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## The Public Believes Predispute Binding Arbitration Clauses Are Unjust: Ethical Implications for Dispute-System Design in the Time of Vanishing Trials

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# THE PUBLIC BELIEVES PREDISPUTE BINDING ARBITRATION CLAUSES ARE UNJUST: ETHICAL IMPLICATIONS FOR DISPUTE-SYSTEM DESIGN IN THE TIME OF VANISHING TRIALS

Victor D. Quintanilla\* & Alexander B. Avtgis\*\*

## INTRODUCTION

One troubling cause of the decline in civil trials is the growing ubiquity of predispute binding arbitration clauses in adhesion contracts.<sup>1</sup> Over the past decade, two interacting patterns have come to encourage transactional attorneys to engage in zealous advocacy when crafting such clauses. First, recent U.S. Supreme Court jurisprudence broadly defers and delegates authority to those who create binding arbitration clauses in adhesion contracts with little oversight.<sup>2</sup> Second, members of the public rarely read or understand these clauses buried in boilerplate language.<sup>3</sup>

These clauses displace the legal backdrop of fair, legitimate, and just public legal institutions with the dispute-system procedure most preferred by those who draft and design adhesion contracts.<sup>4</sup> Therefore, norms of zealous

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1. See J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3074–75 (2015); Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745, 752 (2010) (“As trials have declined, private arbitrations have grown exponentially. . . . [A]lternative dispute resolution (ADR) has gained a life of its own.”).

2. See Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in the Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2808–11 (2015).

3. See Yannis Bakos et al., *Does Anyone Read the Fine Print?: Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 32 (2014); Thomas H. Koenig & Michael L. Rustad, *Fundamentally Unfair: An Empirical Analysis of Social Media Arbitration Clauses*, 65 CASE W. RES. L. REV. 341, 380–82 (2014).

4. See Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1649 (2005); Nancy A. Welsh, *Mandatory Predispute Consumer Arbitration, Structural Bias, and Incentivizing Procedural Safeguards*, 42 SW. L. REV. 187, 188 (2012).

advocacy may collide with a wider and more virtuous ethic that considers third parties and the public's desire for a fair, legitimate, and just civil justice system.<sup>5</sup>

Before turning to the dialectic between these two ethical principles, we report a psychological experiment conducted with the American public.<sup>6</sup> The study randomly assigned members of the public into conditions that varied the amount they learned about the procedure (for example, a legal definition, an example clause, a *New York Times* article) and asked them to rate the fairness and justice of binding arbitration. The experiment reveals that the more the public learns about predispute binding arbitration clauses, the more they believe this dispute-resolution procedure is unjust and illegitimate. Yet, the vast majority of participants mistakenly believed that they had never agreed to a binding arbitration clause.

Drawing on these findings, we discuss the pressing need for a wider ethic that applies to transactional attorneys who design binding arbitration clauses within adhesion contracts. We also draw lessons from behavioral legal ethics and social psychology. These lessons reveal that this wider ethic may be endangered by the situational influences that currently operate within law firms (and in-house) due to these two intersecting patterns. We discuss ways of altering the regulatory environment to encourage the wider ethic to flourish.

#### I. PRIOR EMPIRICAL STUDIES ON PREDISPUTE BINDING CONSUMER ARBITRATION

While the number of empirical legal studies on predispute binding consumer arbitration has increased since *AT&T Mobility LLC v. Concepcion*<sup>7</sup> and *American Express Co. v. Italian Colors Restaurant*,<sup>8</sup> this body of literature has been eclipsed by the rise in the use of binding arbitration clauses in adhesion contracts<sup>9</sup> and the power of these clauses as reinforced by the post-*Concepcion*, post-*Italian Colors* legal regime.<sup>10</sup>

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5. See generally David Luban, *Asking the Right Questions*, 72 TEMP. L. REV. 839 (1999); Carrie Menkel-Meadow, *Are There Systemic Ethics Issues in Dispute System Design?: And What We Should [Not] Do About It: Lessons from International and Domestic Fronts*, 14 HARV. NEGOT. L. REV. 195 (2009); Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375 (2006).

6. The authors conducted this survey, which is referenced repeatedly throughout this Article as Victor D. Quintanilla & Alexander B. Avtgis, *Survey on Binding Arbitration* (Aug. 2016) (on file with the *Fordham Law Review*) [hereinafter Survey].

7. 563 U.S. 333 (2011).

8. 133 S. Ct. 2304 (2013).

9. See generally CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) (2015), [http://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf) [<https://perma.cc/8BPH-XN97>]; Myriam Gilles, *Killing Them with Kindness: Examining "Consumer-Friendly" Arbitration Clauses After AT&T Mobility v. Concepcion*, 88 NOTRE DAME L. REV. 825 (2013).

10. See David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 60 (2014).

Legal scholars have empirically examined several important issues that relate to whether consumers meaningfully consent to predispute binding consumer arbitration. For example, a body of literature examines consumers' general understanding of standard-form contracts and included contract terms. This research reveals both that consumers rarely read the fine print in adhesion contracts,<sup>11</sup> and even in the rare instances when they do, they seldom understand the meaning and effect of binding arbitration clauses.<sup>12</sup>

Recent empirical legal studies that explore predispute binding arbitration clauses, and particularly those clauses with class waivers, focus on the growing prevalence of these clauses themselves<sup>13</sup> or the content, legal implications, or varying effects that such clauses have for consumers and employees.<sup>14</sup> These studies find that predispute binding consumer arbitration clauses and class action waivers are ubiquitous and that their use is rising.<sup>15</sup> Furthermore, these studies reveal that members of the public, as one-shot players, often fare poorly in binding arbitration.<sup>16</sup> Not surprisingly, the mere existence of a predispute binding consumer arbitration clause or class action waiver reduces the likelihood of securing counsel.<sup>17</sup>

These lines of inquiry surely deepen our knowledge of the extent to which consumers and employees truly consent to these terms and the effect of this legal backdrop, while leaving open the question of what an ordinary member of the public thinks and feels about these clauses after learning their effect. In short, a gap exists in the body of empirical work.<sup>18</sup>

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11. See, e.g., Thomas J. Maronick, *Do Consumers Read Terms of Service Agreements When Installing Software?: A Two-Study Empirical Analysis*, 4 INT'L J. BUS. & SOC. RES. 137, 144 (2014); Amy J. Schmitz, *Pizza-Box Contracts: True Tales of Consumer Contracting Culture*, 45 WAKE FOREST L. REV. 863, 886–87 (2010).

12. See, e.g., Bakos et al., *supra* note 3, at 2; Jeff Sovern et al., "Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements, 75 MD. L. REV. 1, 81 (2015) (demonstrating a "profound lack of understanding about the existence and effect of arbitration agreements"); Debra P. Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J.L. & BUS. 617, 671–73 (2009).

13. See, e.g., Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 411 (2007); Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 895 (2008).

14. For example, David Horton and Andrea Cann Chandrasekher examine an extensive dataset of American Arbitration Association complaints as well as report filing rates, outcomes, damages, costs, and case lengths. See Horton & Cann Chandrasekher, *supra* note 10, at 91–102.

15. See generally Gilles, *supra* note 9; Michael L. Rustad et al., *An Empirical Study of Predispute Mandatory Arbitration Clauses in Social Media Terms of Service Agreements*, 34 U. ARK. LITTLE ROCK L. REV. 643 (2012).

16. See Horton & Chandrasekher, *supra* note 10, at 57.

17. See, e.g., Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1334 (2015) ("[G]iven the economics of how plaintiff-side employment attorneys are compensated, when employers impose mandatory arbitration clauses they make it more difficult for employees to secure legal representation.").

18. See, e.g., Peter B. Rutledge, *Arbitration Reform: What We Know and What We Need to Know*, 10 CARDOZO J. CONFLICT RESOL. 579 (2009).

Prior studies underscore that the public fails to grasp what these terms in adhesion contracts mean when seeking goods, services, credit, or employment. Here, we investigate what the public thinks and feels about binding consumer arbitration after learning about the actual meaning and significance of predispute binding arbitration clauses in adhesion contracts. Our study seeks to simulate the critical moment in which a member of the public learns from a legal professional, after his or her dispute has arisen, that the dispute is bound by a predispute binding arbitration clause. We will also describe the implications of this experience on the ethics of dispute-system design in our general discussion.

## II. EMPIRICAL LEGAL STUDY: HOW DOES LEARNING ABOUT PREDISPUTE BINDING ARBITRATION CLAUSES AFFECT THE PUBLIC'S PERCEPTION OF THE DISPUTE PROCEDURE?

Our empirical legal study examined the extent to which learning about predispute binding arbitration clauses affects the way in which ordinary members of the public view the dispute procedure. We conducted a psychological experiment that investigated the hypothesis that the more that ordinary members of the American public learn about the meaning and significance of predispute binding arbitration clauses, the more they think the practice is unfair and unjust. We hypothesized that, relative to providing them (1) no information (and simply testing their lay beliefs); (2) a legal definition of binding arbitration; or (3) a sample predispute binding arbitration clause, after learning about the meaning of predispute binding arbitration clauses in a *New York Times* article reporting how ordinary Americans are affected by the dispute-resolution procedure, their beliefs about the justice and fairness of binding consumer arbitration would diminish.

