

THE CONSENTABILITY OF MANDATORY EMPLOYMENT ARBITRATION CLAUSES

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INTRODUCTION

Binding ex-ante mandatory arbitration clauses in employment contracts (hereafter “arbitration clauses”) and class action waivers are more commonplace than ever in the United States and their popularity continues to rise as more than half of private sector non-union workers are currently bound by them.¹ These clauses require that employees forgo their constitutional right to a day in court should a grievance or dispute arise, both directly, by mandating arbitration as the only avenue of redress, and indirectly, by eliminating (in many cases) the only financially realistic option of class action.² Arbitration clauses have continually been challenged because arbitration does not provide the procedural protections guaranteed by the court system. Nonetheless, the FAA provides that arbitration clauses “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”³ Based on this language, the only effective way to challenge an arbitration clause is through general contract principles. Thus, while courts now generally support the enforcement of arbitration clauses, the clauses must be properly drafted, they must not be based on overreaching, and they must not include oppressive

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1. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration* 1-2, ECONOMIC POLICY INSTITUTE (2017), <https://www.epi.org/files/pdf/135056.pdf>.

2. In 2018, the Supreme Court held that mandatory class action waivers in employment-related arbitration agreements are enforceable. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018).

3. *See id.* (recognizing that arbitration contracts are subject to contract law and that the FAA’s savings clause “permits agreements to arbitrate to be invalidated by ‘generally applicable contract defenses’”).

terms. While lower courts have found arbitration clauses to be illusory,⁴ unconscionable,⁵ or against public policy,⁶ this Article answers a more basic question of contract law—whether, under basic offer and acceptance principles, a modern employee can truly consent to an arbitration clause in an employment contract.

In *Consentability*, Professor Nancy Kim adopts a sliding scale approach for determining consent, under which consent is understood as a dynamic which is “context-dependent, incremental, variable, and relative,” as opposed to an all or nothing conclusion.⁷ Kim’s idea of “relative consent” also recognizes that tension exists not only between and among individuals, but within individuals who themselves often have conflicting desires and interests.⁸ Under Kim’s framework, a proposed activity is not consentable if (1) it’s not possible to validly consent; or (2) the social harms caused by the proposed activity outweigh the social benefits.⁹

In analyzing consent, Kim’s framework weighs the threat to a consenter’s autonomy against consent conditions: “the greater the potential for harm, the closer to perfection (i.e., the more robust) the consent conditions should be.”¹⁰ In the context of arbitration clauses, the framework determines threat to autonomy by analyzing a waiver of rights.¹¹ The framework considers: (1) the duration of the waiver; (2) the type and importance of the right waived; (3) the likelihood of exercising the right; and (4) the availability of alternatives.¹² Conditions of consent, on the other hand, consist of: (1) the act of consent—how

4. See *Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202, 209 (5th Cir. 2012) (holding that a change-in-terms clause which allowed the employer, but not the employee, to decline arbitration instantaneously rendered the arbitration clause illusory).

5. See *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 926 (9th Cir. 2013).

6. See *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 430 (9th Cir. 2015). (finding that pre-dispute agreements to waive California’s Labor Code Private Attorneys General Act of 2004 claims are unenforceable under California law as against public policy).

7. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 75 (2019).

8. *Id.* at 109 (noting that for consenters, “immediate wants loom large and their future needs are obscured”).

9. *Id.* at 49.

10. *Id.* at 118.

11. *Id.* at 77 (explaining that “[a]utonomy includes the power to exercise or waive” civil and political rights, and that “[a]cts which inhibit or restrict these rights pose a threat to the autonomy interest; the threat level depends upon the type of restriction”).

12. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 75 (2019).

a consenter has manifested intent, usually through a signed writing or a click-wrap agreement; (2) the knowledge of the consenter—whether a consenter truly understands the consequences of his or her consent; and (3) the voluntariness of the consenter—the degree of societal and contextual pressures exerted on the consenter.¹³ According to Kim, the requisite robustness of each consent condition depends upon the threat that an act poses to autonomy; if the threat to autonomy outweighs the robustness of the consent conditions, the consenter has not given valid consent to the terms of the agreement. As long as the scale tips in favor of the consent conditions, or there is equipoise between the two, valid consent exists.¹⁴ In some cases, however, the conditions of consent can never be sufficiently robust given the threat to autonomy.¹⁵ Kim uses the term “consentability” to capture the distinction between those situations where valid consent is possible and, in light of the threat to autonomy interest, those where it is not.¹⁶

Consentability focuses primarily on “contracts involving a high degree of bodily intrusion, permanent consequences, or physical and emotional pain and suffering,”¹⁷ such as contracts for the sale of an organ, contracts for sex work or prostitution, or contracts for reproductive services—all of which presumptively have a high-level threat to autonomy.¹⁸ This Article adapts Kim’s framework to the context of mandatory employment arbitration clauses, where there are no physical outcomes, but there may be long-term or permanent consequences or consequences affecting basic constitutional rights. The Article makes the case that, although the threat to autonomy in giving up the right to a jury trial is not as great as the threat to autonomy in a controversial contract implicating bodily integrity, each of the consent conditions (voluntariness, knowledge, and manifestation of assent) is nonetheless insufficiently robust when talking about boiler plate language with an often-buried mandatory arbitration

13. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 9, 72 (2019).

14. *Id.* at 81.

15. *Id.* at 87 (concluding that “[s]ome acts are inconsentable because there is a strong suspicion that consent would be too flimsy or that a person or class of persons is being exploited”).

16. *Id.* at 53.

17. *Id.* at 147.

18. *See* NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 77 (2019) (noting that highest level of threat to autonomy involves “threats to bodily integrity”).

clause, especially when the contract is for employment that is essential to the consenting employee's well-being.

Section I gives a brief overview of the law surrounding arbitration clauses. Section II analyzes the degree to which mandatory arbitration clauses threaten a consenter's autonomy. Under Kim's framework, threats to autonomy range in severity from threats of physical or mental harm at the high end to threats against property interests on the low end.¹⁹ Waivers of rights range between the two extremes and vary in severity according to the rights being waived and the nature of the deprivation.²⁰ Arbitration clauses tend to threaten autonomy more than many other types of waivers of rights because the consenter is waiving the constitutional right to trial and Fourteenth Amendment due process rights, often for many years or for an employee's entire working life, which can amount to decades.²¹ Furthermore, these rights affect whether the rightsholder is able to enforce *other* rights. Arbitration clauses affect not only the procedural right to be heard, but also the right to vindicate rights that form the basis of the underlying grievance. These underlying grievances may, and often do, involve bodily harms, and thus pose a greater threat to autonomy than other types of rights violations.²² Further, because of the prevalence of arbitration clauses in modern day employment contracts, consenters often have no alternatives.²³ Thus, this Section concludes that the threat to autonomy for arbitration clauses is significant.

Next, using Kim's framework, Section III studies the consent construction of employment arbitration clauses. To illustrate the consent conditions surrounding a typical arbitration clause, this Section considers the case of John Morgan, a real Walmart employee in the small town of Kaufman, Texas, who was gunned down while working in 2016. When his family sought to sue the Walmart Corporation for negligence, it was bound by the mandatory arbitration clause in Walmart's employee training module, which Morgan had acknowledged through click-wrap.²⁴

19. See NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 77 (2019).

20. See *id.*

21. See *infra* Section II.B.

22. See NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 76 (2019).

23. See *infra* Section II.D.

24. Wal-Mart Stores, Inc. v. Constantine, No. 05-17-00694-CV, 2018 Tex. App. LEXIS 3023, at *4, *12 (Tex. App. Apr. 30, 2018).

This Section also considers Terry Jones, a hypothetical 24-year-old employee at a Fortune 100 information technology firm in the northwestern United States who was subjected to sex discrimination and a hostile work environment by her predominantly male co-workers and supervisor. These stories will illustrate various forces at play when modern day employees and applicants sign mandatory arbitration clauses, and to illustrate how the three conditions Kim sets forth as necessary for robust consent are all deficient in the context of a typical arbitration clause. Formal manifestations of consent to arbitration clauses, such as through a signature or the click of a mouse, are often superficial and mask gross disparities in bargaining power and a lack of true intent; despite the technical availability of relevant information, most consenters do not access it, and many consenters do not truly understand the consequences of their consent; and in the context of employment contracts, which govern a person's ability to make a living, and where employees or applicants often have little or no bargaining power, consent to arbitration clauses in most cases is not truly voluntary. Thus, this Article concludes that the conditions of consent surrounding most arbitration clauses are inherently weak.

