policing and control are likely.”).

16. The general problems with mandatory arbitration outside the personal injury context are taken up elsewhere in this Symposium and are therefore outside the scope of this Article. See, e.g., Mark E.

As a first step in identifying these concerns, this Article examines some of the cases in which courts have enforced arbitration clauses in personal injury litigation and considers why courts have reached the outcomes they have. Next, the Article evaluates the ways that arbitration can disturb the traditional values of procedural justice, contractual fairness, and the enforcement of tort-based duties. Finally, the Article suggests changes in the law regarding mandatory arbitration of personal injury claims and explores the extent to which change is possible.

## II

### TALES OF THE ARBITRATION CLAUSE

The effect of mandatory arbitration clauses on personal injury claims can be glimpsed in cases in which courts have enforced arbitration of such claims.<sup>17</sup> These cases also illustrate the kinds of circumstances in which compelled arbitration can be found<sup>18</sup> and the courts' inability or reluctance to look beyond the terms of the clause in question to reach a more equitable decision. These cases arise in four main contexts: health care, employment, product sales, and the provision of services.

#### A. Health Care

On January 7, 1973, Roberta Burton checked into Mt. Helix General Hospital for surgery.<sup>19</sup> The admission staff handed her four or five forms to fill out, including one entitled "Arbitration Agreement." This agreement provided in part:

[T]o settle disputes between PATIENT and HOSPITAL by arbitration and NOT by law suit, it is agreed as follows: IN the event of any dispute between PATIENT and

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Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROBS. 133 (Winter/Spring 2004) (arguing that the costs of consumer arbitration are often so high as to preclude consumers from having access to any forum in which to vindicate their rights); Demaine & Hensler, *supra* note 8 (using empirical methods to examine the common terms of consumer arbitration agreements to see how often and in what ways those terms disadvantage consumers); Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 LAW & CONTEMP. PROBS. 279 (Winter/Spring 2004) (arguing that mandatory, binding arbitration generally undermines democratic values); Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration Clauses to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75 (Winter/Spring 2004) (arguing that companies are using class action preclusion provisions in arbitration clauses to insulate themselves from liability for illegal acts).

17. There is relatively little reliable empirical data on binding arbitration of personal injury claims. See Rolph et al., *supra* note 10, at 157-58 (noting the weaknesses in existing studies).

18. This approach is somewhat misleading in that it will reflect only cases in which the claimant was willing to hire a lawyer, to challenge the arbitration clause, and, in most cases, to stick with litigation through at least one appeal. It will not reflect cases in which no claim was made or in which arbitration occurred without opposition. The cases are nevertheless a good representation of the kinds of disputes that arise over arbitration clauses.

19. The account of the facts in this case comes from *Burton v. Mt. Helix General Hospital*, Civ. No. 14210, 1976 Cal. App. LEXIS 1280 (Cal. Ct. App. Feb. 24, 1976).

HOSPITAL involving a claim for money damages or otherwise, whether arising before or after signing of this Contract, said dispute shall be submitted to arbitration.<sup>20</sup>

After her hospitalization, Burton filed a complaint against the hospital charging negligence and intentional infliction of emotional distress. The trial court found that Burton did not understand that the agreement required arbitration of any negligence or malpractice dispute with the hospital. It also found the arbitration agreement to be a form contract drafted by the hospital and presented to patients for signature at the time of their admission.

The court of appeals enforced the arbitration clause. While it admitted that there was sufficient basis for the trial court to find that Burton did not understand that future torts claims could be pursued only through arbitration, the appellate court held that failure to read or understand the arbitration provision was no defense to enforceability when, as here, the terms of the contract were “clear and unmistakable.”<sup>21</sup> The court also rejected Burton’s defense of undue influence, commenting that it is “not unusual for a patient to be asked to sign various consent and release forms at a hospital immediately before being admitted.”<sup>22</sup> Finally, relying on the general policy in favor of arbitration,<sup>23</sup> the court held that the arbitration clause was not beyond a patient’s reasonable expectations in light of its plain language.<sup>24</sup>

## B. Employment

Terena Beauregard worked for KFC National Management Company (KFC) in Florida.<sup>25</sup> She alleged that she was attacked and injured while at work by an employee with a history of violent attacks against co-workers. Beauregard continued to work for KFC after the incident and later applied for a transfer from Florida to North Carolina. Her written application for a transfer was on a form furnished by KFC. It contained the following language:

Because of the delay and expense of the court systems, KFC and I agree to use confidential binding arbitration for any claims that arise between me and KFC, its related companies, and/or their current or former employees. Such claims would include any

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20. *Id.* at \*2.

21. *Id.* at \*6. The court noted that the “language in the instant agreement is clearly broad enough to cover a claim for money damages for alleged negligence in treating the patient” and that “[i]t would be unnecessary redundancy to compel the agreement to specifically enumerate the myriad theories or causes of action which might be the subject of a claim.” *Id.* at \*10.

22. *Id.* at \*8.

23. *Id.* (“Arbitration is favored as a means of providing a summary and expeditious disposition of controversies.”) (citations omitted).

24. *Id.* For other cases enforcing arbitration clauses in the health care setting, see *Madden v. Kaiser Found. Hosps.*, 552 P.2d 1178, 1181-84 (Cal. 1976) (enforcing mandatory arbitration of malpractice claims when a state employer, acting as an agent, binds its employees); *Coon v. Nicola*, 21 Cal. Rptr. 2d 846, 850-51 (Cal. Ct. App. 1993) (enforcing a retroactive arbitration clause); *Leong v. Kaiser Found. Hosps.*, 788 P.2d 164, 168-69 (Haw. 1990) (enforcing arbitration when a parent enters into a contract for his or her child); *McKinstry v. Valley Obstetrics-Gynecology Clinic, P.C.*, 405 N.W.2d 88, 98-99 (Mich. 1987) (enforcing arbitration when a mother enters into a contract for her unborn child).

25. The account of the facts of this case comes from *KFC National Management Co. v. Beauregard*, 739 So. 2d 630 (Fla. Dist. Ct. App. 1999).

concerning compensation, employment (including, but not limited to any claims concerning sexual harassment), or termination of employment.<sup>26</sup>

A year later, Beauregard sued KFC for negligently hiring the co-worker who attacked her. KFC moved to dismiss and to compel arbitration. The trial court denied this motion, and KFC appealed. The court of appeals reversed, concluding that the language in the application was unambiguous and that it applied to claims based on both future and past incidents. The court therefore compelled arbitration, citing the public policy in favor of arbitration.<sup>27</sup>

The dissenting judge would have upheld the trial court's ruling that "the arbitration provisions contained in the KFC form employment application did not require arbitration of a personal injury claim that arose one year before she signed the application."<sup>28</sup> The dissent also would have found the language of the clause too ambiguous to apply to personal injury claims. "Nor . . . do I believe the arbitration clause applies to the personal injury claim," the dissent wrote. "In order for such an adhesion provision to be valid, it must be clear. This one is not."<sup>29</sup>

### C. Product Sales

Paul and Shannon Gaskamp bought a mobile home manufactured by Fleetwood Homes.<sup>30</sup> The financing paperwork included an arbitration provision that stated:

[A]ny and all controversies or claims arising out of, or in any way relating to, the Retail Installment Contract . . . or the negotiation, purchase, financing, installation, ownership, occupancy, habitation, manufacture, warranties (express or implied), repair or sale/disposition of the home, . . . whether those claims arise from or concern contract, warranty, statutory, property or common law, will be settled solely by means of final and binding arbitration before a three-judge panel of the American Arbitration Association (AAA) in accordance with the rules and procedures of the AAA.<sup>31</sup>

The Gaskamps later alleged that they did not have an opportunity to read or negotiate the agreement's terms. They also stated that they were relatively inexperienced in handling business and legal matters.

After moving into their new home, the Gaskamps and their three children began experiencing health problems such as throat and eye irritation and respiratory ailments. One child was hospitalized due to breathing difficulties and was diagnosed as having reactive airway disease as a result of exposure to for-

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26. *Id.* at 631.

27. *Id.* For another type of case enforcing an arbitration clause in the personal injury/employment context, see *Beldon Roofing & Remodeling Co. v. Tanner*, No. 04-97-00071-CV, 1997 Tex. App. LEXIS 2781, at \*1-14 (Tex. App. May 28, 1997) (allowing a workers' compensation nonsubscriber to enforce an arbitration clause contained in its internal benefit system).

28. *Beauregard*, 739 So. 2d at 631-32.

29. *Id.*

30. The account of the facts of this case comes from *Fleetwood Enterprises v. Gaskamp*, 280 F.3d 1069 (5th Cir. 2002).

31. *Id.* at 1071.

maldehyde. The home was tested by the Texas Department of Health and found to have elevated levels of formaldehyde.