### A. Method: Design and Participants

Our study employed a single-factor, between-subjects design consisting of four conditions that cumulatively increased exposure to information: (1) a “no information” condition, (2) a “legal definition of binding arbitration” condition, (3) a “legal definition of binding arbitration and an example predispute binding arbitration clause” condition, and (4) a “legal definition of binding arbitration, an example predispute binding arbitration clause, and a *New York Times* article” condition. We recruited 400 participants ( $N = 400$ ) from Amazon Mechanical Turk. Amazon Mechanical Turk is widely employed within the behavioral and social sciences as a platform to recruit nationally representative samples of the American public.<sup>19</sup> Of the total

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19. See generally Krista Casler et al., *Separate but Equal?: A Comparison of Participants and Data Gathered via Amazon's MTurk, Social Media, and Face-to-Face Behavioral Testing*, 29 *COMPUTERS HUM. BEHAV.* 2156, 2156–60 (2013); John J. Horton et al., *The Online Laboratory: Conducting Experiments in a Real Labor Market*, 14 *EXPERIMENTAL ECON.* 399 (2011); Gabriele Paolacci et al., *Running Experiments on Amazon Mechanical Turk*, 5 *JUDGMENT & DECISION MAKING* 411 (2010). Participants received a \$1.00 payment as compensation for participation in our study.

recruited, seventy-one participants failed the study's manipulation check (described below) and were excluded from analyses. Thus, the final sample consisted of 329 adults who passed the study's manipulation check. This sample included 190 males (57.8 percent) and 139 females (42.2 percent) and comprised the following self-reported racial/ethnic groups: 75.4 percent Caucasian/white, 8.5 percent Asian/Asian American, 5.8 percent African American/black, 7.3 percent Hispanic, 0.3 percent Native American and 2.7 percent other. Geographically, participants resided in thirty-nine states. The majority of participants either graduated from a four-year college/university (40.7 percent) or had studied at such a college/university (13.4 percent). The average age of the sample of the American public was 36.19 years ( $M = 36.19$ ,  $SD = 12.23$ ).

### B. Procedure

After reading an introduction for the research study, participants gave their informed consent to participate in an online survey about dispute-resolution procedures. Participants were then randomly assigned by the Qualtrics platform to one of the following four conditions.

In the "no information" condition, participants read this prompt: "In this survey, you will be asked for your opinions about two procedures for resolving disputes that consumers bring against financial companies, such as credit card issuers, banks, private student loan companies, and mobile wireless companies. These two procedures are (1) binding arbitration and (2) trial." After reading this introductory statement, the participants proceeded to the next page of the survey where they rated the dependent measures described below.

In the "legal definition of binding arbitration" condition, participants read the introductory statement and then immediately proceeded to the next page of the survey, which stated:

Black's Law Dictionary defines arbitration as follows: arbitration n. A dispute-resolution process in which the disputing parties choose one or more neutral third parties to make a final and binding decision resolving the dispute. The parties to the dispute may choose a third party directly by mutual agreement, or indirectly, such as by agreeing to have an arbitration organization select the third party.—Also termed (redundantly) binding arbitration—arbitrate, vb.—arbitral, adj.<sup>20</sup>

In the "example binding arbitration clause" condition, participants read the introductory statement and the legal definition of binding arbitration, and they were then provided an example binding arbitration clause, which stated:

Applicable Law; Arbitration. This website is arranged, sponsored, and managed in the state of Washington, USA. The laws of the state of Washington govern this Agreement and all of its terms and conditions, without giving effect to any principles of conflicts of laws. You agree that any action at law or in equity arising out of or relating to these terms and conditions shall be submitted to confidential arbitration in Seattle,

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20. This quote is drawn from *Arbitration*, BLACK'S LAW DICTIONARY (10th ed. 2014).

Washington, except that, to the extent you have in any manner violated or threatened to violate our intellectual property rights, we may seek injunctive or other appropriate relief in any state or federal court in the state of Washington, and you consent to exclusive jurisdiction and venue in such courts. Arbitration under this agreement shall be conducted under the rules then prevailing of the American Arbitration Association. The arbitrator's award shall be binding and may be entered as a judgment in any court of competent jurisdiction. To the fullest extent permitted by applicable law, no arbitration under this Agreement shall be joined to an arbitration involving any other party subject to this Agreement, whether through class arbitration proceedings or otherwise.

Unbeknownst to the participants, this was virtually the same clause governing their employment as workers of Amazon Mechanical Turk.

In the “*New York Times* article” condition, participants read the introductory statement, the legal definition of binding arbitration, the example binding arbitration clause, and a *New York Times* article entitled “Arbitration Everywhere, Stacking the Deck of Justice” by Jessica Silver-Greenberg and Robert Gebeloff, dated October 31, 2015. This article was the first in an important trilogy of articles reporting an investigation conducted by the *New York Times* on how binding consumer arbitration affects ordinary members of the American public. For most members of the public, this article was their introduction to the real-world meaning and significance of predispute binding consumer arbitration clauses. The article begins with the statement:

On Page 5 of a credit card contract used by American Express, beneath an explainer on interest rates and late fees, past the details about annual membership, is a clause that most customers probably miss. If cardholders have a problem with their account, American Express explains, the company “may elect to resolve any claim by individual arbitration.”

....

Over the last few years, it has become increasingly difficult to apply for a credit card, use a cellphone, get cable or Internet service, or shop online without agreeing to private arbitration. The same applies to getting a job, renting a car or placing a relative in a nursing home.<sup>21</sup>

After reading and learning the information in each of the conditions, they turned to the dependent measures described in detail below. Participants completed a manipulation check to ensure that they correctly understood the information presented, also described below. Afterward, participants

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21. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES: DEALBOOK (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> [<https://perma.cc/HZX7-K7F8>]. Most scholars and readers regarded this news account as highlighting the growing ubiquity of predispute binding arbitration clauses and the way in which these clauses insulate entities from liability. See *DirectTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471–76 (2015) (Ginsburg, J., dissenting); see also Hiro N. Aragaki, *Constructions of Arbitration's Informalism: Autonomy, Efficiency, and Justice*, 2016 J. DISP. RESOL. 141, 142. Some have criticized the article, arguing that the greater problem is predispute binding arbitration clauses that ban class-wide relief. See David B. Lipsky, *The New York Times' Attack on Arbitration*, 22 DISP. RESOL. MAG. 6, 6 (2016).

completed a short demographic questionnaire (about, for example, gender, age, race, education, and residential state). They then indicated which of several statements applied to them, such as, “I am a person who has signed a binding arbitration clause.”<sup>22</sup> Participants then indicated whether and how certain they were that, “[b]y using Mturk, have you entered into a binding arbitration clause with Amazon?”<sup>23</sup> Finally, they were asked to “[p]lease explain your response so that we can understand your answers.”<sup>24</sup>

### C. Measures

This section describes the dependent measures that the participants completed.

#### 1. Familiarity

On a seven-point scale ranging from one (“not at all familiar”) to seven (“very familiar”), we asked participants to rate for trial and binding arbitration: “How familiar are you with the following procedures for resolving disputes that consumers have with financial companies, such as credit card issuers, banks, private student loan companies, and mobile wireless companies?”<sup>25</sup>

#### 2. Justice and Legitimacy Items

Participants were then asked to rate trial and binding arbitration on six items that relate to perceived fairness, unfairness, justice, accuracy, effectiveness, and legitimacy: “Using the scales provided, please rate trial and binding arbitration as ways of resolving disputes that consumers bring against financial companies, such as credit card companies, banks, private student loan providers, and mobile wireless companies.”<sup>26</sup> We asked participants to rate trial and binding arbitration on each of these six items, again, on a seven-point scale ranging from one (“not at all”) to seven (“very”): how fair, unfair, just, accurate, effective, and legitimate are the following procedures?<sup>27</sup> As described below, these six measures were highly correlated with feelings toward binding arbitration and converged on a single underlying factor, referred to as an “anticipated experience of justice.”

#### 3. Feelings Toward Trial and Binding Arbitration

A seven-point scale assessed how participants feel toward trial and binding arbitration as ways of resolving disputes (very negative, negative, somewhat negative, neutral, somewhat positive, positive, very positive).<sup>28</sup>

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22. Survey, *supra* note 6.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*



#### 4. Favorability Toward Binding Arbitration

Participants also rated how favorable or unfavorable they feel toward binding arbitration (very unfavorable, unfavorable, somewhat unfavorable, neutral, somewhat favorable, favorable, very favorable), and they were asked to explain those feelings toward binding arbitration “so that we can understand your impressions.”<sup>29</sup>

#### 5. Manipulation Check

A manipulation-check item assessed whether participants correctly recalled the information that they read about binding arbitration. Participants were asked:

In today’s study, you were presented with and read, (1) Black’s Law Dictionary’s definition of arbitration, (2) Black’s Law Dictionary’s definition of arbitration AND an example arbitration clause, (3) Black’s Law Dictionary’s definition of arbitration, and example arbitration clause, AND a New York Times article on binding arbitration, or (4) None of the above. I simply recorded my impressions of trial and binding arbitration.<sup>30</sup>

### D. Results

This section describes the results of the survey and how we analyzed them.

#### 1. Measuring Results: The Analytic Strategy

Before turning to results, we describe our analytic strategy. First, an initial analysis of variance (ANOVA) omnibus test examined whether there were statistically significant differences between conditions for each dispute-resolution procedure: trial and binding arbitration. Next, if the omnibus test indicated that the conditions significantly differed, Tukey honest significant difference (HSD) post hoc tests probed for differences between the information conditions to specifically examine whether the *New York Times* article condition was different from all other information conditions. All means and standard deviations for each dependent variable (by label) are reported in table 1 in the appendix.