Finally, Section IV balances the threat to autonomy against the conditions of consent to determine the consentability of mandatory employment arbitration clauses. Based on the significant threat to a consenter's autonomy and the lack of sufficient consent conditions present with typical mandatory arbitration clauses, this Section ultimately concludes that, while it is technically possible to validly consent to arbitration (rendering arbitration "consentable"), in the vast majority of cases, consent to mandatory arbitration clauses in the employment context is defective. Further, this Section concludes that, in most cases, the social benefits of arbitration clauses do not clearly outweigh the social harms. Accordingly, this Article proposes a rebuttable presumption against the validity of a mandatory arbitration clause in employment contracts, with the presumption rebutted only by the employer showing that the term was agreed to through negotiation by parties with roughly equal bargaining power.

I. THE BUSINESS OF ARBITRATION

Employers who demand arbitration clauses often argue that arbitration saves both the employer and the employee time and

money, leads to more accurate results, allows for the use of experts to resolve specialized disputes, and may encourage more immediate resolution of malignant labor practices.²⁵ They also argue that given the cumbersome nature of class actions, such benefits of arbitration would not be realized with class arbitrations.²⁶ The Supreme Court has agreed that the plain meaning of the Federal Arbitration Act (FAA), the federal statute governing arbitration, reflects Congress's belief that arbitration offers "the promise of quicker, more informal, and often cheaper resolution for everyone involved."²⁷

However, as a matter of public policy, many have argued that allowing employers to force arbitration of statutory matters such as Title VII discrimination claims, or to forbid the formation of classes, allows those employers to defang the protections Congress intended for American workers.²⁸ This is because arbitration lacks the procedural rigor, due process protections, and appellate review provided by the court system.²⁹ Further,

25. See *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019) (noting that the benefits of arbitration include "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes") (quoting *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662 (2010)); Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 2 (1995) (arguing that alternative dispute resolution techniques such as binding arbitration improve efficiency for all parties concerned).

26. *Lamps Plus, Inc.*, 139 S. Ct. at 1416.

27. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974)).

28. See Leona Green, *Mandatory Arbitration of Statutory Employment Disputes: A Public Policy Issue in Need of a Legislative Solution*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 173, 198 (1998) (stating that "[m]andatory arbitration fails to protect society's interest for the following reasons: (1) the inequality in bargaining power between the employer and prospective employee; (2) the lack of adequate discovery procedures that are essential to prove instances of discrimination; (3) the lack of legal training possessed by arbitrators; and (4) the lack of a mechanism for social vindication."); Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?* 54 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 155, 182 (2019) (noting that "[t]his author is convinced that mandatory employment arbitration is harmful to both individual employees and the public at large."); Sarah E. Belton & F. Paul Bland, Jr., *How the Arbitration-at-All-Costs Regime Ignores and Distorts Settled Law*, 35 BERKELEY J. EMP. & LAB. L. 135, 150 (2015) (indicating that "there is a strong argument that there needs to be some protection against abuses of [employer's] great power. As the Court's jurisprudence repeatedly chips away at the state laws that protect against over-reaching, contract law threatens to be less of a body of true law—with rules and limits—and more into a device for the powerful drafters of contracts to demand and receive whatever they want.").

29. See Leona Green, *Mandatory Arbitration of Statutory Employment Disputes: A Public Policy Issue in Need of a Legislative Solution*, 12 NOTRE DAME J.L. ETHICS

arbitrating employment disputes can quickly exceed the cost of litigation for a variety of reasons.³⁰ The prohibitive cost of arbitration, especially where the offending conduct is not severe enough to prompt one sole employee to take on the expense and burden of action against an employer, may result in employer violations going unchecked.³¹ In addition, because the FAA makes arbitration clauses subject to state contract law,³² it makes employees, who often have substantially less bargaining power than employers, subject to the whims of free-market pressures.³³

Finally, outcomes with arbitrators tend to favor employers, as opposed to outcomes with juries, which are generally more sympathetic to employees. Employers, the presumptive drafters of employment contracts, often choose which arbitrators they will use as a term of the contract, and often pay the arbitrator's fees. Arbitrators, in turn, compete to be chosen by employers, who are likely to be repeat players.³⁴ Arbitration is a business and "arbitrators have an economic reason to find in favor of repeat players."³⁵ Employees, therefore, generally have a better chance of prevailing in front of a jury of their peers than in front of most arbitrators.

& PUB. POL'Y 173, 200-04 (1998).

30. Sarah Lingafelter, *Lack of Meaningful Choice Defined: Your Job vs. Your Right to Sue in a Judicial Forum*, 28 SEATTLE U. L. REV. 803, 813 (2005) (explaining that "arbitrators are agreed upon in the terms of the contract"; "there is no price competition among arbitrators"; and "arbitration providers charge extra fees claimants would not be charged . . . in court").

31. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1634 (2018) (Ginsburg, J., dissenting) (noting in dissent that the codified right to free association came in response to "yellow-dog" contracts which required employees to relinquish association rights and handle grievances singly, thus making the "laboring man . . . absolutely helpless" (quoting 75 CONG. REC. 4504 (remarks of Sen. Norris)).

32. *Id.* at 1621 (recognizing that the FAA's savings clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses.'" (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)).

33. *Id.* at 1649 n.2 (Ginsburg, J., dissenting) (noting that the employees at bar faced a free-market "Hobson's choice," requiring them to either "accept arbitration on their employer's terms or give up their jobs").

34. According to a 2015 study of arbitration, company repeat players made up 84% of arbitration filings. Thomas Sobol, Lauren Barnes & Kristen Johnson, *Forced Arbitration is a Far Worse 'Product' than Jury Trials*, LAW 360, April 26, 2019, at 2 (LEXIS) (citing Consumer Fin. Protection Bureau, *Arbitration Study* (CFPB Study) 56-60 (March 2015)).

35. AM. ASS'N JUSTICE, *FORCED ARBITRATION: HOW CORPORATIONS USE THE FINE PRINT TO BULLY AMERICANS* 9 (July 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2864036 (quoting Jessica Silver-Greenberg and Michael Corkery, *A 'Privatization of the Justice System': In Arbitration, a Bias Toward Business*, N.Y. TIMES, Nov. 2, 2015 at A1).

An estimated sixty million workers are bound by arbitration clauses.³⁶ The rise of binding arbitration in employment contracts traces its roots to the 1925 Federal Arbitration Act (FAA),³⁷ which establishes “a liberal federal policy favoring arbitration agreements.”³⁸ When Congress passed the FAA, it was motivated by two ideas: (1) protecting the desires of contracting parties; and (2) supporting a procedure that could be cheaper and quicker than litigation.³⁹ The FAA remained relatively unquestioned in application and scope until the 1990s when the Supreme Court granted certiorari to cases where employers used mandatory arbitration to settle claims of civil rights violations on the part of workers.⁴⁰ In *Gilmer v. Interstate Johnson Lane Corp.*, the Court held claims under the Age Discrimination in Employment Act of 1967 could be subjected to mandatory arbitration,⁴¹ explaining that “[b]y agreeing to

36. Cynthia Estlund, *23rd Annual Institute for Law & Economic Policy Symposium: Secrecy: The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 689 (2018) (citing ALEXANDER J.S. COLVIN, *THE GROWING USE OF MANDATORY ARBITRATION 2* (2017), <https://www.epi.org/files/pdf/135056.pdf>).

37. Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2019).

38. *Id.* at §§ 5-9. The United States Supreme Court declared in 1874 that “[e]very citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights.” *Home Ins. Co. of New York v. Morse*, 87 U.S. 445, 451 (1874). Many in Congress at the time felt differently about the judiciary’s motives and believed that judges simply wanted to horde profitable litigation and by doing so, robbed employers and employees alike of the cheap and speedy remedy to dispute offered by arbitration. Kenneth R. Davis, *Article: The Arbitration Claws: Unconscionability in the Securities Industry*, 255, 263 (1998) (citing *Scott v. Avery*, 25 L.J. EX. 308, 313 (H.L. 1856)). This led to a Congressional sea change and the passage of the FAA.