The Gaskamps sued Fleetwood and Georgia Pacific, the manufacturer of the particle board contained in the home, both individually and as next friends of their children, putting forward several claims, including strict liability, negligence, fraud, and misrepresentation. Fleetwood and Georgia Pacific filed a motion to compel arbitration on all claims, and the trial court granted the motion. The Fifth Circuit held that the children, who did not sign the contract, were not bound by the arbitration clause. However, the court rejected the adults' claim that the formation of the contract was procedurally unconscionable, despite the rushed conditions of signing and the plaintiffs' comparative lack of sophistication. Thus, the court affirmed the trial court's order compelling arbitration of the Gaskamp parents' claims.

#### D. Services

Sixty-three-year-old Melva Parsley had a limited education and no experience in contracting with exterminators.<sup>32</sup> She entered into a contract with Terminix to protect her property from subterranean termites in 1992. The back of the contract provided: "The Purchaser and Terminix agree that any controversy or claim between them arising out of or relating to this agreement shall be settled exclusively by arbitration."<sup>33</sup> The clause also contained a limitation-of-remedies provision. Terminix employees inspected the property and noted that the family's water well was within five feet of the foundation. The company applied pesticide three times over a period of one year. The pesticides allegedly contaminated the well, and as a result, the Parsleys—Melva and her daughter Geneva—ingested chemicals on a daily basis. Melva was diagnosed with cancer and died in 1995, and Geneva sustained permanent injuries.

Geneva sued Terminix, both individually and as executor of her mother's estate. The suit included claims for personal injury and wrongful death, breach of express and implied warranties, and product liability. Terminix moved to dismiss or to stay proceedings pending arbitration. The court concluded that the agreement to arbitrate was not inherently unfair or unreasonable. The clause was printed in "legible" font on the bottom of the back of the form, and "Melva Parsley should have known she was agreeing that all claims arising from or relating to the contract would be submitted to arbitration."<sup>34</sup> Her age and lack of sophistication were immaterial. The court concluded further that the language of the arbitration clause covered the Parsleys' claims because the claims related to Terminix's performance of its contract. And, although Geneva was not a party to the contract, the court concluded that, as a third-party beneficiary of the contract, she was also subject to the arbitration clause.

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32. The account of the facts of this case comes from *Parsley v. Terminix International Co.*, No. C-3-97-394, 1998 U.S. Dist. LEXIS 22891 (S.D. Ohio Sept. 15, 1998).

33. *Id.* at \*3.

34. *Id.* at \*15.

The court rejected the Parsleys' argument that the arbitration clause was invalid because its limitation-of-remedies provision violated Ohio law. In other cases, courts had held that a provision in an arbitration clause limiting damages to less than that allowed under Ohio's financial responsibility law would make the contract unconscionable. However, since a similar limitation-of-liability clause was included elsewhere in the agreement, the provision included within the arbitration clause was determined to be a mere reiteration. Its unconscionability was therefore a matter for an arbitrator to decide. Thus, the court held that all the claims were subject to arbitration.<sup>35</sup>

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In these cases, the general policy in favor of arbitration often trumps concerns for the injured plaintiff's rights. It does not matter that the arbitration clause is found in an adhesion contract, nor that the plaintiff did not understand the meaning of the clause. It does not matter that the dispute to be arbitrated did not exist, and was probably not even imagined, at the time the contract was signed, nor that the plaintiff is old or unsophisticated or was acting under exigent circumstances. Rather, arbitration is presumed to be a fair and efficient means of settling disputes. In deference to this presumption, courts consider the contract to be a genuine bargain, and the arbitration provisions are held to be neither procedurally nor substantively unconscionable. Further, the arbitrator is presumed to be both competent and unbiased, so that she can be assigned the job of considering the enforceability of the contract.

Other courts dealing with functionally identical fact patterns have found arbitration clauses purporting to cover personal injury claims unenforceable.<sup>36</sup> But courts with reservations about arbitration of personal injury claims are not allowed a direct attack. The FAA's presumption in favor of arbitration precludes these courts from basing decisions on concerns about personal injury

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35. For other cases enforcing arbitration provisions in service contracts, see *Trimper v. Terminix Int'l Co.*, 82 F. Supp. 2d 1, 4-5 (N.D.N.Y. 2000) (holding that the plaintiff's claim for personal injuries stemming from improper pesticide application was covered by the arbitration clause and that the clause bound the signer's entire family); *Troshak v. Terminix Int'l Co.*, No. 98-1727, 1998 U.S. Dist. LEXIS 9890, at \*2-3 (E.D. Pa. July 2, 1998) (holding that a personal injury claim based on the improper application of pesticides was covered by the arbitration clause, but that the claim of a plaintiff minor child was not covered); *Sears Authorized Termite & Pest Control, Inc. v. Sullivan*, 816 So. 2d 603, 606 (Fla. 2002) (holding that the plaintiff's claim that she was bitten by spiders defendant negligently failed to eradicate was covered by the arbitration clause); *Terminix Int'l Co. v. Ponzio*, 693 So. 2d 104, 108 (Fla. Dist. Ct. App. 1997) (enforcing arbitration of a claim of personal injury resulting from a failure to remove spiders).

36. See, e.g., *Broemmer v. Abortion Servs. of Phoenix, Ltd.*, 840 P.2d 1013 (Ariz. 1992) (invalidating an arbitration provision in a medical clinic's admittance form because of the patient's subjective lack of understanding); *Boone v. Etkin*, 771 So. 2d 559 (Fla. Dist. Ct. App. 2000) (invalidating an arbitration provision in an employment agreement because it did not "contemplate the existence and arbitration of future tort claims for personal injuries"); *Dennis v. CMH Mfg., Inc.*, 773 So. 2d 818 (La. Ct. App. 2000) (invalidating an arbitration provision in a contract for the purchase of a mobile home because the plaintiffs did not understand that the provision included personal injury claims); *Carll v. Terminix Int'l Co.*, 793 A.2d 921 (Pa. Super. Ct. 2002) (invalidating an arbitration provision in an extermination contract because the provision denied the arbitrator the power to award damages for personal injury and was therefore unconscionable).



arbitration generally. Accordingly, courts use the tools available to reach their desired outcomes. They rule on issues that are supposed to be heard by the arbitrator,<sup>37</sup> ignore the FAA,<sup>38</sup> or hold the contract at issue to be intrastate (and therefore outside the reach of the FAA) and apply more protective state law.<sup>39</sup> Alternatively, they construe the arbitration clause at issue narrowly, sometimes to the point of straining credulity.<sup>40</sup> Other courts liberally apply state-law contract defenses to find clauses unconscionable<sup>41</sup> or grasp at the plaintiff's illiteracy to find lack of consent.<sup>42</sup> Failing that, courts protect spouses and children who have not actually signed the contract containing the arbitration clause.<sup>43</sup> In doing so, they often render opinions that are technically incorrect.<sup>44</sup>

The task for the legal community in the development of the law of personal injury arbitration should be to amend the law in such a way that would allow the courts to achieve their equitable objectives in a less dubious manner. If that goal is to be achieved, the traditional values of the law that the current state of personal injury arbitration has placed in jeopardy must first be identified.

### III

#### PERSONAL INJURY ARBITRATION AND THE VALUES OF THE LEGAL SYSTEM

The Supreme Court's pronouncement of a general policy in favor of arbitration leaves little flexibility for lawmakers and judges. Freed from such a Procrustean bed, courts and legislatures could narrate the balancing of values inherent in personal injury arbitration. In doing so, they would be able to consider the changes in procedural and remedial law made possible by arbitration, along with the lapses in due process and public accountability that these changes create. Courts could also face the fundamental policy tensions within

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37. *See, e.g., All-Star Homes, Inc. v. Waters*, 711 So. 2d 924 (Ala. 1997) (denying a motion to compel arbitration when a consumer alleged fraud regarding the interest rate he was charged).

38. *See, e.g., Carll*, 793 A.2d at 921 (denying a motion to compel arbitration without citing the FAA).

39. *See, e.g., Timms v. Greene*, 427 S.E.2d 642, 644 (S.C. 1993) (holding state law applicable despite the affidavit of a nursing home administrator stating that the employer was part of a Delaware Limited Partnership, marketed its services to persons residing outside the state, hired employees from outside the state, purchased a majority of its goods outside the state, and was paid in part by Medicare).

40. *See, e.g., Dennis*, 773 So. 2d at 820-21 (holding that the plaintiffs' claim that a mobile home air conditioner was defective and caused conditions that injured them was not covered by a clause requiring arbitration of "any and all claims for liability, damages or expenses arising out of or in connection with the home, the contract, or any warranties, representations, or agreements relating thereto").

41. *See, e.g., Sosa v. Paulos*, 924 P.2d 357, 364-65 (Utah 1996) (holding that a cost-shifting provision plus the circumstances of signing made a contract unconscionable unless the patient was given a copy of the agreement within the contractual revocation period).