#### 2. Familiarity

An ANOVA revealed that participants’ prior familiarity with binding arbitration did not statistically differ across information conditions,  $F(3, 325) = 0.92$ ,  $p = .431$ ,  $\eta_p^2 = .01$ .<sup>31</sup> In addition, participants’ prior familiarity with trial did not differ across information conditions,  $F(3, 325) = 0.93$ ,  $p = .427$ ,  $\eta_p^2 = .01$ . As such, the randomization of

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29. *Id.*

30. *Id.*

31. *See infra* Table 1.

participants with different levels of prior familiarity for these procedures between conditions was successful.

### 3. Justice and Legitimacy Items

(i) *Fairness*. An ANOVA revealed that information had a significant effect on perceptions of the fairness of binding consumer arbitration,  $F(3, 325) = 21.07, p < .000, \eta_p^2 = .16$ .<sup>32</sup> Tukey tests explored potential differences between the *New York Times* article condition and all the other information conditions. Results revealed that the *New York Times* article condition ( $M = 3.27, SD = 1.58$ ) differed from all other conditions: no information condition ( $M = 3.99, SD = 1.36$ ) ( $p = .011$ ), definition condition ( $M = 5.00, SD = 1.37$ ) ( $p < .000$ ), and sample clause condition ( $M = 4.57, SD = 1.43$ ) ( $p < .000$ ).<sup>33</sup> The more participants learned about the meaning and significance of predispute binding consumer arbitration clauses, the more their ratings of the fairness of binding arbitration decreased.

(ii) *Legitimacy*. An ANOVA revealed that information also had a significant effect on perceptions of the legitimacy of binding consumer arbitration,  $F(3, 325) = 19.05, p < .000, \eta_p^2 = .15$ .<sup>34</sup> Tukey tests explored potential differences between the *New York Times* article condition and all the other information conditions. Results again revealed that the *New York Times* article condition ( $M = 3.59, SD = 1.69$ ) differed from all other conditions: no information condition ( $M = 4.71, SD = 1.66$ ) ( $p < .000$ ), definition condition ( $M = 5.51, SD = 1.49$ ) ( $p < .000$ ), and sample clause condition ( $M = 5.02, SD = 1.58$ ) ( $p < .000$ ).<sup>35</sup> As participants learned more about how ordinary Americans are affected by predispute binding arbitration clauses, their ratings of the legitimacy of the procedure decreased.

The pattern of results observed for “fairness” and “legitimacy” was replicated across all seven justice and legitimacy dependent measures, including the remaining measures of “unfairness,” “justness,” “accuracy,” and “effectiveness.”<sup>36</sup> In short, the more the public learns about how predispute binding arbitration clauses operate, the more unfair and unjust they find the dispute procedure.

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32. See *infra* Table 1.

33. For all means and comparisons, see *infra* Table 1.

34. See *infra* Table 1.

35. For all means and comparisons, see *infra* Table 1.

36. See *infra* Table 2. Above, we report the influence of learning about predispute binding arbitration clauses on attitudes toward binding arbitration. Here, we report the influence of learning about predispute binding arbitration clauses on attitudes toward trial. Taken together, the information read did not significantly affect perceptions of fairness of trial  $F(3, 325) = 1.47, p = .224, \eta_p^2 = .01$  ( $M_{Grand} = 5.28, SD_{Grand} = 1.34$ ), perceptions of the unfairness of trial,  $F(3, 325) = 0.143, p = .934, \eta_p^2 = .00$  ( $M_{Grand} = 2.84, SD_{Grand} = 1.44$ ), perceptions of the accuracy of trial,  $F(3, 325) = 2.06, p = .105, \eta_p^2 = .02$  ( $M_{Grand} = 4.93, SD_{Grand} = 1.30$ ), or perceptions of the justness of trial,  $F(3, 325) = 1.44, p = .231, \eta_p^2 = .01$  ( $M_{Grand} = 5.23, SD_{Grand} = 1.38$ ). The information read marginally affected perceptions of the effectiveness of trial,  $F(3, 325) = 2.12, p = .098, \eta_p^2 = .02$  ( $M_{Grand} = 5.14, SD_{Grand} = 1.34$ ), and the legitimacy of trial,  $F(3, 325) = 2.41, p = .067, \eta_p^2 = .02$  ( $M_{Grand} = 5.75, SD_{Grand} = 1.31$ ).

#### 4. Feelings Toward Trial and Binding Arbitration

An ANOVA revealed that learning about binding consumer arbitration had a significant effect on feelings toward the dispute procedure,  $F(3, 322) = 27.19, p < .000, \eta_p^2 = .20$ .<sup>37</sup> Tukey tests explored potential differences between the *New York Times* article condition and all the other information conditions. Results revealed that the *New York Times* article condition ( $M = 2.58, SD = 1.53$ ) differed from the no information condition ( $M = 3.93, SD = 1.47$ ) ( $p < .000$ ), the definition condition ( $M = 4.74, SD = 1.42$ ) ( $p < .000$ ), and the sample clause condition ( $M = 4.26, SD = 1.62$ ) ( $p < .000$ ).<sup>38</sup> As compared to the other conditions, after participants read the *New York Times* article depicting how ordinary Americans are affected by the dispute-resolution procedure, they had greater negative feelings toward binding arbitration. The information provided did not have a significant effect on feelings toward trial,  $F(3, 325) = 1.61, p = .187, \eta_p^2 = .02$  ( $M_{Grand} = 4.98, SD_{Grand} = 1.39$ ).

#### 5. Favorability Toward Binding Arbitration

An ANOVA revealed that learning about binding consumer arbitration had a significant effect on the favorability toward this dispute procedure,  $F(3, 325) = 27.18, p < .000, \eta_p^2 = .20$ .<sup>39</sup> Tukey tests explored potential differences between the *New York Times* article condition and all the other information conditions. Results revealed that the *New York Times* article condition ( $M = 2.61, SD = 1.53$ ) differed from all other conditions: no information condition ( $M = 4.00, SD = 1.61$ ) ( $p < .000$ ), definition condition ( $M = 4.78, SD = 1.35$ ) ( $p < .000$ ), and sample clause condition ( $M = 4.35, SD = 1.67$ ) ( $p < .000$ ).<sup>40</sup> As compared to the other conditions, when participants learned about how ordinary Americans are affected by binding arbitration, they found the dispute-resolution procedure less favorable.

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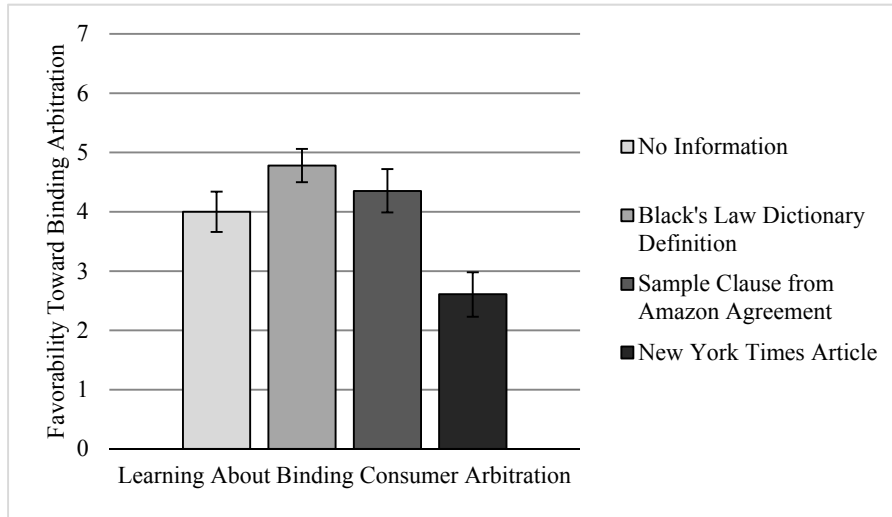
37. See *infra* Figure 1, Table 1.

38. For all means and comparisons, see *infra* Table 1.

39. See *infra* Table 1.

40. For all means and comparisons, see *infra* Table 1.

Figure 1: Categories in this figure and in table 1 in the appendix reflect reading information and cumulate as follows: No information, Black’s Law Dictionary definition, Sample clause from Amazon Mturk agreement, and New York Times article. Means and 95% CI are represented.



### 6. Anticipated Experience of Justice

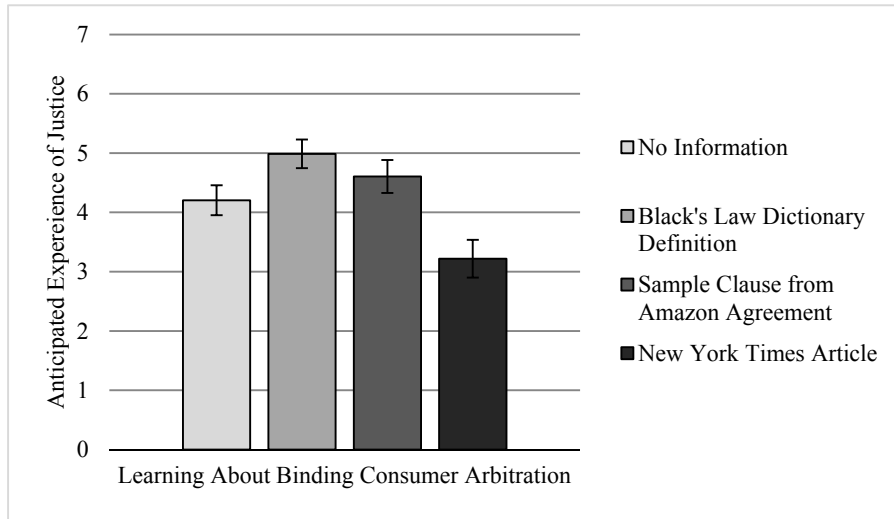
After establishing the interitem correlation of the justice and legitimacy items, we conducted an exploratory factor analysis to test the extent to which these measures form a single composite and load onto a single latent factor. Ultimately, we concluded that these seven measures converged on a single underlying factor—an anticipated experience of justice with binding consumer arbitration. We then conducted a one-way ANOVA to examine the influence of learning about binding arbitration on anticipated experiences of justice.