39. JON O. SHIMABUKURO & JENNIFER A. STAMAN, CONG. RESEARCH SERV., R44960, *MANDATORY ARBITRATION AND THE FEDERAL ARBITRATION ACT 2* (2017), <https://fas.org/sgp/crs/misc/R44960.pdf>. The congressional record states: “It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.” JON O. SHIMABUKURO & JENNIFER A. STAMAN, CONG. RESEARCH SERV., R44960, *MANDATORY ARBITRATION AND THE FEDERAL ARBITRATION ACT 2* (2017) (quoting H.R. REP. NO. 96, 68th CONG. 1st Session. 1 (1924)), <https://fas.org/sgp/crs/misc/R44960.pdf>.

40. JON O. SHIMABUKURO & JENNIFER A. STAMAN, CONG. RESEARCH SERV., R44960, *MANDATORY ARBITRATION AND THE FEDERAL ARBITRATION ACT 14* (2017), <https://fas.org/sgp/crs/misc/R44960.pdf>.

41. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). The Court was “quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protections against discrimination,” such as Title VII violations. *Circuit City*

arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial forum.”⁴² While *Gilmer* ensured enforceability of arbitration clauses on a federal level, *Circuit City Stores* did the same at the state level.⁴³ Finally, in 2018, *Epic Systems Corp. v. Lewis*⁴⁴ added the enforceability of class action waivers, cementing the validity of these employer-friendly clauses.⁴⁵

Nonetheless, while arbitration clauses are now unquestionably enforceable as a general matter, the consent given by employees in the context of applying for or retaining a job tends to be weak or involuntary—as discussed below, arbitration clauses threaten the autonomy of consenters, without the requisite robustness of consent conditions.

II. THREAT TO AUTONOMY

Underlying the general practice of upholding arbitration clauses is the more general notion that legal enforcement of private exchanges is necessary for a smooth-functioning marketplace. By giving effect to the parties’ intentions, contract law honors each party’s autonomy. However, autonomy and freedom of contract have often been limited when they fail to protect members of society from “the potentially harsh effects of an unchecked free market system.”⁴⁶

Arbitration clauses are long-term waivers of future constitutional and statutory rights, the agreement to which threatens a party’s autonomy. In *Consentability*, Kim proposes a hierarchy of threats to autonomy, with property restrictions at the lowest level of threat and harm to body or mind at the highest

Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001).

42. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

43. *Id.* at 114.

44. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

45. *Id.* at 1632 (holding that the National Labor Relations Act does not represent Congressional intent to override the FAA and prohibit class action arbitration waivers). In 2019, the Supreme Court further strengthened the presumption against arbitration class actions by holding that, in order to achieve the full purposes and objectives of the FAA (which is individualized in nature), even absent an express class action waiver, courts cannot infer consent to class action arbitration when a contract contains a mandatory arbitration agreement, unless there is clear express affirmative consent to class action arbitration in the agreement. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416, 1419 (2019).

46. *Rowe v. Great Atl. & Pac. Tea Co.*, 385 N.E.2d 566, 569 (1978).

level of threat.⁴⁷ She places waivers of rights in between, as they involve a significant loss of personal freedom but do not threaten physical or mental harm.⁴⁸ Kim suggests using four factors to gauge the level of the threat to personal autonomy that the waiver presents, including: (1) type of right and importance; (2) duration of waiver; (3) likelihood of exercising the right; and (4) availability of alternatives to the waiver.⁴⁹

While waivers of rights weigh lower in severity than threats of physical harm in Kim's hierarchy of threats to autonomy, she suggests that their place on the hierarchy may vary depending on the precise rights being waived and the nature of the restriction.⁵⁰ The particular rights being waived in the case of arbitration clauses "enable members of society to engage in the political process and participate in civic life," and "include constitutional rights . . . and statutorily created rights."⁵¹ With mandatory arbitration, an employee is giving up the right to enforce other rights. So, while a click or a signature might be adequate when it comes to agreeing to a boilerplate clause about something like a company's vacation policy, with mandatory arbitration, the employee might be giving up the right to vindicate a wrong that actually involves bodily integrity, such as where the employee is trying to sue for sexual harassment or assault in the workplace (as in the cases of John Morgan and Terry Jones). Thus, mandatory arbitration clauses involve not just "rights" but rights that enforce other rights, which increases their threat to autonomy. And this threat to autonomy is even more severe in light of the likely duration of the waiver, the likelihood of exercising the right to sue in the absence of a waiver, and the likely lack of available alternatives.

A. TYPE OF RIGHT AND IMPORTANCE

An arbitral rather than judicial forum is more than a mere change in scenery. With mandatory arbitration clauses, employees waive the constitutional right to a trial, which means they are also waiving various due process rights as well as other rights that may be guaranteed by statute.⁵² The Seventh

47. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 75 (2019).

48. *Id.* at 77.

49. *Id.* at 75.

50. *Id.* at 74-75, 77.

51. *See id.* at 77.

52. Matthew Savare, *Clauses in Conflict: Can an Arbitration Provision Eviscerate a Choice-of-Law Clause?* 35 SETON HALL L. REV. 597, 599 (2005) (noting that "even

Amendment provides that: “In suits at common law . . . the right of trial by jury shall be preserved.”⁵³ The law governing arbitration clauses recognizes consent as a means of waiving this constitutional right to a jury trial.⁵⁴ When an employee signs an arbitration clause, she waives the right to maintain other available resolution processes, such as court action or administrative proceeding, to settle any disputes.

Under the rules of arbitration, there is no judge or jury, and review is limited. Thus, by waiving the constitutional right to a trial, the employee generally also waives various Fourteenth Amendment due process rights that are guaranteed with a trial, such as representation, discovery, the disclosure of arbitrator conflicts of interest, and appellate review.⁵⁵ For an employee victim of a statutory violation at the hands of an employer, an arbitral setting presents a slew of “disadvantages related to appeals, the potential cost-prohibitive nature of arbitration, limited discovery, and concerns about arbitrator bias.”⁵⁶ Under arbitration, the grounds for judicial review for statutory matters are extremely narrow, and when review is granted, arbitrators are often not required to submit the details of their findings.⁵⁷

While the two largest arbitration firms, the American Arbitration Association (AAA) and JAMS, in the 1990s agreed to a “Due Process Protocol” which guarantees the right to representation for both parties to a dispute and requires that arbitrators disclose conflicts of interest, arbitration procedures still vary a great deal and are far more informal than judicial proceedings.⁵⁸ Also, fifteen percent of arbitration is conducted by smaller firms that do not follow the Due Process Protocol, and another fifteen percent is done on an ad hoc basis.⁵⁹ The Due

when parties have expressly delineated their preference for the application of a particular jurisdiction’s substantive laws, courts have still allowed the arbitrators to decide what law, if any, they will apply”).

53. U.S. CONST. amend. VII. While the Seventh Amendment applies only to proceedings brought in federal court, nearly all state constitutions contain similar provisions.

54. See *supra* notes 39-47 and accompanying text.

55. See Sara Lingafelter, *Lack of Meaningful Choice Defined: Your Job vs. Your Right to Sue in a Judicial Forum*, 28 SEATTLE U. L. REV. 803, 810-15 (2005)

56. *Id.* at 810.

57. *Id.*

58. Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights*, ECONOMIC POLICY INSTITUTE 17 (2017).

59. *Id.* at 17-18.

Process Protocol is also silent as to the allocation of fees, so employees may find themselves saddled with costs they would not encounter in a judicial forum or facing a “loser-pays” clause that inhibits the desire to arbitrate.⁶⁰ Arbitration clauses are common requirements for low-wage jobs that involve workers who are especially at a disadvantage in bargaining power and need the support of the judiciary.⁶¹ The fundamental due process deprivation is that the employer invariably chooses the arbitration process that the employee must follow.⁶²

The stakes are even higher in light of the societal impact of mandatory arbitration. Where employees waive their rights to trial and thus to class action lawsuits, employees lose both the strength that comes with numbers as well as the cost-savings when they seek redress to common grievances—the social cost occurs when claims are not brought as a result, and employer wrong-doing goes unchecked. Further, arbitration proceedings are primarily closed affairs, with their results sealed.⁶³ This allows employers to hide systemic violations from public scrutiny. Open, public litigation creates precedent, ensures uniformity in the application of the law, and creates a public record that the public can scrutinize and that serves to educate other employers.⁶⁴ This social cost is amplified as more employers add the language to their contracts and access to alternative employment options dwindles.