42. *See In re Turner Bros. Trucking Co.*, 8 S.W.3d 370, 376 (Tex. App. 1999) (invalidating an arbitration clause when the claimant was functionally illiterate and did not have the agreement explained to him).

43. *See, e.g., Fleetwood Enters. v. Gaskamp*, 280 F.3d 1069, 1073-77 (5th Cir. 2002) (holding that children are not bound by an arbitration provision signed by their parents).

44. For an example of one commentator's frustration, see 2 IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW* § 20.1.1.1 (Supp. 1999) ("Alabama never gives up! Since 1989, the Alabama court has been dodging the FAA on a major scale . . .").

contract law, and between contract law and tort law, that arise when a predispute arbitration clause in an adhesion contract compels arbitration of common law personal injury claims.

## A. Procedural Values

### 1. Threats to Procedural Protections in Personal Injury Arbitration

The problem is not that arbitration is always inherently unfair but that it can easily be made so.<sup>45</sup> Arbitration is a creature of contract, so the party drafting a contract can create the procedural rules that will govern arbitrations arising under that contract. These rules can eliminate or severely limit basic procedural rights, including affordable access to the dispute resolution forum,<sup>46</sup> discovery,<sup>47</sup> class action,<sup>48</sup> live hearings and cross-examination of witnesses,<sup>49</sup> the use

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45. For a fuller critique of the ways in which arbitration can deprive parties of substantive and procedural rights, see Schwartz, *supra* note 3, at 36-37 (listing procedural shortcomings); Elizabeth G. Thornburg, *Fast, Cheap, and Out of Control: Lessons from the ICANN Dispute Resolution Process*, 6 J. SMALL & EMERGING BUS. L. 191, 213-24 (2002) (discussing procedural flaws in domain-name arbitration); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 719-25 (1999) (stating that arbitrators often do not apply the law).

46. Private adjudicators can charge higher initial filing fees than would the corresponding court. Best practices within the dispute resolution community indicate that arbitration services in consumer cases should be available at a "reasonable cost to Consumers based on the circumstances of the dispute, including, among other things, the size and nature of the claim, the nature of goods or services provided, and the ability of the Consumer to pay." AM. ARBITRATION ASS'N, CONSUMER DUE PROCESS PROTOCOL: STATEMENT OF PRINCIPLES OF THE NATIONAL CONSUMER DISPUTES ADVISORY COMMITTEE (Apr. 17, 1998) [hereinafter CONSUMER PROTOCOL], available at [http://www.adr.org/upload/livesite/education/education/consumer\\_protocol.html](http://www.adr.org/upload/livesite/education/education/consumer_protocol.html). In a private system, however, the drafter of an arbitration provision need not follow best practices.

47. Private arbitration systems often eliminate or limit discovery. See Schwartz, *supra* note 3, at 60-61 (discussing the reasons that limited discovery is favorable to corporate defendants). When a private dispute resolution system limits discovery, it limits a device that otherwise serves to equalize the parties' relative positions within the dispute. "To the extent that the private system's inquiry is less thorough, the private system permits the underlying power of the stronger party to persist undeflected." Geoffrey C. Hazard, Jr. & Paul D. Scott, *The Public Nature of Private Adjudication*, 6 YALE L. & POL'Y REV. 42, 58 (1988); see also Haagen, *supra* note 2, at 1053 ("[T]he advantages associated with arbitration come at a potentially substantial cost. Where speed is increased and cost lowered, much of the change is the result of proceedings that allow for less discovery. More restrictive discovery may leave a plaintiff with a meritorious claim unable to prove it."). The Supreme Court, however, has rejected general challenges to arbitration for reasons involving insufficient discovery, at least in the securities arbitration context. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991).

48. See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, *passim* (2000).

49. Arbitration rules are part of the contract between the parties, so the drafting party can design the procedural components as it likes. For example, the contract can eliminate live testimony, in-person hearings, and cross-examination of witnesses. It can limit the number or type of expert witnesses. It can withhold from the arbitrator the power to compel the attendance of unwilling witnesses. It can shift the burden of proof. And it can impose a time limit on the presentation of evidence. See Alderman, *supra* note 2, at 1253 n.65. Professor Richard Reuben has argued that procedural due process protections should apply in the arbitration context, as they do in the courts. See Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949 (2000). However, courts have not yet found in private arbitration the state action necessary to trigger the Due Process Clause. See, e.g., *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1202 (9th Cir. 1998). A truly slanted or patently inadequate set of procedures might

of unbiased decisionmakers,<sup>50</sup> process transparency,<sup>51</sup> and reasoned, written opinions.<sup>52</sup> Furthermore, despite the speed of arbitration systems on paper, they can actually be more time-consuming than litigation.<sup>53</sup>

The possible procedural inadequacies of arbitration are even more problematic in personal injury claims than in small consumer claims. The size of the claim will often make it ineligible for cheaper consumer-claim procedures, requiring large filing and administrative fees, as well as significant costs for the one to three arbitrators, who charge for each day of the hearing. Personal injury claims are more likely to involve a significant information imbalance, so a lack of discovery may very well make it impossible for a complainant to prove the merits of her case. The complexity of the factual disputes often involved in personal injury claims means that the fact-finding process also suffers under stripped-down arbitral processes. Without live testimony and cross-examination, the arbitrator would be forced to make decisions based on an inadequate evidentiary record. Substituting an arbitrator for a jury as fact finder is also more problematic in the context of personal injury claims, in which legal standards are often concerned with subjective notions such as what behavior is “reasonable.” All of these circumstances make it such that outcomes in personal injury arbitration are particularly likely to be skewed by shortcuts in the process.<sup>54</sup>

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lead to a finding that an arbitration clause is unconscionable. However, arbitrations involving only the exchange of documents and e-mails are not uncommon. *See, e.g.*, NAT’L ARBITRATION FORUM, NATIONAL ARBITRATION FORUM CODE OF CONDUCT, R. 2 (definitions), R. 28 (documentary hearing) and app. C (fees) (July 1, 2003), available at <http://www.arbforum.com/code/index.asp>.

50. Arbitrators may have a direct bias, such as a financial stake in attracting repeat business from the contract drafter, or an indirect bias, such as a background and identity that might tend to make the arbitrator sympathize with one side rather than the other—as might be said of doctors in malpractice arbitration or securities dealers in securities arbitration. *See* Reuben, *supra* note 49, at 1057-59. The Supreme Court has rejected the claim that arbitrators with a background identified with one side will be biased. *See Gilmer*, 500 U.S. at 30-31. For an example of a specific arbitration system rejected for bias, see *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938-39 (4th Cir. 1999).

51. *See* Sternlight, *supra* note 2, at 686 (noting the typical arbitration requirement of privacy). When the process leading to a decision is shrouded in secrecy, litigants are less likely to believe that their claims have been fairly and impartially considered. In addition to the litigants’ interest in disputes, the public has an interest in the fairness of the process, the subjects under dispute, and the outcome of those disputes. Arbitration also removes from the courts the role of developing substantive law that can guide citizens in their primary behavior and bind the decisions of lower courts.

52. *Cf.* Reuben, *supra* note 49, at 1082-85 (explaining that written opinions, while not required by the FAA, make the process more democratic, enhance the integrity and legitimacy of the process, provide rationality and transparency in an otherwise arbitrary process, perform a persuasive and educational function, and can coalesce into a collective arbitral wisdom).

53. *See, e.g.*, *Engalla v. Permanente Med. Group, Inc.*, 938 P.2d 903, 912-13 (Cal. 1997) (noting that in this case an arbitrator was selected 144 days after service of the claim and only one day before the plaintiffs’ decedent died). A survey of Kaiser arbitrations between 1984 and 1986 showed that, on average, an arbitrator was appointed to begin the arbitration process in 674 days, almost two years after a patient’s demand for arbitration. The written agreement provided that the neutral arbitrator would be appointed within 60 days, but only one percent of cases met that target. The average time to a hearing was 863 days. *Id.*

54. Arbitration could be made more litigation-like, incorporating the procedural protections characteristic of court process. However, this might make arbitration less appealing to the companies with

Procedural rules can also provide the benefits of participation, dignity, and empowerment for the parties, particularly for the claimant. Studies have shown that tort litigants, most of whom are bringing personal injury claims, care very much about how decisions are made and not just about the outcomes reached.<sup>55</sup> Certain kinds of arbitration systems could deprive claimants of these process-related benefits. As Professor Shuman has noted,

tort litigation may be important to restore injured plaintiffs not only because the outcome vindicates the plaintiff, but also because the process itself may be therapeutic. Tort litigation provides the plaintiff an opportunity to tell an important story in a culturally meaningful context which manifests that society values the litigant.<sup>56</sup>

Arbitration can be structured so that the only “hearing” consists of the arbitrator reading written submissions from the parties. Or it can be a “telephone hearing” in which a conference call substitutes for a trial, and there is no cross-examination of adverse witnesses. There might also be no face-to-face encounter between the antagonists.<sup>57</sup> These modifications of live-hearing procedures and this lack of confrontation can deprive plaintiffs of the chance to “tell their story,” an important part of a claimant’s feeling that she has been given a meaningful hearing.