To begin, table 3 in the appendix reveals the interitem correlation between these dependent measures. As can be observed, the variables are highly correlated, with all interitem Pearson’s R rising above .446. This indicates that the psychological experiences reflected by these dependent measures are highly correlated.

Next, we conducted an exploratory factor analysis, which revealed a Cronbach’s  $\alpha$  of .936. This evidences a high reliability that these items reflect an underlying construct. Therefore, we conducted an exploratory factor analysis, which revealed that all seven dependent measures are explained by a single underlying factor. The cross-scenario solution yielded one significant eigenvalue of 5.10 for all seven measures, respectively, cumulatively explaining 72.79 percent of the total variation. The KMO statistic was .935 with a significant Bartlett’s Test of Sphericity ( $p < .001$ ), indicating the appropriateness of the factor analysis.

An ANOVA revealed that learning about binding consumer arbitration had a significant effect on anticipated experiences of justice,  $F(3, 325) = 28.46$ ,  $p < .000$ ,  $\eta_p^2 = .21$ .<sup>41</sup> Tukey tests explored potential differences between the *New York Times* article condition and all the other information conditions. Results revealed that the *New York Times* article condition ( $M = 3.22$ ,  $SD = 1.29$ ) differed from all other conditions: no information condition ( $M = 4.20$ ,  $SD = 1.20$ ) ( $p = .001$ ), definition condition ( $M = 4.99$ ,  $SD = 1.16$ ) ( $p < .000$ ), and sample clause condition ( $M = 4.61$ ,  $SD = 1.27$ ) ( $p < .000$ ).<sup>42</sup> As compared to the other conditions, when participants learned how ordinary Americans are affected by binding arbitration, their anticipated experiences of justice in this dispute-resolution procedure greatly diminished.

Figure 2: Categories reflect reading information presented and cumulate as follows: No information, Black's Law Dictionary definition, Sample clause from Amazon Mturk agreement, and New York Times article. Means and 95% CI are represented.



### 7. Beliefs the Public Holds About Whether They Have Entered into Binding Arbitration Clauses

After responding to these measures, participants then completed a brief demographic questionnaire, which asked them to “[p]lease mark any of the following statements that apply to you.”<sup>43</sup> The first category was, “I am a person who has signed a binding arbitration clause,” and it was listed first

41. See *infra* Table 1, *infra* Figure 2.

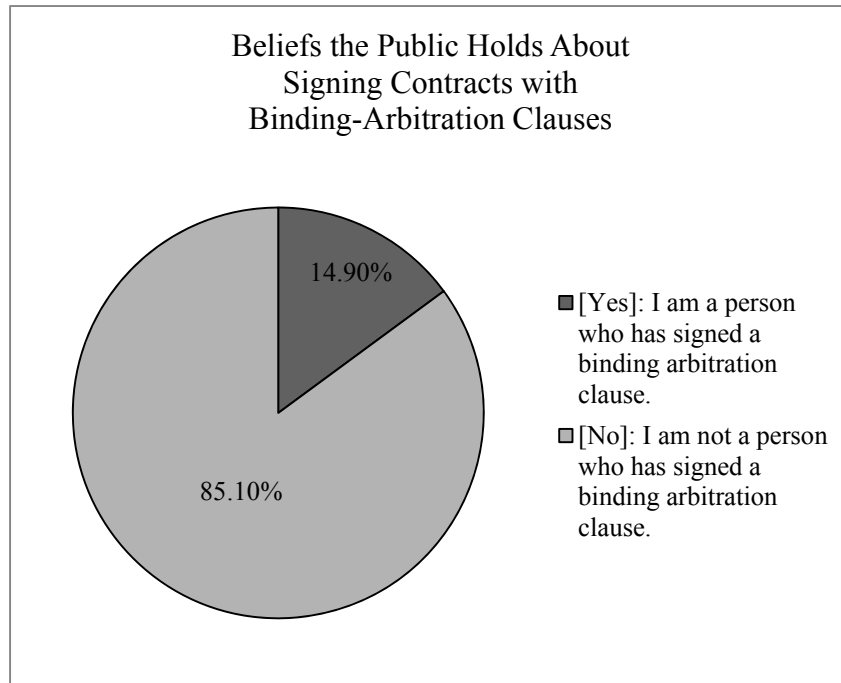
42. For all means and comparisons, see *infra* Table 1.

43. Survey, *supra* note 6.

and quite conspicuously before several other categories.<sup>44</sup> The list also contained a “none of the above” option below these categories.

Troublingly, 71.4 percent (235 participants) marked “none of the above,” and only 14.9 percent (49 participants) indicated that they have signed a binding arbitration clause. These responses are patently incorrect for at least two reasons. First, the Consumer Financial Protection Bureau’s empirical research reveals that binding arbitration clauses are ubiquitous and that tens of millions of consumers use consumer financial products or services that are subject to predispute arbitration clauses, including mobile wireless phones (87.5 percent of contracts covering 99.9 percent of the market).

*Figure 3: Beliefs that the public holds about whether they have signed contracts with binding arbitration clauses. The vast majority of the participants did not believe that they had signed a contract with a binding arbitration clause.*



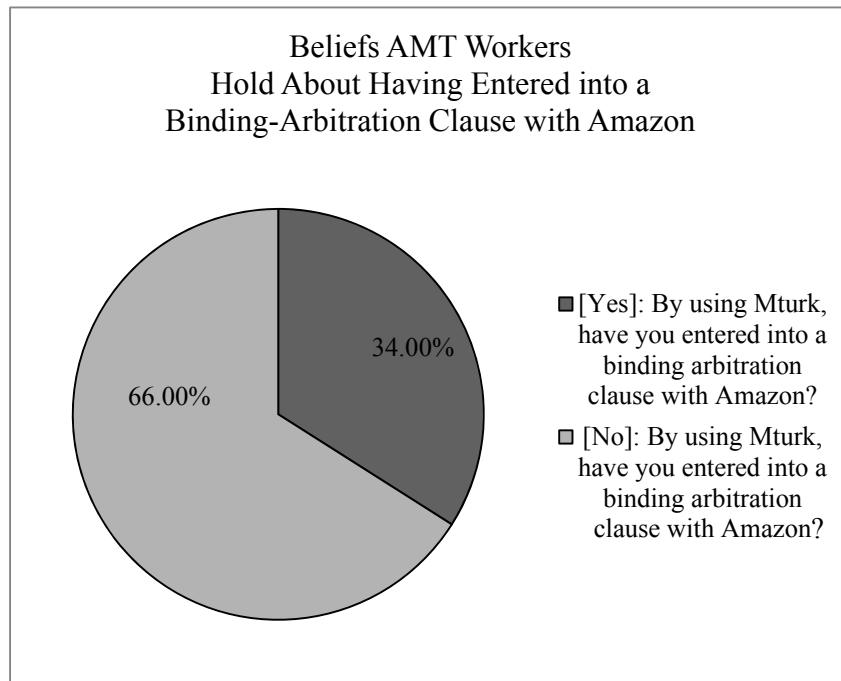
Second, by definition, *all* of these participants (100 percent) as workers on Amazon Mechanical Turk’s online platform have entered into a predispute binding arbitration clause with a class action waiver. Indeed, by registering

44. These additional categories were “I have legal training or experience,” “I am an arbitrator,” “I own or run a business,” “I am a person who has a claim or dispute that involves or involved a binding consumer arbitration clause,” “I am affiliated with a public interest group,” “I am a person who has filed a claim in court,” “I am a person who has defended myself against a claim in court,” and “None of the Above.” *Id.*

for and using the site, *all* workers had agreed “to be bound by all terms and conditions of this agreement,” which included virtually the precise predispute binding arbitration clause used in the study.<sup>45</sup>

Finally, we asked participants, “By using MTurk, have you entered into a binding arbitration clause with Amazon?”<sup>46</sup> Most participants marked “no” (66 percent, 217 participants); some participants marked “yes” (34 percent, 112 participants).<sup>47</sup>

*Figure 4: Beliefs Amazon Mechanical Turk (AMT) workers hold about whether they have entered into a binding arbitration clause with Amazon.*



Importantly, we then followed up by asking them, “How certain are you of your response?” on a zero (not at all certain) to 100 (very certain) scale.<sup>48</sup> The median indicated uncertainty (*Median* = 40). We combined the dichotomous scores with the continuous score to create a score for each participant ranging from -100 (very certain that they did not enter into a binding arbitration clause with AMT) to 100 (very certain that they entered into binding arbitration clause with AMT). The mean score on this scale

45. See *Amazon Mechanical Turk Participation Agreement*, AMAZON MECHANICAL TURK, <https://www.mturk.com/mturk/conditionsofuse> (last updated Dec. 2, 2014) [<https://perma.cc/2WG5-JKS4>]. The only alteration to the clause was replacing “Amazon” and “Amazon Mechanical Turk” with “We” and “Our” to retain anonymity.