B. DURATION OF WAIVER

Whether an employee stays with one company or moves around the workforce, the duration of her waiver of rights through an arbitration clause will often last many years. In 2018, 27% of employed wage and salary workers aged fifty-five to sixty-four had been at their jobs for twenty or more years.⁶⁵

60. Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights*, ECONOMIC POLICY INSTITUTE 4, 17 (2017).

61. Sara Lingafelter, *Lack of Meaningful Choice Defined: Your Job vs. Your Right to Sue in a Judicial Forum*, 28 SEATTLE U. L. REV. 803, 810 (2005).

62. *See id.* (suggesting that employees are dependent on arbitration clauses and employers create them, indicating they create them, so they choose the terms in which the employee must agree to if they want to job).

63. *See id.* at 815.

64. *See id.*

65. *Economic News Release*, U.S. DEP'T OF LAB. BUREAU OF LAB. STAT., <https://www.bls.gov/news.release/tenure.t03.htm> (last modified Sept. 20, 2018).

Another 25% had job tenures longer than ten years.⁶⁶ Because over 50% of private sector employers require arbitration clauses,⁶⁷ even private sector employees that move from one job to another have a one in two chance of being required to waive their rights through an arbitration clause. Thus, chances are great that an employee could ultimately waive her constitutionally and statutorily guaranteed rights for decades.

C. LIKELIHOOD OF EXERCISING RIGHT

In order to calculate the severity of the threat to autonomy, Kim suggests that courts should look not just at the nature and duration of the rights being waived, but at the likelihood that the consentor would actually exercise the right if it were not waived.⁶⁸ In today's culture, the likelihood that an aggrieved employee would exercise her right to sue if not restrained by an arbitration clause appears to be fairly high. First, generally, the United States is the fifth most litigious country by capita, with a high emphasis on the rule of law to settle disputes.⁶⁹ Specifically, a recent study shows that arbitration clauses likely have a chilling effect on the willingness of an employee to seek redress for a grievance, as employees bound to arbitration seek remedy at a fraction of the rate seen by federal courts.⁷⁰

The U.S. labor force is approximately 160 million workers.⁷¹

66. *Economic News Release*, U.S. DEP'T OF LAB. BUREAU OF LAB. STAT., <https://www.bls.gov/news.release/tenure.t03.htm> (last modified Sept. 20, 2018).

67. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECONOMIC POLICY INSTITUTE 2 (2017).

68. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 75 (2019).

69. Raminus Polus, *Why are Americans so Litigious?*, HISTORUM, (Oct. 2013, 6:20 AM), <https://historum.com/threads/why-are-americans-so-litigious.135651/>; see also Paul H. Rubin, *More Money Into Bad Suits*, N.Y. TIMES (Nov. 16, 2010) (explaining that "the United States is the most litigious society in the world. We spend about 2.2 percent of gross domestic product, roughly \$310 billion a year, or about \$1000 for each person in the country on tort litigation, much higher than any other country."); see *id.* (explaining that "the United States is already the most litigious society in the world. We spend about 2.2 percent of gross domestic product, roughly \$310 billion a year, or about \$1000 for each person in the country on tort litigation, much higher than any other country.").

70. See Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 690-92 (2018) (noting that if the ratio of the 60 million U.S. employees covered by arbitration clauses who sought redress for grievances in arbitration matched the rate at which employees who were not covered by such clauses sought redress in federal courts, in 2016, there would have been at least 14,700 arbitrations instead of the 5,126 arbitrations estimated to be the actual number).

71. *Labor Force Statistics from the Current Population Survey*, U.S. DEP'T OF LAB. BUREAU OF LAB. STAT., https://data.bls.gov/pdq/SurveyOutputServlet?graph_name=

Subtract from that the sixty million workers bound to mandatory arbitration.⁷² That leaves 100 million employees who might possibly file a claim against their employer. Studies show that over one million employment discrimination complaints have been filed with the government since 2010.⁷³ That means that in the last decade, roughly one in every 100 employees who was legally able to do so (not bound by arbitration clauses) filed some form of workplace discrimination complaint. Indeed, in 2018 alone, 76,505 U.S. workers filed discrimination or retaliation charges against their employers,⁷⁴ and the likelihood that an employee will sue is only rising.⁷⁵

Specifically, sexual harassment cases are up significantly in the decades since Anita Hill's sexual harassment claim,⁷⁶ and especially now, in the era of the #MeToo movement.⁷⁷ Employee suits claiming retaliation under Title VII are also up since the 1990s, however the numbers ebbed and flowed in the low 30,000s between 2010 and 2018.⁷⁸ Suzanne Lucas posits four factors that led to increases in employees suing and holding employers accountable: (1) increased awareness of statutory rights; (2) increased coverage of discrimination in national publications such as the *New York Times* and the *Washington Post*;⁷⁹ (3) social media empowering employees to feel they are not alone in challenging actions of their employers; and (4) what Lucas calls "employer panic," which can lead to retaliation suits.⁸⁰

LN_cpsbref1&request_action=wh (last visited June 2019).

72. Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 690 (2018).

73. *Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2017* (2018), U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

74. *Id.*

75. Suzanne Lucas, *Why are Employment Discrimination Lawsuits Rising So Rapidly?* (Apr. 4, 2019), <https://www.thebalancecareers.com/why-employment-discrimination-cases-are-rising-fast-4156883>.

76. Meg Bond, *Things Have Changed Since Anita Hill—Sort Of* (Sept. 27, 2018), <https://www.pri.org/stories/2018-09-27/things-have-changed-anita-hill-sort>.

77. *Id.*

78. *Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2017* (2018), U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>.

79. Suzanne Lucas, *Why are Employment Discrimination Lawsuits Rising So Rapidly?* (Apr. 4, 2019), <https://www.thebalancecareers.com/why-employment-discrimination-cases-are-rising-fast-4156883> (citing that in 2017 the *Times* had over 1600 articles with the word discrimination and the *Post* had over 2000 articles with the word discrimination).

80. *Id.*

D. AVAILABILITY OF ALTERNATIVES TO WAIVER

This factor considers whether an employee would have the ability to find alternative employment that does not require consent to an arbitration clause if he chooses not to agree to the waiver. This availability is difficult to define as it depends on the region of the United States and the type of employment sought. However, an estimated sixty million workers are bound by arbitration clauses.⁸¹ Since 2010, “80 of America’s *Fortune* 100 companies have used arbitration to resolve employment disputes,” and “over half imposed arbitration through a forced arbitration clause.”⁸² These 100 largest domestic United States companies command combined annual revenues of over 7.6 trillion dollars.⁸³ Many have created monopsonies in their regions, where they command large percentages of the labor market.⁸⁴ If a worker finds herself in a regional labor market comprised of two or three of these large companies that require arbitration, her access to alternative employment is significantly diminished, especially if she is seeking specialized employment. Even if a worker finds herself able to access employment in a small business, she is still likely to face mandatory arbitration.⁸⁵ A 2018 survey by the Economic Policy Institute found that 49.8% of businesses with fewer than 100 employees used mandatory arbitration.⁸⁶

Thus, based on the likely long duration of the waiver, the importance of the constitutional rights being waived, the high likelihood of an employee exercising the right to sue but for the

81. Cynthia L. Estlund, *The Black Hole of Mandatory Arbitration*, 96 N. CAR. LAW REV. 679, 689 (2018).

82. Imre S. Szalai, *The Widespread Use of Workplace Arbitration Among America’s Top 100 Companies*, THE EMPLOYEE RIGHTS ADVOCACY INSTITUTE FOR LAW & POLICY 1, 3 (Mar. 2018), <http://employeerightsadvocacy.org/wp-content/uploads/2018/03/NELA-Institute-Report-Widespread-Use-of-Workplace-Arbitration-March-2018.pdf>.

83. *Id.*

84. *Labor Market Monopsony: Trends, Consequences, and Policy Responses*, COUNCIL OF ECONOMIC ADVISERS ISSUE BRIEF (Oct. 2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf (explaining that a labor-market monopsony occurs when “reduced competition . . . give[s] employers power to dictate wages” or presumably other contract terms).

85. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration: Access to the Courts is now barred for more than 60 million American workers*, ECONOMIC POLICY INSTITUTE (2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/>.

86. *Id.*

arbitration clause, and the lack of availability of alternate contract terms, the threat to autonomy is significant. Even though arbitration clauses in employment contracts do not involve direct bodily intrusion, this significant threat to autonomy demands more robust conditions of consent.

III. CONSENT CONDITIONS

According to Kim's framework, there are three conditions to consider when evaluating consent: the act of consent, the knowledge of the consentor, and the voluntariness of the consentor.⁸⁷ This assessment of the conditions surrounding consent should be on a "sliding scale" where assessing "the requisite robustness of each condition depends upon the relative blameworthiness of the parties in light of their relationship, third party effects, and societal impact."⁸⁸ Kim notes that the ability to consent is affected by personal circumstances, economic constraints, social pressures, time restrictions, and cognitive limitations.⁸⁹ These factors all affect the robustness of consent, as does the behavior of the consent-seeker.⁹⁰ Opportunistic behavior on the part of the consent-seeker requires more robust consent conditions.⁹¹

Consent construction is complicated by the possibility of "consent destruction."⁹² According to Kim, the passage of time may degrade consent, so that consent given at one time may no longer be valid at a later time. No human being is truly autonomous at all times—we present a succession of different selves, whereby the present self and the future self are discontinuous.⁹³ Humans are flawed, and our limitations cause us to mis-predict and misjudge future events. Flawed decision

87. NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 71 (2019).

88. *Id.* at 100.

89. *Id.* at 13-14 (noting that "visceral factors" play a large role in consent, and that "[p]eople are likely to underestimate the effect that external influences have upon human behavior," such as "environmental and situational factors").

90. *Id.* at 73 (noting that "[t]he motive of the consenting party and the behavior of the consent-seeker affect the degree to which each of the conditions must be found (i.e. their requisite robustness level) Negative behavior on the part of the consent-seeker means that the consent conditions must be more robust in order for consent to be found.").

91. *Id.*

92. NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 15 (2019).

(discussing how consent may be destroyed prior to performance if circumstances later change the consenting party's understanding).

93. *Id.* at 61.

making arises where an individual makes a decision that is inconsistent with the individual's own preferences due to emotional impulses or a lack of information.⁹⁴ Furthermore, given the unpredictability and irrationality of human behavior, some decisions may promote one's present autonomy but risk limiting one's future autonomy.⁹⁵ According to Kim, the more a decision limits future autonomy, the greater the robustness required for consent.⁹⁶

Consent may be validly granted but then subsequently destroyed. In cases of consent destruction, the activity must cease after consent is withdrawn.⁹⁷ The important exception is where the parties have entered into a contract. Contract law requires parties to perform according to the terms of the contract, even if one of the parties later changes her mind.⁹⁸ Consequently, a contract which limits a party's future autonomy in a significant way requires special scrutiny and the conditions of consent must be particularly robust.⁹⁹

Kim argues that where the threat to autonomy is particularly high and there is no equal countervailing interest at stake for the other party, the conditions of consent will not be sufficiently robust to justify contract enforcement.¹⁰⁰ In these cases, the bargain should be inconsentable.¹⁰¹ Such is the case with slavery, for example, where "one's autonomy interest in physical and legal freedom will always outweigh the other party's economic interest in owning a slave."¹⁰² A contract for slavery,

94. See NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 62 (2019) (discussing "hot/cool" decision-making framework).

95. *Id.* at 63.

96. *Id.* at 85 (noting that the "greater the potential harm to autonomy interest (taking into consideration the relevant factors), the more certainty (i.e. the higher the burden of proof) required to establish the necessary consent conditions").

97. *Id.* at 17.

98. *Id.* at 16.

99. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 122, 125 (2019) (explaining that "[given] the limits of human cognition and human susceptibility to manipulation and distraction, valid consent requires more than merely making relevant information available."); *id.* at 122 (explaining that "[c]ertain provisions in agreements, such as waivers of rights, for example, often need to be separately signed or drafted in a particular way").

100. *Id.* at 139-140 (explaining the state should restrict or prohibit those activities which pose a high-level threat to an individuals' autonomy); *id.* at 98 (2019) (noting that "[c]ertain types of promises are too oppressive to keep and their oppressiveness makes breaking them an act of maturity and responsibility.").

101. *Id.* at 92.

102. *Id.*

therefore, is incontestable, because the consenter should have the ability to change her mind, but does not under the tenets of contract law. Decisions involving inconsistent preferences are most likely to be regretted, and consequently, these are the decisions where regulation is most warranted.

As shown in Section II, in the case of arbitration clauses, since the parties are contracting to waive future constitutional and statutorily guaranteed due process rights, which significantly threatens a consenter's autonomy, the requisite robustness of each consent condition must be high.¹⁰³ In reality, the opposite is usually true and (1) the manifestation of intent is often weak and only bolstered by the traditional, but unrealistic duty to read; (2) the knowledge of the consenter is often limited and the consent-seeker routinely does little to bridge the gap; and (3) the voluntariness of the consenter is often deficient or virtually non-existent in the face of contextual coercion.¹⁰⁴ Further, consent destruction is likely, since ex-ante waivers involve one party giving up a future anticipated right. To an employee starting a new job, who does not expect legal disputes, an arbitration agreement might not seem important. But if an employee's rights are later violated at work, that arbitration agreement might mean the difference between winning or losing the case—as with bodily integrity contracts, the potential for a change of heart seems especially likely. Accordingly, this Section shows how consent conditions surrounding mandatory arbitration clauses are not sufficiently robust.

A. ACT: MANIFESTATION OF INTENT

The manifestations of intent for consenters to employment arbitration clauses generally come in three flavors: (1) a signature at the time of hiring; (2) a click-wrap agreement; or (3) implied consent by continued employment after notification of a unilateral change in terms.¹⁰⁵ Federal courts are divided regarding whether sufficient manifestation of intent can be

103. *See supra* Section II.

104. *See infra* Sections III.A., III.B., and III.C.

105. Amy L. Ray, *When Employers Litigate to Arbitrate: New Standards of Enforcement for Employer Mandated Arbitration Agreements*, 51 SMU L. REV. 441, 448 (1998) (explaining that courts “might not imply constructive consent to enforce an arbitration agreement in the absence of a party’s actual intention” and “[s]uch actual intent may be either express (such as a written or oral statement) or implied by the party’s conduct,” such as continuing employment after receiving an amended employee handbook).

shown by an employee's silent acquiescence to an employer's change in terms that institutes mandatory arbitration as a condition of continued employment.¹⁰⁶ This Article will focus instead on the two instruments that courts have consistently accepted as sufficient manifestations of intent: a signed writing and a click-wrap acknowledgement.¹⁰⁷

Recall John Morgan. Before Morgan could start working at the Walmart in Kaufman, Texas that hired him, he had to complete a computer-based-learning module (CBL) regarding his health benefits entitled "Texas Injury Care Benefit Plan CBL." The CBL "trains employees on subjects including reporting injuries, the benefits available under the Plan, and the process for receiving benefits."¹⁰⁸ The CBL was paperless, and Morgan could only access it through computers in the Walmart store.¹⁰⁹ To access the module, Morgan used his confidential associate identification number and password.¹¹⁰ Within the module was a section about arbitration that explained that the plan had a mandatory arbitration process to resolve disputes. The CBL module required Morgan to click on a button that accessed the arbitration clause. Finally, Morgan arrived at a section titled "Acknowledgement of Completion" which informed him that by "clicking on the button below, the employee is completing the course and acknowledging that he or she has read and understood the arbitration acknowledgement and policy."¹¹¹ Before Morgan could begin earning money or accessing the health benefits that accompanied his employment, he had to click that button. When Morgan clicked the button, he waived his right, and the right of his family, to sue for negligence regarding his murder.¹¹²

106. Suskin & Schwab, *When Does an Employee's Silence Signify Agreement to a Mandatory Arbitration Contract?*, 34 EMP. RELATIONS L.J. 1, 4-5 (2008) (noting that different federal circuits have taken different approaches to the burden of proof regarding manifestation of intent).