## 2. Remedial Limits and Personal Injury Arbitration

From the standpoint of available remedies, a contract calling for arbitration can alter otherwise applicable law. Regulated industries, by using well-drafted arbitration clauses, can in effect deregulate themselves by compelling arbitration under contractual rules changing governing standards or disallowing the usual legal remedies.<sup>58</sup> The same is true of insulation from common law liability. In effect, “[v]ast areas of the law are privatizable . . . through arbitration.”<sup>59</sup> This is often accomplished by limiting or eliminating the normal civil remedy.

The exterminator contract at issue in *Carll v. Terminix International Co.*<sup>60</sup> provides a good example. Ordinarily, a person injured by the negligence of

the power to impose it. In the medical malpractice setting, for example, it has been suggested that “to the extent that arbitration agreements must make significant concessions to prospective patient-plaintiffs . . . to be acceptable to courts, they may lose their appeal to providers.” James A. Henderson, Jr., *Agreements Changing the Forum for Resolving Malpractice Claims*, 49 LAW & CONTEMP. PROBS. 243, 248 (Spring 1986).

55. See generally E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants’ Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC’Y REV. 953, 980-91 (1990) (comparing litigants’ experiences in trials versus arbitration).

56. Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, 43 U. KAN. L. REV. 39, 64 (1994).

57. Modern courts tend to hold that the FAA does not require an oral hearing. See, e.g., *FDIC v. Air Fla. Sys.*, 822 F.2d 833 (9th Cir. 1987) (paper hearing adequate); *Hart v. Orion Ins. Co.*, 453 F.2d 1358, 1361 (10th Cir. 1971) (upholding denial of request for evidentiary hearing). See generally Elizabeth G. Thornberg, *Going Private: Technology, Due Process, and Internet Dispute Resolution*, 34 U.C. DAVIS L. REV. 151, 206 (2000) (discussing the rules of consumer arbitration providers).

58. Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-dispute Mandatory Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069, 1073 (1998).

59. Ware, *supra* note 45, at 704.

60. 793 A.2d 921 (Pa. Super. Ct. 2002).

another would be entitled to recover all damages proximately caused by the negligent act, including medical expenses, lost income, lost earning capacity, and compensation for pain and suffering.<sup>61</sup> The Terminix contract at issue in *Carll*, however, prohibited the arbitrator from awarding such damages even if the exterminator was at fault. The contract provided:

[T]he arbitrator shall not have the power or authority to[] hold Terminix responsible for (i) the repair or replacement of any damage to the identified property, (ii) loss of anticipated rents and/or profits, (iii) direct, indirect, special, incidental, consequential, exemplary or punitive damages, or (iv) damages or penalties relating to or arising out of any claim alleging any deceptive trade practice.<sup>62</sup>

The court noted that in essence the provision created a situation in which “notwithstanding any claim of negligence by Terminix, its sole responsibility [would be] to ‘re-treat’ the property.”<sup>63</sup> Thus, by contractual provision, the contract drafter sought to relieve itself from any meaningful liability for breach of contract, negligence, or violations of consumer protection statutes. Moreover, if the FAA is followed, an arbitrator rather than a judge is allowed to determine the enforceability of these types of remedial limits.<sup>64</sup> Arbitrators might be more likely to limit available remedies in accordance with the parties’ contract because an arbitrator’s mandate is governed by the terms of that contract. Arbitrators might also fail to recognize that certain laws are mandatory and may not be varied by contract, a scenario much less likely in a court of law.<sup>65</sup>

The impact of a limitation-of-remedies clause will likely be much more serious in a personal injury case than in a small consumer warranty claim. In a typical consumer contract claim, the contract drafter is probably trying to disclaim only consequential damages (“Your defective program crashed my computer,” or “I lost a day’s wages dealing with you people,” or “Your widget caught on fire and shorted out my electrical system”) or special statutory penal-

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61. DAN B. DOBBS & PAUL T. HAYDEN, *TORTS AND COMPENSATION* 775 (4th ed. 2001).

62. *Carll*, 793 A.2d at 923.

63. *Id.* at 923-24. Under the Uniform Commercial Code, such a clause would be unconscionable as a matter of law. U.C.C. § 2-719 (1998). Thus, if Terminix were a seller of goods, a court would likely not enforce it. Even in a case involving service contracts, many courts would likely find such a limitation to be unconscionable.

64. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04 (1967); Alan Scott Rau, *The Arbitrability Question Itself*, 10 AM. REV. INT’L ARB. 287, 331-47 (1999) (discussing separability and the allocation of power between courts and arbitrators); see also 2 MACNEIL ET AL., *supra* note 44, §§ 19.1.2, 20.1.1.1. (discussing *Prima Paint* and the separability doctrine); Jeffrey W. Stempel, *A Better Approach to Arbitrability*, 65 TUL. L. REV. 1377, 1390-92 (1991) (discussing the *Prima Paint* problem). But see *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943-45 (1995) (holding that a court rather than an arbitrator should determine whether the parties have agreed to arbitration). Courts are currently deciding a number of issues that should be left for the arbitrator, either misunderstanding or refusing to apply *Prima Paint*. 2 MACNEIL ET AL., *supra* note 44, §§ 15.3.3.1, 15.3.3.3.

65. Metzloff, *supra* note 10, at 205 (“[A]rbitrators are not subject to the same level of appellate review as judges who are deciding cases and, thus, may have greater flexibility to ignore specific substantive law requirements.”). In addition, arbitrators need not be lawyers and may be unaware of legal requirements outside the bounds of contract terms. Empirical studies have long demonstrated that arbitrators often do not apply the applicable law. See, e.g., Heinrich Kronstein, *Arbitration Is Power*, 38 N.Y.U. L. REV. 661, 669-79 (1963) (examining arbitrators’ application of their own “law”); Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 866-67 (1961) (noting that arbitrators apply their own rights and norms for each particular dispute).

ties for deceptive trade practices. In a personal injury claim, a limitation-of-remedies provision such as the one drafted by Terminix eliminates virtually all of the normal tort remedies: medical expenses, past and future pain and suffering, lost income, lost earning capacity, damage to property, and punitive damages. While the contract plaintiff would still get her “benefit-of-the-bargain” damages, the tort plaintiff would get almost nothing for her potentially serious injuries. The ability to assign to an arbitrator the contractual duty to refuse to award tort damages is thus even more problematic than the same kinds of damage limitations in contract-based cases.

### 3. Lack of Meaningful Review

A further problem is that the FAA largely insulates procedural changes and limitations on remedies from judicial review. Under the separability doctrine, challenges to the enforceability of such provisions are to be heard by the arbitrator, not by a court.<sup>66</sup> After the arbitrator has reached a decision, the strict limits on judicial review of the award also mean there will be no way for a court to overrule an arbitrator who has enforced unconscionable provisions or who has ignored otherwise applicable law.<sup>67</sup> Errors of law are not grounds for vacating the award.<sup>68</sup> Only by showing “manifest disregard” of the law—that the arbitrator knew the law and deliberately chose not to apply it—will legal error serve as the basis for vacating an arbitral award.<sup>69</sup> In a system in which no transcript of the proceedings is kept and awards are not explained, it will be a highly unusual case in which manifest disregard can be proven. Similarly, the procedural shortcomings that can particularly affect personal injury claims, from process flaws to remedial limits, will not be correctable on appeal.

Contract drafters, however, have made it easier to get review if the arbitrator invalidates remedial limits and awards normal tort damages. The limits on remedy are said to be limits on the authority of the arbitrator, and exceeding arbitral authority is one of the few grounds for which the FAA provides appellate review.<sup>70</sup> If, then, an arbitrator were to award normal personal injury damages in the face of the Terminix clause, Terminix could secure judicial review of the decision by arguing that the arbitrator had exceeded her authority.

In the commercial setting, in which the parties have equal power and opportunity to bargain over all the terms of the arbitration, and in which the dispute centers on the parties’ contractual obligations, this might be justifiable under

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66. See *supra* note 64 (citing sources).

67. See Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L.J. 1279, 1281 (2000) (“[E]xisting rules governing judicial review of arbitral decisions are not only inadequate to ensure that mandatory rules are applied, but they actually encourage arbitrators to ignore such rules.”).

68. See Ware, *supra* note 45, at 723.

69. *Id.* at 724. See generally Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 774-78 (1996) (discussing the requirements for a court to find “manifest disregard” of the law).