46. Survey, *supra* note 6.

47. See *infra* Figure 4.

48. Survey, *supra* note 6.

indicated that most participants were very uncertain but tilted toward believing (mistakenly) that they had not entered into a binding arbitration clause with Amazon Mechanical Turk ( $M = -7.98$ ,  $SD = 56.03$ , 95% CI  $[-14.05, -1.90]$ ). Illustrative explanations included, “I do not know,” “I don’t believe there is a binding arbitration clause with Amazon, but I signed up with Mturk long enough ago that I don’t remember all the terms and conditions,” “I feel that binding arbitration clauses are common with a lot of companies,” and “Probably was in the fine print.”

### III. IMPLICATIONS ON THE ETHICS OF DISPUTE SYSTEM DESIGN

This empirical legal study reveals that, when members of the public learn how predispute binding arbitration clauses operate, they feel that the arbitration process is unfair and unjust. Hence, the empirical study highlights a situation in which zealous advocacy norms conflict with ethical ideals that seek to mitigate harm to third parties and the public. Mainly, if transactional attorneys zealously advance their client’s economic interest when crafting predispute binding arbitration clauses within adhesion contracts, this may degrade the rule of law, including rule-of-law norms and rule-of-law culture,<sup>49</sup> imperiling the long-term viability of our legal institutions. Given the extant legal landscape in which the U.S. Supreme Court has delegated broad discretion to firms to craft binding arbitration clauses in adhesion contracts with little judicial oversight,<sup>50</sup> psychological influences within law firms and companies<sup>51</sup> make it more likely that transactional attorneys will serve as zealous advocates rather than virtuous agents who consider the long-term harm to the public caused by the degradation of legal institutions. Even so, structural changes in the legal landscape may alter these dynamics and make it more likely that the wider ethical ideal will flourish.

#### A. *The Public Learns the Significance of Predispute Binding Arbitration Clauses After Disputes Arise*

The more the public learns about predispute binding arbitration clauses, the more the public believes binding arbitration is unjust and illegitimate. Yet most members of the public *first* learn how predispute binding arbitration clauses affect them *after* their disputes arise, and especially after they consult with legal professionals. Much like the *New York Times* reporting on binding arbitration clauses, legal aid providers and plaintiffs’ lawyers will be the first

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49. See CHARLES GARDNER GEYH, *COURTING PERIL: THE POLITICAL TRANSFORMATION OF THE AMERICAN JUDICIARY* 16–43 (2015).

50. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); Resnik, *supra* note 2, at 2810, 2885–87; see also *DirectTV, Inc. v. Imburgia*, 136 S. Ct. 463, 463 (2015).

51. See Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1137 (2013).



to explain that binding arbitration largely favors the drafters of adhesion contracts and that there is very little ground for court review.<sup>52</sup>

This moment of interaction between laypeople and legal professionals is fundamental to understanding how predispute binding arbitration clauses degrade the rule of law and the legitimacy of public legal institutions. These legal professionals must explain the actual meaning, significance, and effect of binding consumer-arbitration clauses. For example, they will likely explain that binding arbitration often favors industry as a repeat player and seldom the one-shot player,<sup>53</sup> that there is seldom any ground for judicial review of an arbitrator's decision,<sup>54</sup> and that in many jurisdictions, an arbitrator need not even explain his or her decision.<sup>55</sup> Similarly, if the member of the public is an employee who has a grievance against an employer, these legal professionals will explain that employees win less often and less money in arbitration than in litigation,<sup>56</sup> that arbitration is not a hospitable venue for unrepresented claimants,<sup>57</sup> and that predispute binding arbitration clauses, given the prevalence of class action waivers, essentially eradicate class actions and group litigation.<sup>58</sup>

Finally, plaintiffs' lawyers will explain that given the likelihood that the claimant will not prevail and, hence, that these legal professionals will not be compensated with contingency fees or prevailing statutory fee awards, the aggrieved member of the public will likely be unable to secure legal representation.<sup>59</sup> If members of the public have claims that they cannot reasonably present on their own pro se, then it is virtually certain that they will fail to receive meaningful legal relief or access to justice. From this

52. Members of the public rarely know that a contract contains a predispute binding arbitration clause. See CONSUMER FIN. PROT. BUREAU, *supra* note 9, at 18–22 (“[O]ver three-fourths stated that they did not know whether their card issuers used pre-dispute arbitration clauses (78.8%).”). Hence, lawyers and legal aid providers are often the first to inform claimants about the significance of predispute binding arbitration clauses.

53. See Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 96, 97–100 (1974); Horton & Chandrasekher, *supra* note 10, at 57; Margaret Jane Radin, *Access to Justice and Abuses of Contract*, 33 WINDSOR Y.B. ACCESS TO JUST. (forthcoming 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2735011](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2735011) [<https://perma.cc/9BGV-XAKW>].

54. See Welsh, *supra* note 4, at 206–09.

55. See Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 397–98; see also Michael S. Barr, *Mandatory Arbitration in Consumer Finance and Investor Contracts*, 11 N.Y.U. J.L. & BUS. 793, 809 (2015); Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 LAW & CONTEMP. PROBS. 279, 301 (2004).

56. See Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 80 (2014); Sternlight, *supra* note 17, at 1312, 1322–25.

57. See Alexander J.S. Colvin & Kelly Pike, *Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System Has Developed?*, 29 OHIO ST. J. ON DISP. RESOL. 59, 78 (2014). Rules prohibit arbitrators from providing help to the parties. See UNIF. ARBITRATION ACT § 4 cmt. 4(c) (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2000) (disallowing the neutral to assist, despite explicitly recognizing the possibility that power imbalances may exist between parties); Joseph L. Daly, *Arbitration: The Basics*, 5 J. AM. ARB. 1, 12 (2006).

58. Compare *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), with *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

59. See Sternlight, *supra* note 17, at 1334–40.

angle, one observes a perspective in which predispute binding arbitration clauses prevent the effectuation of rights, including important civil rights enacted under federal law.<sup>60</sup>

*B. Firms Are Incentivized to Use Predispute  
Binding Arbitration Clauses to Reduce Litigation Exposure*

From another angle, one can understand why predispute binding arbitration clauses are attractive to firms, businesses, and multinational companies.<sup>61</sup> To begin, the Supreme Court has diffused and delegated decision-making authority to firms, allowing them to craft binding arbitration clauses and related dispute procedures with little judicial oversight.<sup>62</sup> Professor Nancy Welsh has described this diffusion and delegation as a form of institutional self-help, an opportunistic search for the funding and personnel that courts need to conduct fact-finding and decision making in cases that courts view as routine.<sup>63</sup> Professor Margaret Radin has observed that the Supreme Court's decisions are predicated on theories of private ordering and individual freedom.<sup>64</sup>

As profit-seeking actors, firms seek to maximize their economic self-interest within the wide discretion afforded by the Supreme Court.<sup>65</sup> By way of analogy, it is within this extant legal structure that Justice Oliver Wendell Holmes Jr. famously elaborated that an actor will behave as a "bad man" going as far as the law will permit him to go, irrespective of ethical considerations or externalities that harm third parties or the public.<sup>66</sup> For

60. See Resnik, *supra* note 2, at 2851 n.228.

61. See Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, in *BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS* 3 (Omri Ben-Shahar ed., 2007); Todd D. Rakoff, *The Law and Sociology of Boilerplate*, in *BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS*, *supra*, at 200, 206; see also Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627 (2002).

62. See *DirectTV, Inc. v. Imburgia*, 136 S. Ct. 463, 476 (2015) (Ginsburg, J., dissenting) ("Today's decision steps beyond *Conception* and *Italian Colors*. There, as here, the Court misread the FAA to deprive consumers of effective relief against powerful economic entities that write no-class-action arbitration clauses into their form contracts."); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311 (2013) ("[T]he fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy." (emphasis added)).

63. See Judith Resnik, *Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement*, 2002 *J. DISP. RESOL.* 155, 162–163, 165; Welsh, *supra* note 4, at 193–98.

64. See MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 19 (2012) [hereinafter RADIN, *BOILERPLATE*]; Margaret Jane Radin, *An Analytical Framework for Legal Evaluation of Boilerplate*, in *PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW* 215 (G. Klass et al. eds., 2014) [hereinafter Radin, *An Analytical Framework*].

65. Cf. 1 ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 26–27 (R.H. Campbell et al. eds., 1976) (4th ed. 1786) ("It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.").

66. See Oliver Wendell Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 459–61 (1897).

example, a firm may act in its own economic interest to reduce both exposures to liability and aggregate annual litigation expenditures by crafting adhesion contracts with predispute binding arbitration clauses. Existing legal structures tolerate—indeed, perhaps encourage—adhesion contracts with predispute binding arbitration clauses.<sup>67</sup>

Firms, therefore, harness the authority delegated to them under the Federal Arbitration Act (FAA) to shield themselves as far as possible from liability.<sup>68</sup> For example, many firms require consumers to enter into adhesion contracts with binding arbitration clauses that ban class actions. The difficulty is that when consumers have claims that are too small to rationally pursue on an individual basis (i.e., the negative-expected-value-suit problem<sup>69</sup>), these class action bans have the effect of negating liability for these harms.<sup>70</sup> Moreover, some firms have crafted adhesion contracts that bar injunctive and declaratory relief.<sup>71</sup> Others employ adhesion contracts that require consumers to travel to distant forums to arbitrate.<sup>72</sup> Finally, scholars have written about the incentives that these firms may have to capture arbitral bodies and the extent to which the repeat-player effect and funding sources may bias and influence arbitrators' decision making.<sup>73</sup>

*C. The Societal Effect Is a Tragedy of the Commons  
That Degrades the Rule of Law and Civil Justice System*

While each firm acts in its own independent economic self-interest, taken together the cumulative effect of this conduct is a tragedy of the commons.<sup>74</sup>

67. See *Arbitration: Is It Fair When Forced?: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 9–11 (2011) (statement of F. Paul Bland, Senior Attorney, Public Justice); Resnik, *supra* note 2, at 2870. We note that the term “firm” encompasses all economic entities, including law firms. See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 02-425 (2002).