107. *Wal-Mart Stores, Inc. v. Constantine*, 2018 WL 2001959 at *1-7 (Tex. App. Apr. 30, 2018) (citing precedent confirming that electronic click-wrap manifestation of intent is as sufficient as signing); *Bekele v. Lyft, Inc.*, 199 F. Supp. 3d 284, 296-97 (D. Mass. 2016) (ruling that a click wrap acknowledgement was sufficient manifestation of intent to bind a Lyft Inc. employee driver to mandatory arbitration, because the company "satisfied its burden of demonstrating that the [electronic Terms of Services Agreement] provided [the plaintiff] with reasonable notice of its arbitration provision").

108. *Wal-Mart Stores, Inc.*, No. 05-17-00694-CV, 2018 WL 2001959, at *1.

109. *Id.*

110. *Id.*

111. *Id.* at *1-2.

112. *Id.* at *1, *10. (ruling that the click-wrap acknowledgement by a person of

And recall Terry Jones, the hypothetical technology firm employee. When she was applying for her job, she found herself at the end of a very long application process by the time she was presented with an employment contract that contained an arbitration clause. She had competed with dozens of other equally qualified candidates. She had filled out the application, written an essay, and had even taken an aptitude test. She went through an hour interview. Her references, whom she loathed to pester, had spoken with the firm's management. After all this, she found herself presented with the company's standard form contract for the job of her dreams. When Jones signed the agreement, she waived her right to sue for sex discrimination or sexual harassment.

Morgan's clicked acknowledgement during the CBL, and Jones's signed contract—both represent sufficient manifestations of intent for most courts to determine that they assented to the terms of the agreement. However, Kim's framework demands a more robust manifestation of consent, in light of the threat to autonomy posed by mandatory arbitration clauses,¹¹³ and heightened further by the lack of robustness of the knowledge and voluntariness factors relating to consent conditions.¹¹⁴ Each of these employees was asked to agree to waive the right to a jury trial as part of the process of acknowledging receipt of other information. Given the importance of the right, the manifestation of consent should be specific to a waiver of that right, and not bundled with agreement to other terms. Because of the way the arbitration terms were presented, it is not clear that their manifestations of consent were specific to arbitration (rather than to the general terms of employment), and thus their manifestations of consent to the arbitration clauses were weak.

B. KNOWLEDGE OF PARTIES

Kim's framework also suggests consent is significantly weakened where the knowledge condition is deficient.¹¹⁵ As Kim explains, “[c]ontract law . . . does not require *actual* (subjective)

sound mind offered sufficient manifestation of intent to overcome a claim of procedural unconscionability against the consent-seeking employer).

113. See *supra* note 11 and Section II.

114. See *infra* Sections III.B. & III.C.

115. NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 122 (2019) (noting that “[c]onsent to participate in an activity where the participant lacks knowledge about what the activity entails *cannot* be valid consent to that activity”) (emphasis in original).

knowledge. Instead, contract law substitutes *capacity* and *access to information* or *notice* for knowledge.¹¹⁶ That framework is built upon the modern objective theory of contract law that looks primarily at outward manifestations of intent for proof of assent.¹¹⁷ However, arbitration clauses should require a more nuanced approach that includes a subjective assessment of the consentor's actual knowledge and understanding at the time of assent. In the two examples above, acceptance by the courts of both types of manifestations of intent as sufficient to satisfy acceptance of an offer of employment is predicated on the duty-to-read doctrine: "The law typically requires only the provision of relevant information, and not evidence of understanding."¹¹⁸ Yet, as more and more of modern contractual behavior is governed by the boilerplate in adhesion contracts drafted by corporate and employer-side lawyers, and proffered by powerful companies to laypeople at a substantial knowledge disadvantage, access to information cannot be seen as equivalent to knowledge of it: "The consenting party must have access to the information in a form and at a time which helps that party *understand* material and relevant information and the consequences of consent."¹¹⁹

In his 1960 defense of boilerplate contract clauses, Karl Llewellyn conceded that

[F]orm-agreements tend either at once or over the years, and often by whole lines of trade, into a massive and almost terrifying jug-handled character; the one party lays his head into the mouth of a lion—either, and mostly, without reading the fine print, or occasionally in hope and expectation . . . that it will be a sweet and gentle lion.¹²⁰

He rested his defense of boilerplate clauses on the notion that the "blanket assent" given by signing is to the "dickered terms," "the broad type of the transaction," and any reasonable terms, but not to any "unreasonable or indecent terms the seller may have on his form, which . . . alter or eviscerate the reasonable meaning of the dickered terms."¹²¹ Contentious clauses, in particular, must be dickered in order to assure a meeting of the minds, especially

116. NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 83 (2019).

117. *See id.* at 29.

118. *Id.* at 10.

119. *Id.* at 124 (emphasis in original).

120. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 362 (Little, Brown and Company, 1960).

121. *Id.* at 370.

because with boilerplate clauses in employment contracts, invariably the consent-seeking lion has the service of lawyers in drafting the contract, whereas the average employee generally does not when deciding whether to put her head in the lion's mouth.

As Kim notes, “[i]f . . . the consent-seeker knew that the consentor was ignorant of certain information, the consentor's knowledge condition would be considered more deficient than if the consentor's ignorance were not known to the consent-seeker.”¹²² The lion here, the (corporate) employer, has a vested interest in a lack of understanding, because the employer realizes that “[w]hile most consumers do not read contracts prior to entering into standard transactions, many do so *afterward*. [Thus a] contract may be used to deter litigation as much as it is used to win litigation.”¹²³

For our two applicants, Morgan and Jones, there does not seem to be a good faith effort on the part of the employers to ensure the applicants understood the meaning of agreeing to arbitration. When Morgan began his CBL, he was not accompanied by any Walmart personnel prepared to answer nuanced legal questions about the contract to which he acquiesced. He was not given the option to research on his own and complete the CBL later. Instead, he was told that he would not receive health benefits until he signed electronically.¹²⁴ The same was essentially true when Jones signed her contract. Both companies could have instituted practices that make true understanding of arbitration clauses the goal during signing, rather than simply furnishing the information as required by law. For example, both companies could easily have provided a short video tutorial that explains the consequences of mandatory arbitration.

Even in situations where the employee reads and understands the arbitration clause, real understanding must include the potential negative consequences to the employee's future self, which Kim refers to as the “regret principle.”¹²⁵ Kim notes both that “[i]t is impossible to know in advance which

122. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 81 (2019).

123. NANCY KIM, *WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS* 29 (2019).

124. *Wal-Mart Stores, Inc. v. Constantine*, No. 05-17-00694-CV, 2018 Tex. App. LEXIS 3023, at *14 (Tex. App. Apr. 30, 2018).

125. *See* NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 57 (2019).

future limitations an individual might regret,”¹²⁶ and that “human beings tend to be myopic. Their immediate wants loom large and their future needs are obscured.”¹²⁷ For our two applicants, Morgan and Jones, and for most hopeful employees signing employment contracts at the beginning of a new job opportunity, the notion of possible workplace conflict, discrimination, or negligence is a distant unlikelihood contrasted against the very real need for gainful employment. Neither Morgan nor Jones is a lawyer and it is likely that neither understands the extent and significance of the rights being waived.

C. VOLUNTARINESS OF THE CONSENTER

In assessing voluntariness, Kim’s framework considers the behavior of the consent-seeker, the consent-seeker’s duty of care, and the consentor’s motive for consent. If the consent-seeker is responsible for the “tough situation” that leads the consentor to assent, then the voluntariness condition is deficient.¹²⁸ Even, however, if the consent-seeker is not directly responsible for the tough situation, the consent is still deficient if the consent-seeker did not engage in the reasonable care necessary to alleviate the negative externalities.¹²⁹ Finally, if the consentor agrees to the contract only to “escape a harm which poses a high-level threat to autonomy” then the consent is not truly voluntary.¹³⁰

Employees rarely choose arbitration clauses voluntarily—rather, employees agree to arbitration clauses when they are included in contracts drafted by employers and that they are required to sign in order to get or keep a job. An empirical study of arbitration conducted in 2015 (the largest and most comprehensive study to date), found that “[c]onsumers win in arbitration only 20% of the time—and only 11% of the time when facing a repeat player on the other side.”¹³¹ Nonetheless, because of market pressures placed on employees, especially middle and lower class workers in one-employer towns like in Morgan’s case, employees often have no real choice when asked to sign an

126. NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 74 (2019).

127. *Id.* at 109.