70. 9 U.S.C. § 10(a)(4) (2000).

the rubric of freedom of contract.<sup>71</sup> In the context of contracts of adhesion presented to powerless patients, employees, and consumers who might be injured, however, there is no real issue of freedom involved, and there are no safeguards to prevent the creation and enforcement of unfair private adjudication systems.<sup>72</sup>

## B. Contract Values

Contract theory is based in part on the concept that people should be legally bound by the terms of the bargains they have made.<sup>73</sup> Some economists claim this approach leads to fair and efficient outcomes.<sup>74</sup> Parties are said to be the best judges of their own best interests, so enforcing contracts results in the best use of resources.<sup>75</sup> This model assumes that decisionmakers calculate the expected values of various courses of action and choose the one that maximizes their expected utility. To make this calculation properly, contracting parties would need to have the ability to accurately compute probability estimates and dollar costs for uncertain future events and to recognize their own attitudes toward risk.<sup>76</sup>

In the context of arbitration clauses in consumer, employee, or patient<sup>77</sup> contracts that purport to cover personal injury claims, it is extremely unlikely that potential plaintiffs “know, or can know, all the feasible alternative actions open to them, that they know, or can easily discover, all relevant prices, and that they know their wants and desires.”<sup>78</sup> An agreement to arbitrate is not part of the core transaction involved in a contract for medical care, employment, or the purchase of a good or service, and is therefore unlikely to get much attention from the nondrafting party.<sup>79</sup> At the predispute stage, when no one has been injured, the cost of assembling and processing the information required to fully assess the consequences of an arbitration clause seems far greater than the

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71. See Speidel, *supra* note 58, at 1072-83.

72. See generally Schwartz, *supra* note 3, at 58-59 (discussing lack of consent and the ability to privatize the law).

73. Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 211 (1995).

74. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 79-125 (3d ed. 1986); Lewis A. Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 U. COLO. L. REV. 683 (1986) (discussing the law-and-economics analysis of contract issues).

75. Eisenberg, *supra* note 73, at 211-12.

76. *Id.* at 213.

77. For a discussion of the implications of treating health care claimants as patients rather than as consumers, see Wendy K. Mariner, *Standards of Care and Standard Form Contracts: Distinguishing Patient Rights and Consumer Rights in Managed Care*, 15 J. CONTEMP. HEALTH L. & POL'Y 1 (1998).

78. Thomas S. Ulen, *Cognitive Imperfections and the Economic Analysis of Law*, 12 HAMLINE L. REV. 385, 386 (1989).

79. See Henderson, *supra* note 10, at 987 (“The arbitration provision, viewed from the perspective of the patient, is indeed subsidiary to the primary exchange of medical services for an undertaking of payment.”). The drafting party, on the other hand, has a great deal of information about these repetitive transactions and a great deal of incentive to prepare form contracts that are optimal from the drafter’s perspective. Eisenberg, *supra* note 73, at 243. The cost-benefit analysis is entirely different from this perspective.

potential benefits of this information.<sup>80</sup> Lay people would likely need legal advice to make an informed decision—a costly investment before a cause of action has arisen.<sup>81</sup> It is not surprising, then, that individuals do not undertake this type of investigation about tangential provisions in form contracts. Yet without that information, the rational-choice justification for enforcing an arbitration clause fails.<sup>82</sup>

Consider Edgar and Beatrice, a couple deciding whether to enter into a contract with MIB, Inc. to rid their home of bugs. They are likely to be focusing on the price and on the promised performance. They do not give much attention to the arbitration clause printed in small font on the back of the contract. Assuming for the purposes of argument that they could foresee performance-based disputes (for example, over whether the bugs actually are killed), it is another matter entirely to think that they might expect to suffer personal injuries from misapplication of toxic chemicals. Moreover, this is entirely rational for Edgar and Beatrice at the contract-formation stage, and their inattention will be anticipated and exploited by MIB.

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80. Schwartz, *supra* note 3, at 57, 108. Even if the consumer is somewhat aware of the possibility of future personal injuries, she will not give such worries sufficient weight because of distortions in human cognition. Studies have shown that people systematically give too little weight to future benefits and costs as compared to present ones. This is referred to as “faulty telescopic faculty.” Eisenberg, *supra* note 73, at 222.

81. New research on the literacy of the U.S. adult population indicates that even consumers who might take the time and trouble to “read” their contracts are unlikely to understand them. See Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL’Y REV. 233, 261-62 (2002). Professor Richard Shell also suggests that many individuals defer to the authoritative quality of printed forms, especially when doing so has no immediate economic consequences. G. Richard Shell, *Fair Play, Consent, and Securities Arbitration: A Comment on Speidel*, 62 BROOK. L. REV. 1365, 1368-69 (1996). Even if an arbitration clause is drafted clearly, a contracting party would need to do further research to learn the costs of the proposed arbitration, the procedures that would be used, the nature and biases of relevant arbitrators, and the possibility of review of an unfavorable outcome. The party would then need to evaluate those qualities of arbitration alongside the same attributes of litigation to meaningfully compare the costs and benefits of the two systems.

82. See P.S. Atiyah, *Medical Malpractice and the Contract/Tort Boundary*, 49 LAW & CONTEMP. PROBS. 287, 294 (Spring 1986) (pointing out that claims for injuries caused by negligence “are precisely the unforeseen and accidental by-products of a contractual relationship [that] cannot be accommodated within contractual theory”). The Supreme Court’s insistence that each arbitration clause be considered in isolation exacerbates the problem of arbitration clauses in standard contracts for mass-marketed products and services. See, e.g., *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90-91 (2000) (requiring the plaintiff to prove the cost of her particular arbitration procedure); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 483-84 (1989) (holding the consumer failed to produce a sufficient factual showing to support a defense of overwhelming economic power). See generally Sternlight, *supra* note 2, at 662 (“[T]he Court will no longer rule out whole categories of cases on the assumption that the parties lacked equal bargaining power.”). The case-specific nature of challenges to arbitration deprives lower courts of the ability to consider any type of arbitration in the aggregate. Thus, there can be no conversation about the externalities created when large groups of people waive their right to file suit. See Schwartz, *supra* note 3, at 114. The ability of an industry to deregulate itself through arbitration clauses is more powerful in the aggregate than in individual cases. *Id.* at 108. “Standard contracts . . . could thus become effective instruments in the hands of powerful industrial and commercial overlords[,] enabling them to impose a new feudal order of their own making upon a vast host of vassals.” Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 640 (1943) (citation omitted).



If instead Beatrice were to apply for a job with MIB, she would probably be thinking about her proposed salary and job responsibilities, and perhaps even about her rights if she were to be terminated, but not about the possibility that a co-worker might assault or injure her on the job. In neither situation are Edgar and Beatrice likely to consider the full implications of the difference between litigation and arbitration should disaster occur.

The right-to-bargain concept is also limited by another principle of contract theory that is concerned with equitable protection of the parties' welfare. "[M]odern contract law is . . . tempered both within and without its formal structure by principles . . . that focus on fairness and the interdependence of parties rather than on parties' actual agreements."<sup>83</sup> The Supreme Court's arbitration jurisprudence, with its emphasis on formal agreement to contract terms, underplays the fairness side of contract law. When the parties to a contract have disparate bargaining power, disparate knowledge, and disparate interests, both the moral and economic bases of contracting demand attention to more than the mere outward trappings of contract.<sup>84</sup>

Collectively, the costs of acquiring and processing information lead to significant information failures, which in turn lead to inequitable outcomes. An accurate determination of the intentions of the contracting parties is especially important when an unforeseen personal injury claim is at stake. The decision-maker should be allowed to determine whether a power imbalance, coupled with informational and cognitive limits, outweighs the fact that the consumer signed the contract. Unfortunately, the Supreme Court has interpreted the FAA to require courts to presume that the parties intended to arbitrate their claims by imposing on any issue of consent a requirement that the parties' intentions be "generously construed as to issues of arbitrability."<sup>85</sup> Lower courts are thereby forced to assume that the party consented and that ambiguous clauses require arbitration of the dispute in question—even disputes for personal injuries arising unexpectedly out of contractual relationships.

Further, the Supreme Court has assigned to the arbitrator the task of deciding whether an arbitration clause is enforceable. The arbitrator (who is often selected by the more powerful, drafting party) is thus allowed to rule on challenges to the fairness of her being assigned a dispute, and to her own authority. Even under the presumptions the Supreme Court has imposed, common sense leads to the conclusion that a court would be more likely to consider this issue impartially.

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83. Robert A. Hillman, *The Crisis in Modern Contract Theory*, 67 TEX. L. REV. 103, 104 (1988); see also *id.* at 127 ("[I]ndividualist and communitarian visions coexist in modern contract law."); Atiyah, *supra* note 82, at 290 ("[T]raditionally, contract law was thought to be independent of distributive justice; increasingly it has come to be argued that contract law is . . . distributive in its implications . . .").