68. See Glover, *supra* note 1, at 3061–32.

69. See generally Lucian Arye Bebchuk, *Suits with Negative Expected Value*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 551–54 (Peter Newman ed., 1998).

70. See Eisenberg et al., *supra* note 13, at 888; Imre Stephen Szalai, *Correcting a Flaw in the Arbitration Fairness Act*, 2013 J. DISP. RESOL. 271, 282.

71. See Myriam Gilles, *Individualized Injunctions and No-Modification Terms: Challenging “Anti-Reform” Provisions in Arbitration Clauses*, 69 U. MIAMI L. REV. 469, 470–71, 472 n.12 (2015).

72. See CONSUMER FIN. PROT. BUREAU, *supra* note 9, at 53–55; see also Linda S. Mullenix, *Gaming the System: Protecting Consumers from Unconscionable Contractual Forum Selection and Arbitration Clauses*, 66 HASTINGS L.J. 719 (2015).

73. See Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 U. ILL. L. REV. 695, 697; Peter B. Rutledge, *Who Can Be Against Fairness?: The Case Against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267, 273–74 (2008).

74. Cf. RADIN, BOILERPLATE, *supra* note 64, at 36. It bears noting that firms, executives, and elite lawyers exhibited a high degree of coordination when devising a legal strategy to broaden the liability shielding power of these predispute binding arbitration clauses with class action waivers. See generally *Ross v. Am. Express Co.*, 35 F. Supp. 3d 407 (S.D.N.Y. 2014), *aff'd*, 630 F. App'x 79 (2d Cir. 2015); Myriam Gilles, *Opting out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 398–99 (2005); Nancy A. Welsh & Stephan J. Ware, *Ross et al. v. American Express et al.: The Story Behind the Spread of Class Action-Barring Clauses in Credit Card Agreements*, 21 DISP. RESOL. MAG. 18, 18–19 (2014).

As the prevalence of these clauses rises and most transactions that consumers enter contain predispute binding arbitration clauses, the legitimacy and justness of our civil justice system and the rule of law erode. Increasingly, firms conclude that it is in their independent economic interest to “defect” from or opt out of public legal institutions by adopting predispute binding arbitration clauses that subtly bias the results of this dispute procedure in their favor.<sup>75</sup> When wide swaths of the public learn that their grievances must be arbitrated using a dispute-resolution procedure that favors the repeat player and that there is no judicial review, trust in the courts and the rule of law wanes, and the perceived legitimacy and justness of our civil justice system degrades. Professor Radin refers to the effect of mass-market boilerplate rights-deletion schemes as “democratic degradation.”<sup>76</sup> In short, the interaction of these conditions and clauses operates to diminish the legitimacy and justness of our legal institutions.

#### D. Zealous Advocacy Is a Cause and Consequence

Transactional attorneys serve clients and draft adhesion contracts within this legal landscape and, thus, face tension between the norm of zealous advocacy and a wider virtuous ethic that seeks to limit harm to third parties and takes responsibility for the quality of justice. A transactional attorney, whether in-house or outside counsel, drafts adhesion contracts for clients who seek to advance their economic interests, regardless of harm to public institutions. Consent to adhesion contracts is illusory as the public neither reads nor understands their terms. Therefore, transactional attorneys have marked leeway and power to draft binding arbitration clauses within adhesion contracts that members of the public will “accept.”<sup>77</sup>

A transactional attorney who serves as a zealous advocate will seek to maximize his or her client’s economic interest with zeal. In this regard, the ABA Model Rules of Professional Conduct state, “As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications. As advocate, a

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75. See CONSUMER FIN. PROT. BUREAU, *supra* note 9, at 16–17; Glover, *supra* note 1, at 3074–76.

76. See RADIN, BOILERPLATE, *supra* note 64, at 15–18, 33; Reuben, *supra* note 55, at 279, 309–18; cf. Tyler, *supra* note 5, at 375 (“Being legitimate is important to the success of authorities, institutions, and institutional arrangements since it is difficult to exert influence over others based solely upon the possession and use of power.”). This erosion to the democratic backdrop complicates the theory that adjudication is purely a private good. See generally William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979).

77. Scholars have noted that the Supreme Court now treats binding arbitration clauses more favorably than other clauses within adhesion contracts; for example, other clauses within adhesion contracts are subject to a variety of contract-related defenses. See Peter B. Rutledge & Christopher Drahozal, “Sticky” Arbitration Clauses?: *The Use of Arbitration Clauses After Concepcion and Amex*, 67 VAND. L. REV. 955, 974 (2014) (“[A] nonarbitral class waiver . . . poses greater risks of court invalidation. After *Concepcion*, the FAA provides a substantial degree of protection for arbitral class waivers; nonarbitral class waivers have no such federal law backing.”); Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, 22 AM. REV. INT’L ARB. 323, 389–90 (2011).

lawyer zealously asserts the client's position under the rules of the adversary system."<sup>78</sup> From this perspective, the primary ethical principle governing transactional lawyers is to advocate their client's private interest with zeal, rather than to weigh whether the public's interest in a just, fair, and legitimate civil justice system is inimical to their client's interest.<sup>79</sup> The principle of zealous advocacy points these transactional attorneys toward taking their clients as far as they can go within the broad delegation and discretion of decision-making authority that the Supreme Court allows. Zealous advocacy makes it likely that transactional lawyers will encourage their clients to opt out of public legal institutions and into binding arbitration and to craft predispute binding arbitration clauses within adhesion contracts that robustly advance their client's economic interests.<sup>80</sup>

In short, it is highly unlikely that those who zealously draft and design adhesion contracts will consider the public's perspective or enact dispute resolution procedures that truly lead to neutral, unbiased, and just outcomes. Instead, these zealous advocates will engage in zero-sum thinking and maximize one side—their client's interest—when crafting adhesion contracts irrespective of degradation to civil justice and the rule of law. Zealous advocacy impairs the legal infrastructure that supports private ordering and comes at the expense of the public's ability to rely on a just legal infrastructure that the public demands in a vibrant democracy that abides by the rule of law.<sup>81</sup>

#### *E. A Wider, More Virtuous Ethical Ideal*

Surely it is erroneous to conclude that these transactional attorneys *must* act as zealous advocates when crafting binding arbitration clauses within adhesion contracts. Does the ethical principle of zealous advocacy even

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78. MODEL RULES OF PROF'L CONDUCT pmbl. (AM. BAR. ASS'N 2016); *see also id.* r. 1.3 cmt. 1 ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."). The principle of zealous advocacy as expressed within the professional rules has waxed and waned across time. For example, the ABA Model Code of Professional Responsibility previously stated, "The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law." MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 (AM. BAR. ASS'N 1980). While the ABA's Ethical Considerations were not mandatory, they were aspirational and represented the objectives toward which every member of the profession should strive and constituted a body of principles upon which lawyers can rely for guidance in many specific situations. *See* DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 11 (1988) (discussing how wide and narrow understandings of this principle have dueled across time); *see also* Carol Rice Andrews, *Ethical Limits on Civil Litigation Advocacy: A Historical Perspective*, 63 *CASE W. RES. L. REV.* 381, 427–35 (2012); William H. Simon, *Ethical Discretion in Lawyering*, 101 *HARV. L. REV.* 1083, 1084–90 (1988).

79. *See* DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 49–80 (2003); Austin Sarat, *The Profession Versus the Public Interest: Reflections on Two Reifications*, 54 *STAN. L. REV.* 1491, 1493 (2002).

80. *Cf.* COLL. OF COMMERCIAL ARBITRATORS, *PROTOCOLS FOR EXPEDITIOUS, COST EFFECTIVE COMMERCIAL ARBITRATION: KEY ACTION STEPS FOR BUSINESS USERS, COUNSEL, ARBITRATORS & ARBITRATION PROVIDER INSTITUTIONS* 1–3 (Thomas J. Stipanowich et al. eds., 2010), [http://www.thecca.net/sites/default/files/CCA\\_Protocols.pdf](http://www.thecca.net/sites/default/files/CCA_Protocols.pdf) [<https://perma.cc/6C2D-NPE4>].