128. *Id.* at 131.

129. *See id.*

130. *Id.* at 131-32.

131. Thomas Sobol, Lauren Barnes, and Kristen Johnson, *Forced Arbitration is a Far Worse ‘Product’ Than Jury Trials*, LAW 360 (April 2019) (citing Consumer Fin. Protection Bureau, *Arbitration Study* (CFPB Study) 56-60 (March 2015)).

employment contract with an arbitration clause, and no real ability to negotiate different terms or to walk away from the contract.

Let's return to the case of John Morgan. Within the last ten years, Walmart, the largest employer in John Morgan's town of Kaufman, Texas, has created a virtual monopsony, a labor market monopoly, as they have in towns throughout the midwestern and southern United States.¹³² In those two U.S. regions, Walmart employs one in four or five retail workers in the counties where it operates.¹³³ Overall, Walmart employs 1.4 million workers in the U.S., a significant one percent of the population.¹³⁴ Of that number, people of color make up forty-two percent of its workforce, but only thirty-one percent of management and twenty-two percent of corporate officers.¹³⁵ Walmart requires that its employees sign arbitration clauses, but they are not alone. In Texas, nearly sixty-eight percent of workplaces have mandatory arbitration policies.¹³⁶ Nationally, fifty-seven percent of retail employers require that employees assent to arbitration clauses.¹³⁷ In Kaufman, a town of roughly 7,000 with an employee population of 3,000,¹³⁸ 451 of the available jobs are in retail, with 300 of those supplied by Walmart—ten percent of the workforce.¹³⁹ While there are specialized manufacturing employers that employ around 325 employees, and there are also nearly 350 office and administrative support positions, it is the retail industry that offers the largest portion of unskilled labor employment, with a majority of those jobs through Walmart.¹⁴⁰

132. Alessandro Bonanno & Rigoberto A. Lopez, *Wal-Mart's Monopsony Power in Local Labor Markets*, Research Report No. 103, Food Marketing Policy Center, U. CONN. DEP'T OF AGRIC. AND RES. ECON. 3-4 (2008).

133. *Id.* at 3.

134. *Id.* at 2.

135. *2016 Culture, Diversity & Inclusion Report*, WALMART 36-37 (2016), <http://cdn.corporate.walmart.com/8c/08/6bc1b69f4a94a423957d4c2162db/wm-cdireport2016-v27-reader-pages.pdf>.

136. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECONOMIC POLICY INSTITUTE 7 (2017), <https://www.epi.org/files/pdf/135056.pdf>.

137. *Id.*

138. DATAUSA, <https://datausa.io/profile/geo/kaufman-tx/> (last visited Oct. 19, 2019).

139. *Walmart Ready to Reveal New Store Kaufman Shoppers*, WALMART (Apr. 16, 2014), <https://corporate.walmart.com/newsroom/2014/04/23/walmart-ready-to-reveal-new-store-to-kaufman-shoppers>.

140. DATAUSA, <https://datausa.io/profile/geo/kaufman-tx/> (last visited Oct. 19, 2019).

While Walmart, and the other large retail corporations that comprise the fifty-seven percent of the retail industry that require arbitration, did not work toward monopsony just to use that power to coerce employees into signing arbitration clauses, they are responsible for those market externalities, as they stem from strategic corporate planning to seize local market share. Walmart's executive management is certainly aware of its disproportionate influence in the local labor markets where it operates.

Terry Jones, too, was the victim of market pressure in her case because of the dearth of jobs available to women at technology firms, and her presumed inferior bargaining power in light of that context. When she agreed to the arbitration clause, she had not met any of her future colleagues, but she was aware of the rampant sexism in the tech industry,¹⁴¹ which she had experienced firsthand during her computer engineering program.¹⁴² On the other hand, she realized that nearly sixty percent of information technology firms in the U.S. include arbitration clauses in their employment contracts.¹⁴³ She could choose not to sign, but that would mean starting the application process over again with firms from the forty percent minority that do not employ arbitration clauses. However, by signing, Jones would waive her right to a judicial forum should she find herself discriminated against on the basis of gender, like so many other women in the science and technology industry.¹⁴⁴ Like Morgan, she too was not given an opportunity to reflect on the waiver and was given any supposed choice only after a grueling application process.

141. See Sheelah Kolhatkar, *The Tech Industry's Gender-Discrimination Problem*, NEW YORKER MAGAZINE (Nov. 21, 2017) (explaining that in a 2015 poll conducted of two hundred senior-level women in Silicon Valley firms, 66% said they had been excluded from important events because of their gender, and 60% reported unwanted sexual advances in the workplace).

142. *Statistics*, NATIONAL GIRLS COLLABORATIVE PROJECT, <https://ngcproject.org/statistics> (last visited Jul. 31, 2019) (noting that women earn only 18% of computer science degrees nationally).

143. Jaclyn Diaz, *More Employers Turn to Arbitration to Handle Job Claims*, BLOOMBERG LAW, (Dec. 6, 2018, 5:16 AM), <https://news.bloomberglaw.com/daily-labor-report/more-employers-turn-to-arbitration-to-handle-job-claims>.

144. THE NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, *SEXUAL HARASSMENT OF WOMEN: CLIMATE, CULTURE, AND CONSEQUENCES IN ACADEMIC SCIENCES, ENGINEERING, AND MEDICINE* 56-57 (2018), <http://nap.edu/24994> (explaining that in male-dominated professions, such as engineering and the technology industry, rates of sexual harassment of women exceed fifty percent).

Under those circumstances, even if such conduct on the part of Walmart or the Tech Firm falls short of duress or coercion, it seems possible that both Morgan's and Jones's consent was influenced in part by their employers' overreaching or lack of reasonable care to counteract their market influence during the consenting process—and thus both Morgan's and Jones' consent was insufficiently voluntary.¹⁴⁵ Morgan was only able to complete the CBL on the in-house store computer. He was unsupervised as he did so. Jones was only given the contract to sign after a rigorous application process, at which point she probably already felt committed to the job. At the very least, the companies could have allowed the employees to take a paper version of the clause home before consenting. Both companies seem to be taking advantage of their drafting power when they introduce an arbitration clause after someone has already invested so much time in the job application process. This runs afoul of the "Opportunism Corollary" and requires a more robust manifestation of consent condition.¹⁴⁶

However, even if the companies' behavior was stellar prior to the employees' manifestations of consent, the lack of alternatives affects the condition of voluntariness: "In a situation where someone has the option only to 'take it or leave it,' the provision of more information may do little to alter behavior if there are no available options."¹⁴⁷ Indeed, as Kim explains, "people without options cannot consent; they submit."¹⁴⁸ Where that is the case, the motive for consent will control over the behavior of the consent-seeker.

In Kaufman, roughly one in four people lives below the poverty line.¹⁴⁹ The city's poverty rate of 27.3%¹⁵⁰ is well above the national average and even above that of the southern United States, the region with the highest rate in the nation.¹⁵¹ Nearly

145. See NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 28 (2019) (noting that "[s]ocietal pressures may not be as obvious as physical force, but they can be just as coercive").

146. *Id.* at 70 (noting that "[o]ppportunistic conduct may affect the consenter in such a way that the manifestation of consent does not constitute valid consent").

147. *Id.* at 129.

148. *Id.* at 116.

149. *Kaufman, TX*, DATAUSA, <https://datausa.io/profile/geo/kaufman-tx/> (last visited Oct. 19, 2019).

150. *Id.*

151. Fontenot, Semega & Kollar, *Income and Poverty in the United States: 2017*, U.S. CENSUS BUREAU (Sep. 2018), <https://www.census.gov/content/dam/Census/library/publications/2018/demo/p60-263.pdf>.

one in four people in Kaufman lacks health insurance, with another twenty-three percent relying on Medicaid.¹⁵² John Morgan was fifty-nine-years-old, old enough to be conscious of the need for access to healthcare, but too young for Medicare.¹⁵³ As a low-wage worker, he would have also been conscious of his chances at finding alternative employment. He would not have known that the majority of employers in the state, as well as the majority of employers in retail, require consent to arbitration clauses. He would, however, know that there were few options for his skillset in Kaufman, Texas outside of Walmart. Terry Jones too, while just starting out in a new career, would know the limitations of her options, in a predominantly male industry. “Where an individual must choose between two actions which both pose a high-level threat to the autonomy interest [e.g., mandatory arbitration and giving up a job opportunity, especially one that is critical for providing basic needs], the choice should not be viewed as voluntary. There is no choice if the status quo (the other ‘option’) threatens survival.”¹⁵⁴ Essentially, terms offered on a take-it-or-leave-it basis are inherently coercive if the service or product being offered is a necessity. If there is no other viable option for employment, then in effect, employment that provides an applicant’s livelihood is a necessity. Therefore, while Morgan and Jones both manifested consent to their employment contracts, on a sliding scale that recognizes the incremental and variable nature of consent, the voluntariness of their consent nonetheless falls well below “robust.”