84. Schwartz, *supra* note 3, at 55-56.

85. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). Courts are also forbidden from considering whether entire categories of arbitration clauses are unconscionable. Sternlight, *supra* note 2, at 662. And they are required to assume that arbitration is a fair and desirable way to resolve disputes, with particular cases again being treated as the exception.

In the world of contract law, “freedom of contract and fairness principles are *all* very important.”<sup>86</sup> The general policy in favor of arbitration has deprived courts of the opportunity to grapple with the interaction between individualist and communitarian principles of contract law. FAA preemption case law has also deprived state courts and legislatures the ability to frame predictable prophylactic rules against certain types of arbitration, including that of personal injury claims, based on their assessment of competing values.<sup>87</sup> Under such a regime, neither freedom of contract nor the principle of fairness can assume its proper role in contract theory.

### C. Tort Law Values

Modern tort law performs multiple functions,<sup>88</sup> and it has achieved its current balance through centuries of development. These functions include achieving corrective justice in individual cases, promoting optimal deterrence for would-be tortfeasors,<sup>89</sup> and narrating the values of society at large.<sup>90</sup> All three, as well as the courts’ ability to shape their relative importance to fit an evolving culture, could be threatened by mandatory arbitration of personal injury claims.

Corrective justice focuses on the relationship between the parties themselves and is based on the idea that “correction of the wrong may help to restore the moral balance” between the wrongdoer and the victim.<sup>91</sup> The injurer thus owes compensation to the person injured, and this compensation is generally thought of as an attempt to restore the victim to her position prior to injury.<sup>92</sup> If an arbitration system decreases the chances that victims will be adequately compensated, either by erecting procedural barriers or by limiting the available remedies, then it disturbs the corrective justice function of tort law.<sup>93</sup>

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86. Hillman, *supra* note 83, at 133.

87. *See supra* notes 1-8 and accompanying text.

88. *See* KENNETH S. ABRAHAM, *THE FORMS AND FUNCTION OF TORT LAW* 14-19 (1997) (“Although much of modern tort law scholarship has been concerned with analysis of and debate about the proper functions of tort law, they remain contested.”).

89. The tort system actually tries to further efficiency in two ways: by deterring accidents that should be prevented and by efficiently allocating the risks and costs of unpreventable accidents, sometimes referred to as the “spreading aim” of tort law. The latter concerns how the costs of unpreventable accidents should be allocated, as when, for example, one party buys insurance and transfers a risk from itself to an insurance company that can more efficiently bear that risk. *See* Ellen S. Pryor, *The Stories We Tell: Intentional Harm and the Quest for Insurance Funding*, 75 *TEX. L. REV.* 1721, 1740-46 (1997).

90. *See* ABRAHAM, *supra* note 88, at 19; Pryor, *supra* note 89, at 1747-50.

91. ABRAHAM, *supra* note 88, at 14. Tort scholars disagree about the extent to which corrective justice is a distinct basis for tort law and about the content of corrective justice theory. *See* JULES L. COLEMAN, *RISK AND WRONGS* 303-28 (1992); Margaret Jane Radin, *Compensation and Commensurability*, 43 *DUKE L.J.* 56, 60 (1993); Kenneth W. Simons, *Corrective Justice and Liability for Risk-Creation: A Comment*, 38 *UCLA L. REV.* 113, 125-29 (1990).

92. ABRAHAM, *supra* note 88, at 15; Pryor, *supra* note 89, at 1747.

93. There is great debate over the best way to measure a victim’s losses. Some argue for an insurance theory of compensation. *See, e.g.*, Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 *CAL. L. REV.* 773, 793-96 (1995). Others disagree. *See, e.g.*, Ellen Smith Pryor, *The Tort Law Debate, Efficiency, and the*

This is especially problematic in personal injury cases because victims can be faced with devastating and ongoing out-of-pocket losses such as mounting medical bills and lost income and earning capacity, as well as inadequate rehabilitation if an award fails to fund needed treatment.

Tort liability also seeks to prevent future tortious actions by threatening potential defendants with liability if they cause actionable harm.<sup>94</sup> Efficient tort law requires forcing defendants to pay for safety measures up to the point where the cost of those measures exceeds the anticipated cost of accidents.<sup>95</sup> Companies deciding which precautions to adopt must take into account the full cost of the harm they cause, or they will fail to act with sufficient care. Therefore, arbitration clauses that provide slanted processes or limited remedies undermine the efficiency goal of personal injury law. A powerful contracting party can impose inadequate arbitration systems on countless potential plaintiffs. By doing so, it can reduce the anticipated cost of its accidents significantly, and thereby decrease the deterrent effect of tort law.<sup>96</sup>

A decrease in the deterrent effect of the law is especially problematic in the United States, where tort duties are a major component of how social policy is enforced.<sup>97</sup> The United States depends in large part on private lawsuits, including suits seeking compensation for personal injuries, for the enforcement of these policies. Despite this private enforcement mechanism, the goals remain public, and public interest in the enforcement of the law remains.<sup>98</sup> Contracting around these duties, while occasionally allowed, is therefore both suspect and disfavored.<sup>99</sup>

If mandatory arbitration predictably results in the wrongfully injured party's receiving little or no compensation (when the court system would have provided greater compensation), arbitration also undermines efficiency in another

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*Kingdom of the Ill: A Critique of the Insurance Theory of Compensation*, 79 VA. L. REV. 91, 94 (1993) (arguing that insurance theory is "untenable as a primary guide to determining the appropriate compensatory sums in any programmatic setting"); Jane Stapleton, *Tort, Insurance, and Ideology*, 58 MOD. L. REV. 820 (1995) (canvassing theories of insurance and arguing that neither actual insurance nor insurability is relevant to the measure of liability for personal injury claims).

94. See GUILDO CALABRESI, *THE COSTS OF ACCIDENTS* 26-31 (1970); ABRAHAM, *supra* note 88, at 15-16.

95. ABRAHAM, *supra* note 88, at 16.

96. Schwartz, *supra* note 3, at 114; Maureen Dulen, Comment, *Twenty Years Later . . . Contractual Arbitration as Medical Malpractice Tort Reform*, 1992 J. DISP. RESOL. 325, 338.

97. See Patrick Higginbotham, *Foreword*, 49 ALA. L. REV. 1, 4-5 (1997) ("Congress has elected to use the private suit, private attorneys-general as an enforcing mechanism."); cf. Geoffrey C. Hazard, Jr., Remarks at the Conference on the Federal Rules of Civil Procedure (Mar. 1995) ("Civil claims are an integral part of law enforcement in this country."), *quoted in* Edward Cooper, *Discovery Reform Proposals* 18 (Oct. 1996) (unpublished manuscript, on file with author).

98. Schwartz, *supra* note 3, at 114-15.

99. See Thomas C. Galligan Jr., *Contortions Along the Boundary Between Contracts and Torts*, 69 TUL. L. REV. 457, 527 (1994) ("A fear that contractual indemnity may adversely affect the deterrent effect of tort liability causes society to look at such agreements with especially strict scrutiny."). Although courts do occasionally allow exculpatory clauses that prospectively waive tort liability, such clauses are disfavored and are strictly scrutinized. Reuben, *supra* note 49, at 1023. They are even less likely to be enforced when they purport to waive liability for intentional or grossly negligent torts, or torts by an entity that performs a public duty. Schwartz, *supra* note 3, at 112-13.

way: It places the risk of loss on the party with limited ability to take precautions that would avoid the harm. A system that provides inadequate remedies in effect shifts the risk of loss to the patient, the employee, or the consumer. These parties are not the ones who perform the medical procedure, structure the working environment, manufacture the product, or provide the service. They have little or no power to prevent losses, only to bear them. Ineffective arbitration thus shifts the risk of loss to the least effective loss-avoider, undermining once again the deterrent function of tort law.

The tort system also “plays a narrative and declarative role . . . for the culture at large.”<sup>100</sup> The public nature of litigation, and its status as a function of government, is a way in which society enunciates its values, and in which it creates and enforces the rules that govern primary behavior. From the standpoint of the legal system, arbitration can eliminate the ability of courts to perform this declarative function. In personal injury cases, courts hold certain kinds of behavior to be unacceptable violations of duty and others to be reasonable conduct.<sup>101</sup> When these values are incorporated into published opinions, they not only help the individual parties in the case before the court but also create precedent that will apply in future cases and shape future behavior.

The public discussion of tort liability also helps society understand and discuss its rules and values. It can result in a public mandate for change, public awareness of a problem, and greater public understanding of legal doctrines. The secrecy of the arbitration process works the opposite way. Privatized processes allow the parties to keep the matter secret at the option of one of the parties.<sup>102</sup> This can result in the public lacking information about important issues of health and safety and product reliability, rendering inoperative a vehicle through which public concerns can become legally enforceable duties.