81. *Cf.* RADIN, *BOILERPLATE*, *supra* note 64, at 15–18, 33.

apply to transactional attorneys who craft adhesion contracts?<sup>82</sup> According to Lon Fuller, the purpose of adversarialism is to ensure that, when legal officials deliberate, they are presented with plural perspectives.<sup>83</sup> That is, adversarialism ensures that legal officials are adequately presented with each party's account so that these legal officials can take the perspective of all sides before rendering a legal decision. The site in which transactional attorneys labor, however, is far outside the courtroom or a context in which work product is zealously prepared to present a narrative to an impartial adjudicator. As Professor David Luban has concluded, it would be error to enter a blanket claim of moral nonaccountability given how far we are from the purpose of adversarial ethics.<sup>84</sup>

There are, however, wider and more virtuous ethical principles that apply to transactional attorneys who create binding arbitration clauses within adhesion contracts. Indeed, attorneys have an ethical responsibility to protect the public's interest in the quality of justice. For example, the preamble of the Model Rules of Professional Conduct state: "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."<sup>85</sup> Lawyers, moreover, serve a unique, indispensable role that mediates between their client's interest and the public's interest.<sup>86</sup> Alexis de

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82. Commentators are divided on whether the principle of zealous advocacy applies to lawyers beyond the litigation context. See Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV. 1165, 1171 n.36, 1193 (2006); Christopher J. Whelan, *Some Realism About Professionalism: Core Values, Legality, and Corporate Law Practice*, 54 BUFF. L. REV. 1067, 1069–70 (2007). Leaving to one side the issue of whether transactional attorneys *must* act as zealous advocates under the model rules, the principle of zealous advocacy is a powerful social norm that influences the thoughts, feelings, and behavior of transactional attorneys. See Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 FORDHAM L. REV. 327, 359 n.144 (1998); Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1244–45 (1991). See generally Mark C. Suchman, *Working Without a Net: The Sociology of Legal Ethics in Corporate Litigation*, 67 FORDHAM L. REV. 837 (1998). Socialization in the legal profession may transmit this social norm. See Michael Hatfield, *Professionalizing Moral Deference*, 104 NW. U. L. REV. COLLOQUY 1, 5–7 (2009) ("From the beginning of law school, a lawyer is idealized as a zealous advocate for her client's objective."). Finally, the Model Rules of Professional Conduct, when contrasted with the Model Code of Professional Responsibility, narrow the obligation to represent clients with zeal. Compare MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 ("The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law."), with MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 ("A lawyer is not bound, however, to press for every advantage that might be realized for a client.").

83. See generally Lon L. Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 30 (Harold J. Berman ed., 1961).

84. See, e.g., Luban, *supra* note 5, at 851; see also DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 62–64 (2007); Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern Multicultural World*, 38 WM. & MARY L. REV. 5, 38–40 (1996).

85. See MODEL RULES OF PROF'L CONDUCT pmbl. See generally MODEL CODE OF PROF'L RESPONSIBILITY pmbl.; CANONS OF PROF'L ETHICS pmbl. (AM. BAR. ASS'N 1908).

86. See Simon, *supra* note 78, at 1113–19. See generally Katherine R. Kruse, *The Jurisprudential Turn in Legal Ethics*, 53 ARIZ. L. REV. 1 (2011); David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717 (1988).

Tocqueville elaborated this wider ethic,<sup>87</sup> Talcott Parsons expounded on it,<sup>88</sup> and Louis Brandeis also advanced this more virtuous principle.<sup>89</sup> This ethical principle would require lawyers not to engage in actions that erode the legitimacy of the civil justice system or public institutions. Finally, drawing on Aristotelian virtue ethics, the role of an attorney should be imbued with an ethical responsibility that goes beyond maximizing their client's self-interest—attorneys have an ethical role and responsibility to protect the interest of the public as well.<sup>90</sup> In sum, under this wider and more virtuous ethical ideal, transactional attorneys behave unethically when crafting adhesion contracts that erode our civil justice system and the legitimacy of legal institutions.

Doubtless, there is tension between the ethical principle of zealous advocacy and this wider ethical ideal. On the one hand, zealous advocacy advances the economic interests of a client and may result in adhesion contracts with manifestly unjust clauses. On the other hand, a wider and more virtuous ethical ideal would have transactional attorneys protect the public's interest in the rule of law and the viability of just legal institutions when engaging in dispute-system design.<sup>91</sup>

#### *F. Implications of Behavioral Legal Ethics and Social Psychological Research*

Even so, we should not conclude that transactional lawyers who do not abide by this wider and more virtuous ethical principle are unethical people. Decades of social psychological research underscore that situational influences and roles within environments powerfully shape the way people

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87. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 267–70 (J.P. Mayer ed., George Lawrence trans., HarperPerennial 1988) (1835) (discussing the role that lawyers play in public life and preserving democratic institutions); see also Phil C. Neal, *De Tocqueville and the Role of the Lawyer in Society*, 50 MARQ. L. REV. 607 (1967).

88. See TALCOTT PARSONS, *A Sociologist Looks at the Legal Profession*, in *ESSAYS IN SOCIOLOGICAL THEORY* 370, 370–71 (rev. ed. 1954) (elaborating the role of lawyers as serving both clients and the public interest, a role that maintains stability and dynamism in democratic society); TALCOTT PARSONS, *The Professions and Social Structure*, in *ESSAYS IN SOCIOLOGICAL THEORY*, *supra*, at 34, 38.

89. See Louis D. Brandeis, *The Opportunity in the Law*, in *BUSINESS: A PROFESSION* 325 (1925) (discussing the role of lawyers in protecting public interest); see also Robert F. Cochran, Jr., *Louis D. Brandeis and the Lawyer Advocacy System*, 40 PEPP. L. REV. 351, 354–56 (2013).

90. See Lorie M. Graham, *Aristotle's Ethics and the Virtuous Lawyer: Part One of a Study on Legal Ethics and Clinical Legal Education*, 20 J.L. PROF. 5, 29 (1996); see also ARISTOTLE, *THE ETHICS OF ARISTOTLE* (E.V. Riecke ed., J.A.K. Thompson trans., Penguin Books 1955) (n.d.). From this perspective, an Aristotelian account of virtue ethics is in marked tension with an account that would permit an amoral role morality for legal professionals. See W. Bradley Wendel, *Lawyers and Butlers: The Remains of Amoral Ethics*, 9 GEO. J. LEGAL ETHICS 161 (1995).

91. See generally Menkel-Meadow, *supra* note 5; cf. Roger C. Cramton, *Furthering Justice by Improving the Adversary System and Making Lawyers More Accountable*, 70 FORDHAM L. REV. 1599, 1603–04 (2002); Sharon Dolovich, *Ethical Lawyering and the Possibility of Integrity*, 70 FORDHAM L. REV. 1629, 1680–82 (2002); Thomas D. Morgan, *Practicing Law in the Interests of Justice in the Twenty-First Century*, 70 FORDHAM L. REV. 1793, 1796–97 (2002).

think, feel, and behave. Professors Jennifer Robbennolt, Jean Sternlight, Andrew Perlman, and others have elaborated an approach known as behavioral legal ethics, which weaves together social psychology and legal ethics to better understand the experiences of lawyers within firm cultures and the way they make meaning within their environments.<sup>92</sup> Importantly, social psychological research on the fundamental attribution error (also referred to as the correspondence bias) reveals that we overestimate the extent to which people's actions, especially their apparently virtuous or unethical actions, reflect the kind of people that they are and that we underestimate the extent to which their conduct is the product of situational influences.<sup>93</sup> Regarding such situational influences, Kurt Lewin developed the "field theory," which explores the causes and conditions that influence people within a given situation.<sup>94</sup> According to Lewin, a "field" refers to the psychological context that individuals experience in a particular point in time.<sup>95</sup> Lewin identified two opposing forces present in any given field: "channels" that drive people toward a goal<sup>96</sup> and "barriers" that inhibit movement toward that goal.<sup>97</sup>

Transactional lawyers, both in-house and within law firms, encounter a context in which clients seek to maximize their economic interest in all of their transactions, including when creating adhesion contracts. In the parlance of Lewin's field theory, there are many "channel factors" that make it much more likely that these lawyers will serve as zealous advocates rather than rise to a wider and more virtuous ethical principle. For example, a salient norm in these environments is the norm of serving a client's economic interest.<sup>98</sup> Far less salient is the ethic of contemplating and avoiding various courses of actions that harm the public's long-term interest in the quality of justice. Moreover, social psychological research reveals that face-to-face encounters with clients (and senior partners) increase the likelihood that midlevel transactional lawyers will zealously advance client interests when

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92. See generally Andrew M. Perlman, *A Behavioral Theory of Legal Ethics*, 90 IND. L.J. 1639 (2015); Robert A. Prentice, *Behavioral Ethics: Can It Help Lawyers (and Others) Be Their Best Selves?*, 29 NOTRE DAME J.L. ETHICS & PUB. POL'Y 35 (2015); Nancy B. Rapoport, "Nudging" Better Lawyer Behavior: Using Default Rules and Incentives to Change Behavior in Law Firms, 4 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 42 (2014); Jennifer K. Robbennolt, *Behavioral Ethics Meets Legal Ethics*, 11 ANN. REV. L. & SOC. SCI. 75 (2015); Robbennolt & Sternlight, *supra* note 51, at 1107–09.

93. See generally SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION: FROM BRAINS TO CULTURE* (2013); DANIEL T. GILBERT, *SPEEDING WITH NED: A PERSONAL VIEW OF THE CORRESPONDENCE BIAS* (1998); RICHARD E. NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* (1980).

94. See KURT LEWIN, *FIELD THEORY IN SOCIAL SCIENCE* (1951); see also THOMAS GILOVICH & LEE ROSS, *THE WISEST ONE IN THE ROOM: HOW YOU CAN BENEFIT FROM SOCIAL PSYCHOLOGY'S MOST POWERFUL INSIGHT* 42–70 (2015).

95. LEWIN, *supra* note 94, at 48–53.

96. *Id.* at 174.

97. *Id.* at 40.