IV. THE “*CONSENTABILITY*” OF MANDATORY ARBITRATION CLAUSES

Under Kim’s framework, a proposed activity is not consentable where (1) consent is not possible; or (2) the social harms outweigh the social benefits of the proposed activity.¹⁵⁵ With arbitration clauses, both are generally true: although consent is technically possible, it is unlikely to be sufficient,¹⁵⁶ and the social harm generally outweighs any social benefit.¹⁵⁷

152. *Kaufman, TX*, DATAUSA, <https://datausa.io/profile/geo/kaufman-tx/> (last visited Oct. 19, 2019).

153. Eligibility for Medicare starts at age 65 with limited exceptions. Social Security Act, 42 U.S.C. § 1395c (2019).

154. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 116 (2019).

155. *Id.* at 49.

156. *See id.*

157. Because the focus of this Article is consent, the full contours of a public policy argument are beyond the scope of this Article. For a more detailed analysis of

First, “defective consent” arises where “the consentor has manifested consent, but at least one of the other conditions of consent is deficient in light of the threat to the autonomy interest.”¹⁵⁸ Per Kim’s sliding scale, the greater the potential harm to a consentor’s autonomy, the higher the more robust the consent conditions must be—and the higher the burden of proof must be to establish consent: “[w]here only the loss of money is at stake, the burden of proof is lower (i.e.,) by a preponderance of the evidence) than where constitutional due process rights or public policy considerations are implicated.”¹⁵⁹

As explained in the preceding sections, in the vast majority of cases, arbitration clauses pose a significant threat to a consentor’s autonomy and all the conditions of consent are likely to be deficient. Employees generally manifest consent but without full knowledge, with a heavy heart or under pressure.¹⁶⁰ Thus, in the vast majority of cases, consent to mandatory arbitration clauses in an employment contract is defective.

Second, there are significant social harms associated with arbitration clauses. Since arbitration proceedings are closed and the results confidential, employers can hide systemic violations from the public, which enables repeating conduct. Confidentiality agreements (and the confidentiality that goes along with arbitration) can “enable abusers by silencing victims and allowing harassers to continue their misbehavior.”¹⁶¹ Indeed, the abuser “may be undeterred and even emboldened knowing that the public may never learn of the misconduct,” while victims “may feel isolated and fail to come forward for fear of not being believed.”¹⁶² In these cases,

whether arbitration clauses violate public policy, *see* NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 49 (2019).

158. *Id.* at 164.

159. *Id.* at 85.

160. *Id.* at 100.

161. Bradford J. Kelly & Chase J. Edwards, *#MeToo, Confidentiality Agreements, and Sexual Harassment Claims*, BUSINESS LAW TODAY, (Oct. 17, 2018), <https://businesslawtoday.org/2018/10/metoo-confidentiality-agreements-sexual-harassment-claims/>.

162. *Id.* (noting that “[o]pponents of confidentiality provisions in settlement agreements argue that the greatest benefit of banning such provisions means that serial harassers would lose the ability to buy the silence of their victims.”). Consider the recent spate of sexual harassment and sexual abuse cases the public did not know about that resulted in additional women being unnecessarily harmed. For example, gymnasts on the USA gymnastics team were required to sign confidentiality agreements that included steep penalties for disclosure, and were

the public interest in learning about a harmful practice will typically outweigh the employer's or the public's interest in arbitration—the harm to collective autonomy outweighs the individual autonomy interest.

Based on the forgoing, because consent is not possible in most employment contracts and because the social harms often outweigh the social benefits of arbitration, this Article proposes a rebuttable presumption of no valid consent to mandatory arbitration clauses in employment contracts, even when an employee “manifests” consent with a signature or click, with the presumption rebutted only by a showing by the employer that the term was agreed to through negotiation by parties with roughly equal bargaining power.

Kim's notion of defective consent turns the duty to read on its head—for the reasons explained above, a mandatory arbitration clause where bargaining power is unequal is not generally capable of consent, even if an employee reads it and “manifests consent.” Under my proposal, the “manifestation of consent” would not result in a presumption of consent. Rather, after an employee “manifests consent” to a mandatory arbitration provision in an employment contract, the employer would then have the burden to show the consent conditions were sufficiently robust for the arbitration clause to be enforceable. For example, the employer could show that the employee had other employment opportunities where arbitration was not required

therefore kept in the dark about dozens of abuse cases filed against Larry Nassar, the former USA Gymnastics team doctor. Bradford J. Kelly & Chase J. Edwards, *#MeToo, Confidentiality Agreements, and Sexual Harassment Claims*, BUSINESS LAW TODAY, (Oct. 17, 2018), <https://businesslawtoday.org/2018/10/metoo-confidentiality-agreements-sexual-harassment-claims/>. Similarly, Dov Charney, the former CEO of American Apparel, was able to capitalize on the fact that each of the at-least six arbitrated sexual harassment suits against him was kept confidential, because of confidentiality and mandatory arbitration clauses. Jim Edwards, *With New Sex Harassment Suits, Is American Apparel's CEO Facing the Endgame?*, CBS NEWS: MONEYWATCH, (June 6, 2011, 11:04 AM), <https://www.cbsnews.com/news/with-new-sex-harassment-suits-is-american-apparels-ceo-facing-the-endgame/>. Other well-known individuals accused of harassment or abuse who have been protected by confidentiality clauses under similar circumstances include Harvey Weinstein, Kevin Spacey, Bill O'Reilly, and Bill Cosby. Such cases abound (*see The Problem of Sexual Harassment and Forced Arbitration*, CORREIA & PUTH, <https://www.correiaputh.com/news/problem-sexual-harassment-forced-arbitration/> (last visited Oct. 19, 2019)) as non-disclosure agreements and mandatory arbitration become more common. Bradford J. Kelly & Chase J. Edwards, *#MeToo, Confidentiality Agreements, and Sexual Harassment Claims*, BUSINESS LAW TODAY, (Oct. 17, 2018), <https://businesslawtoday.org/2018/10/metoo-confidentiality-agreements-sexual-harassment-claims/>.

(for example, Walmart could show that Kroger's and Target were hiring and didn't require mandatory arbitration) and that the arbitration clause was disclosed before the hiring process even started. The employer would have to prove that the employee understood what the clause meant. In other words, the "manifestation of consent" would not automatically result in a presumption that the other conditions were met, as it is now with the duty to read.

Note that this Article does not make the case that all arbitration clauses should *per se* lack consentability. A prohibition against all arbitration contracts would be overbroad and would unnecessarily restrict individual freedom. As with bodily integrity contracts, the parties should be able to make contracts with arbitration agreements that bind them, as long as the consent is real and robust. On the sliding scale of consent, an agreement between two parties of relatively equal bargaining power might yield a contract where neither party is at a distinct disadvantage with arbitration. For example, labor unions often prefer arbitration for a variety of reasons. Arbitration clauses that are negotiated freely by entities with roughly similar power (labor union and employer) are less suspect, especially where they contain an avenue to appeal any arbitration ruling in a United States court, as is often the case with collective bargaining agreements. Similarly, where two businesses, each represented by an attorney, include an arbitration clause in their negotiated contract, one could expect the requisite consent conditions to be present and robust. In these cases, the threat to autonomy is not outweighed by the consent conditions and so the agreement is consentable. However, in employment contracts, based on the likely threat to autonomy and the deficient consent conditions in the typical case, the presumption should go the other way. "Although society should be concerned about sliding down the slippery slope to restricting freedom, it should be equally concerned about tumbling down the other side of that slope and ending up in a place where the brutes and bullies always win."¹⁶³

163. NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 118 (2019).