The privatization involved in moving personal injury claims to arbitration works another fundamental change in the narrative workings of the tort law system. Arbitration removes claimants’ right to jury trial and displaces the function of the jury.<sup>103</sup> Many personal injury cases involve negligence claims, in which the law’s definition of the defendant’s duty is based on how a reasonable person would act under the same or similar circumstances. The jury decides whether the defendant has complied with this standard and whether her behavior has caused foreseeable harm to the plaintiff. Lay people apply com-

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100. Pryor, *supra* note 89, at 1748.

101. See Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 676 (1986) (“[I]f ADR is extended to resolve difficult issues of constitutional or public law—making use of nonlegal values to resolve important social issues or allowing those the law seeks to regulate to delimit public rights and duties—there is real reason for concern. An oft-forgotten virtue of adjudication is that it ensures the proper resolution and application of private values.”).

102. The party drafting the arbitration clause has the power to provide that the arbitration will be confidential. Indeed, this is one of the primary appeals of arbitration for some parties. See Sternlight, *supra* note 2, at 686.

103. Cf. Elizabeth G. Thornburg, *The Power and the Process: Instructions and the Civil Jury*, 66 FORDHAM L. REV. 1837, 1863-66 (1998) (noting that one function of the jury is to limit the judge’s power).

munity norms of behavior to determine in each case whether the defendant's conduct was acceptable. They also determine in the aggregate what level of care is required under like circumstances. In making decisions about questions such as the reasonableness of behavior, the jury is "engaging in highly contextual moral evaluation."<sup>104</sup> Sending a case to arbitration not only deprives the claimant of a jury trial but also deprives society of the jury's role as enunciator of behavioral norms.<sup>105</sup> By shifting decisionmaking to a privately chosen arbitrator, arbitration reassigns the power for these decisions from judges and juries to private entities.<sup>106</sup> At the extreme, unrestrained enforcement of arbitration clauses could make all tort policy considerations disappear altogether.

#### IV

##### DRAFTING A NEW ENDING TO THE PERSONAL INJURY ARBITRATION STORY

From the standpoints of procedural justice, contract values, and tort-law values, there is reason to be extremely concerned about the expansion of mandatory arbitration into the personal injury arena, and lawmakers need to be allowed to address these concerns. Outside the court system, concern is growing. Dispute-resolution professionals understand that mandatory arbitration of consumer claims, especially those involving personal injury, can be unfair.<sup>107</sup> For example, in 1998 the Commission on Health Care Dispute Resolution<sup>108</sup> adopted recommended principles that would allow binding arbitration of disputes involving patients only when the parties agree to arbitrate *after* the dispute has arisen.<sup>109</sup> The American Arbitration Association has recently announced that it will no longer accept the administration of cases involving individual patients without a post-dispute agreement to arbitrate.<sup>110</sup> The Drafting Subcommittee on Consumer Contract Issues working on the new revision of the Uniform

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104. Robert P. Burns, *The History and Theory of the American Jury*, 83 CAL. L. REV. 1477, 1490 (1995) (reviewing JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY (1994)). Burns suggests that mandatory arbitration might be used to provide a forum that is "more harmonious with other forms of institutionalized power" when juries reach decisions that "diverge from [the moral sensibilities] of an elite possessing political and economic power." *Id.*

105. The use of juries also contributes to the corrective justice function of tort law. See Catherine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2351-52 (1990) (arguing that the structure of tort law adjudication is consistent with the goal of corrective justice).

106. Cf. William Powers, Jr., *Border Wars*, 72 TEX. L. REV. 1209, 1214 (1994) (noting that different legal paradigms assign decisionmaking responsibility to different social institutions, notably private markets, owners of private property, legislatures, courts, and juries). In addition to undermining the narrative function of tort law, arbitration shifts power from the government to private parties, thereby detracting from the constitutionally based right of citizens to democratic self-rule.

107. See, e.g., CONSUMER PROTOCOL, *supra* note 46 ("[T]here are legitimate concerns regarding the fairness of consumer conflict resolution mechanisms required by suppliers.").

108. This was a joint project of the American Arbitration Association, the American Bar Association, and the American Medical Association. *Id.*

109. Comm'n on Health Care Dispute Resolution, *Final Report* 15 (July 27, 1998), available at <http://www.adr.org/upload/livesite/focusArea/Healthcare/healthcare.pdf>.

110. Am. Arbitration Ass'n, *Health Care Policy Statement*, at <http://www.adr.org/index2.1.jsp?JSPssi d=15728> (last visited Feb. 1, 2004).

Arbitration Act directed its reporter to prepare a lengthy comment describing court decisions voiding contracts of adhesion on grounds of unconscionability.<sup>111</sup>

Some state legislatures have tried to impose blanket limitations on agreements to arbitrate personal injury claims. For example, under Texas law, a pre-dispute arbitration clause is not enforceable against personal injury claims unless each party to the claim, on advice of counsel, agrees in writing to arbitrate and the agreement is signed by each party and each party's attorney.<sup>112</sup> Michigan's system of medical malpractice arbitration at one time required: (1) that a patient receiving health care in a hospital be informed, after treatment is complete, that the proposed arbitration agreement is optional; (2) that a patient receiving care from an individual provider be given an informational brochure discussing the arbitration agreement; and (3) that all patients be given sixty days to withdraw their consent to arbitrate.<sup>113</sup> Several states flatly prohibit arbitration of personal injury claims.<sup>114</sup> However, in any case that comes within the constitutional limits of the Commerce Clause,<sup>115</sup> the FAA preempts these state policy choices and mandates enforcement.<sup>116</sup>

What will it take to achieve a better balancing of the values at stake in mandatory arbitration of personal injury claims? Unfortunately, nothing short of an amendment to the Federal Arbitration Act will do the trick.<sup>117</sup> Since the Court has interpreted the FAA to preempt any state law specifically addressing arbitration, has decreed that arbitration is preferred to litigation, and has assigned

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111. Memorandum from the Drafting Subcommittee on Consumer Contract Issues Under the Revised Uniform Arbitration Act (RUAA), to NCCUSL Commissioners 3, *available at* <http://www.law.upenn.edu/bll/ulc/uarba/arbzm.pdf> (last visited Feb. 1, 2004). The Subcommittee noted that the preemptive effect of the FAA limited its options because case law "dramatically limits meaningful choices for drafters addressing adhesion contracts under the UAA." *Id.* at 2.

112. TEX. CIV. PRAC. & REM. CODE § 171.002(a)(3), (c) (Vernon 2004).

113. 1975 Mich. Pub. Acts 140, *repealed by* 1993 Mich. Pub. Acts 78. *See generally* John P. Desmond, Comment, *Michigan's Medical Malpractice Reform Revisited—Tighter Damage Caps and Arbitration Provisions*, 11 T.M. COOLEY L. REV. 159, 173-82 (1994) (discussing Michigan's attempt at medical malpractice reform through arbitration).

114. *See, e.g.*, ARK. CODE ANN. § 16-108-201(b)(2) (Michie 2003) (excluding personal injury or tort matters); GA. CODE ANN. § 9-9-2(c)(10) (2002) (excluding personal bodily injury and wrongful death claims); KAN. STAT. ANN. § 5-401(c)(3) (2002) (excluding tort claims); MONT. CODE ANN. § 27-5-114(2)(a) (2002) (excluding personal injury claims, whether based on contract or tort); S.C. CIV. CODE ANN. §15-48-10(b)(4) (Law. Co-op. 2002) (excluding personal injury claims, whether based on contract or tort).

115. For a discussion of the constitutional implications of the FAA's inclusion of all arbitration provisions in contracts involving commerce, see *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-74, 277 (1995).

116. *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 686-88 (1996); *see* 1 MACNEIL ET AL., *supra* note 44, § 10.10.7.1 (citing New York and Ohio as having two arbitration laws preempted by the FAA); *id.* §10.8.3.3 (listing areas preempted by general federal arbitration law).

117. Many believe such an amendment to be politically unlikely. *See* Mayer, *supra* note 12 (stating that most bills "are deemed to have little chance of passage"). For a discussion of some recent proposals, see Russell D. Feingold, *Mandatory Arbitration: What Process is Due?*, 39 HARV. J. ON LEGIS. 281, 298 (2002) (proposing the prohibition of mandatory binding arbitration in specific contexts in which bargaining power is inherently unequal).

almost every issue of validity to the arbitrator, there is no way to allow for debate or development without Congress changing the law.<sup>118</sup>

One possibility, and probably the least politically difficult, is to amend the FAA to remove personal injury arbitration from its coverage. This would allow courts to address problems specific to personal injury arbitration. Freed from a “preference” for arbitration and armed with the ability to consider the validity of arbitral terms, the courts might discover that the existing contract doctrines of contract formation, interpretation, and unconscionability are effective tools for policing the fairness of arbitration contracts. With the power to consider the enforceability of the specific terms of the contract, the courts could also monitor process shortcuts and limitations on available remedies. Moreover, the precedent created by these courts could guide contracting parties in the drafting and implementation of these agreements, which might in turn limit drafters’ overreaching.<sup>119</sup> An end to federal preemption of the area would also allow the courts to enforce state statutes that limit or prohibit personal injury arbitration.

Courts, however, are by their nature limited to deciding the cases before them on specific facts before them and are thus less able to implement rules that have a broader effect. While they might use case law to create across-the-board rules controlling or prohibiting mandatory arbitration of personal injury claims, such rulemaking would be unusual for a court. Leaving the issue in the hands of the courts also creates the possibility of law that varies widely from state to state. Differences in both case law and statutes would leave the parties uncertain as to whether the arbitration clause in their particular contract is enforceable. It would also allow the better informed drafting parties to use choice-of-law clauses to choose the law of a less protective state.

Using lawsuits to curb arbitral abuses in an ad hoc manner is also inefficient. If claimants seeking to avoid arbitration must mount case-specific challenges to the fairness of the negotiation of their contract, and to the fairness of the terms of their contract, the process of challenging arbitration clauses will be time consuming and expensive. It would require discovery to ascertain the prospective filing and arbitral fees and the exact nature of the process that would be used in each case.<sup>120</sup> It would require discovery to determine whether the prospective arbitrator or arbitral body has direct or indirect biases. It would require

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118. An alternative would be for the Supreme Court to rethink and overrule some of its FAA cases, but since many are recent, this seems unlikely without a significant change in the composition of the Court.

119. *But see* Bailey Kuklin, *On the Knowing Inclusion of Unenforceable Contract and Lease Terms*, 56 U. CIN. L. REV. 845, 845 (1988) (discussing the benefits to drafters of including unenforceable terms).

120. *See, e.g.,* *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 n.6 (2000) (holding the plaintiff’s assertion that the costs of arbitration precluded her from effectively vindicating her federal statutory rights was merely speculative). The arbitration clause in *Randolph* did not identify a specific provider or arbitrator, but the plaintiff had supplied evidence of typical AAA charges. This was said to “provide no basis on which to ascertain the actual costs and fees to which she would be subject in arbitration.” *Id.* Absent specific discovery about the defendant’s plans for arbitration and the costs these would entail, it is hard to imagine how a plaintiff challenging the costs of arbitration would be able to meet this burden.

motions and briefs and a decision by the judge. Fact-intensive challenges such as these would impose substantial costs on plaintiffs, defendants, and the court system. A more prophylactic and predictable approach would be preferable.

A more effective approach to personal injury arbitration will have to come from legislative bodies. Congress and state legislatures could consider a number of options.<sup>121</sup> They might prohibit mandatory, predispute, binding arbitration of certain types of disputes based on concerns that meaningful consent cannot be had, that the type of dispute belongs in a public forum, that jury trials are inextricably interwoven with the law in the area, or that systemic arbitration would prevent the development of needed case law.<sup>122</sup> Personal injury claims fall into this category, especially those arising out of adhesive contractual relationships.

A requirement that the parties choose arbitration only *after* the nature and extent of the dispute have become apparent might function as a proxy for monitoring the fairness of the procedures directly, since the system would have to be designed to be attractive both to claimants and to defending parties.<sup>123</sup> Post-dispute agreements might also help to alleviate the effects of cognitive failures in the contracting process. For example, a person injured during a termite extermination is more likely to assess accurately the comparative costs and benefits of agreeing to a particular arbitral procedure after the injury has occurred. The injured person is also more likely to have an attorney to help provide the information necessary to make that decision.

In addition, legislatures could set minimum standards for arbitral due process for those areas in which arbitration is permitted. These requirements could address, for example, arbitrator qualifications and biases and the expense of filing fees, administrative fees, and arbitrator fees. They could also provide for information-sharing mechanisms; hearing procedures that allow the compelled testimony of witnesses and the availability of cross-examination; reasoned, written decisions; deadlines for disposition; and appeals that provide some protection from erroneous arbitral decisions. This would be a delicate balancing job.

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121. Congress could regulate arbitration clauses that fall within its constitutional power over interstate commerce (as it currently does through the FAA), and state legislation could fill in the gaps for contracts that are purely intrastate. Some states already have such legislation. *See supra* text accompanying notes 113-17.

122. *See supra* Part III; *see also* Kenneth S. Abraham, *The Lawlessness of Arbitration*, 9 CONN. INS. L.J. 355, 366-69 (2002/2003) (arguing that mandatory arbitration should be prohibited where legal standards are developing and binding precedent would be necessary to guide behavior).

123. It should be noted that there is at least some fear that if a truly attractive expedited process for resolving claims existed, it would actually attract a number of claims that are not now asserted in any forum. *See Metzloff, supra* note 10, at 219 (noting recent evidence of the large, currently untapped pool of potential medical malpractice claims); *cf.* THE BETTER BUSINESS BUREAU SYSTEM ET AL., PROTECTING CONSUMERS IN CROSS-BORDER TRANSACTIONS: A COMPREHENSIVE MODEL FOR ALTERNATE DISPUTE RESOLUTION 13 (2000), *available at* <http://www.bbbonline.org/about/press/whitepaper.doc> (discussing on-line dispute resolution mechanisms for e-commerce consumer complaints) ("If one assumes that an online, global consumer dispute resolution mechanism exists, that it meets the requirements for accessibility and visibility, that it is fair, impartial and trusted by consumers[,] and that online merchants have pre-agreed to use such a mechanism, then the Internet eliminates most traditional barriers.").



Too much process, and arbitral tribunals are turned into courts, with the attendant potential for cost and delay but without the systemic checks on error and abuse of discretion. Too little process, and the result is slanted and unfair.

Legislative solutions should also include public accountability. Governments (and the public) should have access to information about the nature and results of private complaints. When information about recurring problems goes from the public domain (courts) to the private (arbitration), enforcement agencies and other advocacy groups lose valuable information needed to monitor and enforce existing laws.<sup>124</sup> “If the general production of . . . information [about the activities of private entities] diminishes significantly, there will of course be much less basis for public critique and regulation—indeed, little basis even for an informed public deference to business self-governance.”<sup>125</sup> Arbitrators perform public functions, and those who rely on arbitration clauses are asking public courts to enforce contract terms and arbitration awards. Public bodies should refuse enforcement (including stays of litigation, enforcement of arbitral awards, and giving preclusive effect to arbitral awards) unless those processes ensure an acceptable level of procedural fairness and disclosure.<sup>126</sup>

In addition, since unregulated private processes also have the power to vary substantive law, legislatures should also insist on certain mandatory laws that cannot be contractually waived.<sup>127</sup> Arbitrators should not be empowered to enforce a limit on remedies that a court would not enforce. When government fora lose control over disputes, they lose a large amount of control over the law. This is particularly true in a country like the United States in which much of the implementation and enforcement of legal norms is left to private litigation.

Courts and legislatures have legitimate reasons to prohibit or control the use of predispute arbitration clauses. Accordingly, FAA jurisprudence should be changed to allow courts to develop a coherent body of law that highlights their deeper reasons for closely examining such clauses rather than merely looking for case-specific overreaching, or protecting only the young and the illiterate. Moreover, a more uniform and proactive solution to the problem of personal injury arbitration will require legislation on the federal and state levels, including amendments to the FAA.

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124. See, e.g., Daniel Eisenberg, *Anatomy of a Recall*, TIME, Sept. 11, 2000, at 28 (describing how litigation regarding Firestone tires became feasible only after a plaintiffs' lawyer secured discovery regarding consumer complaints and other lawsuits, and when a judge allowed the lawyer to share the information with lawyers involved in similar suits).

125. Bryant G. Garth, *Privatization and the New Market for Disputes: A Framework for Analysis and a Preliminary Assessment*, in 12 STUDIES IN LAW, POLICY AND SOCIETY 367, 386 (Susan S. Silbey & Austin Sarat eds., 2002); see also Carrie Menkel-Meadow, *Do the "Haves" Come out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 46-47 (1999) (suggesting data collection to identify patterns of problems).

126. Cf. Metzloff, *supra* note 10, at 225-26 (considering statutory procedural standards for medical malpractice arbitration).

127. See generally Ware, *supra* note 45, at 727-54 (arguing that enforcement of arbitration agreements allows parties to contract out of mandatory rules).

## V

## CONCLUSION

No reforms can take place, at the state or federal level, until the problems of predispute binding arbitration specific to personal injury claims are acknowledged. Just as arbitration is not always bad, it is not always good, and it has the potential to be appalling when it is imposed in one-sided contracts of adhesion. In the context of personal injury arbitration, in which the weaker party often will not have envisioned the possibility of her future injury when signing a contract with an arbitration clause, mandatory arbitration becomes fundamentally unjust. It is unacceptable because it threatens the goals of the underlying procedural and substantive law and often results in inequitable solutions. The time has come to switch from fiction to nonfiction, and to let the legal system recognize and defeat the monster of personal injury arbitration.