98. See Cramton, *supra* note 91, at 1603; Dolovich, *supra* note 91, at 1682; Morgan, *supra* note 91, at 1797; see also Sung Hui Kim, *Gatekeepers Inside Out*, 21 GEO. J. LEGAL ETHICS 411, 437 (2008); Robert Eli Rosen, "We're All Consultants Now": How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services, 44 ARIZ. L. REV. 637, 670–72 (2002).



crafting dispute-resolution clauses within adhesion contracts.<sup>99</sup> Further, research on the foot-in-the-door technique suggests that these lawyers will likely behave as zealous advocates of their clients' interests when drafting predispute binding arbitration clauses given the many other transactions in which these lawyers already seek to advance their client's economic interests.<sup>100</sup>

Finally, research on cognitive dissonance suggests that lawyers may reappraise their conduct as reasonable and normative.<sup>101</sup> For example, social psychological research reveals that our past behavior influences the way we feel and think about that behavior.<sup>102</sup> Indeed, a consistent finding in the behavioral science literature is that people's behavior is often more predictive of their attitudes than their attitudes are of their behavior.<sup>103</sup> Rather than believing that they are behaving unethically, these transactional lawyers will likely reappraise their past actions as rational, necessary, and just. For example, they may rationalize predispute binding arbitration as faster, cheaper, and better.<sup>104</sup> Or perhaps they may reappraise their conduct as normative, believing it would harm their client's interests *not* to employ these clauses with terms that reduce their client's liability exposure, especially when many other companies are engaging in the same practice.

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99. See GILOVICH & ROSS, *supra* note 94, at 45–46; see also ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 282 (1988) (“[A]lthough large-firm lawyers embrace the ideology of professional autonomy in the abstract, when it comes to questions of legal policy that pertain to their practice they strongly identify with their clients’ positions and interests. . . . [T]he reported incidence of disagreements between lawyers and clients is extremely rare, never occurring in the careers of three or four lawyers in my four-firm sample.”); Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451 (2007) (“[L]awyers frequently find themselves in the kinds of contexts that produce high levels of conformity and obedience and low levels of resistance to illegal or unethical instructions. The result is that subordinate lawyers . . . will find it difficult to resist a superior’s commands in circumstances that should produce forceful dissent.”).

100. See Cassandra Burke Robertson, *Judgment, Identity, and Independence*, 42 CONN. L. REV. 1, 47 (2009). See generally Jonathan L. Freedman & Scott C. Fraser, *Compliance Without Pressure: The Foot-in-the-Door Technique*, 4 J. PERSONALITY & SOC. PSYCHOL. REV. 195 (1966).

101. See LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 33 (Stanford Univ. Press 1962) (1957); Elliot Aronson, *Dissonance, Hypocrisy, and the Self-Concept*, in COGNITIVE DISSONANCE THEORY: PROGRESS ON A PIVOTAL THEORY IN SOCIAL PSYCHOLOGY 21 (Eddie Harmon-Jones & Judson Mills eds., 1998).

102. See Paula M. Niedenthal et al., *Embodiment in Attitudes, Social Perception, and Emotion*, 9 PERSONALITY & SOC. PSYCHOL. REV. 184, 189 (2005); Pitor Winkielman et al., *The Embodied Emotional Mind*, in EMBODIED GROUNDING: SOCIAL, COGNITIVE, AFFECTIVE, AND NEUROSCIENTIFIC APPROACHES 263, 263 (Gün R. Samin & Eliot R. Smith eds., 2008).

103. See generally Laura R. Glasman & Dolores Albarracín, *Forming Attitudes That Predict Future Behavior: A Meta-Analysis of the Attitude-Behavior Relation*, 132 PSYCHOL. BULL. 778 (2006).

104. See, e.g., *U.S. Chamber Releases Poll Showing Arbitration Faster, Simpler and Less Costly Than Litigation*, U.S. CHAMBER INST. FOR LEGAL REFORM (Apr. 13, 2005), <http://www.instituteforlegalreform.com/resource/us-chamber-releases-poll-showing-arbitration-faster-simpler-and-less-costly-than-litigation> [<https://perma.cc/UHU6-UVKC>]; cf. Donald C. Langevoort, *Where Were the Lawyers?: A Behavioral Inquiry into Lawyers’ Responsibility for Clients’ Fraud*, 46 VAND. L. REV. 75, 78, 101–10 (1993) (discussing the rationalization that ensues after lawyers engage in conduct that harms the public).

There are certainly barriers to a wider ethic as well. For example, the ethic that considers the long-term public interest is not salient within these environments. Moreover, there are no clear exit options out of this ethical dilemma. Transactional lawyers who wish to rise to a higher ethical ideal must opt out of the default norm of zealously advancing their client's economic interest, perhaps by confronting their client, which may well imperil their livelihood.<sup>105</sup> The interaction of these channels and barriers underscores that it is much more likely for transactional attorneys to reappraise their conduct as reasonable and just and to draft predispute binding arbitration clauses that zealously advance their client's interests.

*G. Changing Default Rules and Allowing  
the Wider Ethical Principle to Flourish*

When taken together, the wider ethical principle is frustrated by the interaction of the broad delegation of authority to firms that harness predispute binding arbitration clauses with little oversight, the incentive to maximize a client's own economic interest, and the situational influences that transactional lawyers encounter within their working environments. As a practical matter, the interaction of these powerful causes and conditions endanger the wider ethical ideal. Urging transactional lawyers to rise to a wider, more virtuous ethic will have little effect on the status quo.<sup>106</sup>

Yet the wider ethical principle may flourish if the default rules that broadly defer and delegate authority to firms are restructured. For example, greater regulatory or judicial oversight of predispute binding arbitration clauses will alter the behavior of firms and, by implication, the transactional lawyers who draft these clauses on behalf of their clients.<sup>107</sup> Professor Radin has argued that greater oversight and regulation are justified based on the theory that firms should be allowed to maximize their own profit, but within limits.<sup>108</sup> Mainly, firms should not be permitted to erode the background legal conditions that make private ordering possible. Instead, regulatory and judicial oversight should allow these firms to act in their self-interest, so long as they do not erode or degrade the commons of a viable, legitimate, and just

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105. See, e.g., DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 47 (2007) (“[A]fter lawyers have offered their ‘quiet counsel,’ they will still have to press forward with the representation if the client won’t be dissuaded. Perhaps the lawyer can say that she gave morality the old college try, and her heart is pure. Our worry, however, was not about impure hearts, but about dirty hands.”); cf. GILOVICH & ROSS, note 94, at 60 (“Even if participants decided that they wanted to get off the path they were on, it wasn’t at all clear how to do so. There was no clear exit out of the (traumatic) situation in which they found themselves.”).

106. See Kath Hall, *Why Good Intentions Are Often Not Enough: The Potential for Ethical Blindness in Legal Decision-Making*, in *REAFFIRMING LEGAL ETHICS: TAKING STOCK AND NEW IDEAS* 210, 210 (Kieran Tranter et al. eds., 2012); Thomas L. Shaffer, *The Irony of Lawyers’ Justice in America*, 70 *FORDHAM L. REV.* 1857, 1860–62 (2002).

107. Cf. *Client Alert: CFPB Attacks Pre-Dispute Arbitration Clauses*, VORYS (Mar. 16, 2015), <http://www.vorys.com/publications-1459.html> [<https://perma.cc/NH7Q-3PZB>]. Note that even the title of the article “alerts” clients to the possible regulation on the horizon, putting them on notice of the change in trade winds. See *id.*

108. See Radin, *An Analytical Framework*, *supra* note 64, at 220–21.

civil justice system.<sup>109</sup> Moreover, while our legal culture imbues predispute binding arbitration clauses with legal meaning, symbolism, and qualities such as choice, consent, volition, and a sense of being bargained for, we should recall that from an ecological perspective, members of the public neither read, appreciate, understand, nor consider these clauses when coping with the actual demands of daily life. Professor Arthur Leff noted several decades ago, “[S]uch clauses are things, the products of non-bargaining, similar to ‘unilaterally manufactured commodities.’”<sup>110</sup> Regulators and courts, therefore, have an important role to play in monitoring this boundary when deciding the permissibility of various forms of dispute-system design within adhesion contracts that force the public out of the formal civil justice system and that may impair our public legal institutions.<sup>111</sup>

There are many other models of oversight across the globe that offer comparative guidance. Indeed, the United States is one of the few Western liberal democracies where there are relatively few limitations upon the arbitrability of consumer disputes.<sup>112</sup> Within the European Union, member states review clauses for fairness, and Sweden declares these clauses invalid.<sup>113</sup> The United Kingdom and Germany impose other important limitations.<sup>114</sup>

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109. See *id.* at 236–37; cf. Stephen J. Ware, *The Politics of Arbitration Law and Centrist Proposals for Reform*, 53 HARV. J. ON LEGIS. 711, 712 (2016) (rejecting overbroad enforcement, while preserving the general enforcement of arbitration agreements under contract law’s standards of consent).

110. See Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 147 (1970); see also Resnik, *supra* note 2, at 2870.

111. See Lisa Blomgren Bingham, *Control over Dispute-System Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMP. PROBS. 221, 250–51 (2004). Depending on how this form of regulation is designed, this legal landscape may have the effect of positive liberty, promoting bona fide consent, individual autonomy, and human flourishing. See Hiro N. Aragaki, *Does Rigorously Enforcing Arbitration Agreements Promote “Autonomy”?*, 91 IND. L.J. 1143, 1148–53 (2016). Scholars have encouraged different forms and standards of judicial review. See generally Sarah Rudolph Cole, *Revising the FAA to Permit Expanded Judicial Review of Arbitration Awards*, 8 NEV. L.J. 214 (2007); Maureen A. Weston, *The Other Avenues of Hall Street and Prospects for Judicial Review of Arbitral Awards*, 14 LEWIS & CLARK L. REV. 929 (2010).

112. See *DirectTV, Inc. v. Imburgia*, 136 S. Ct. 463, 478 (2015) (“The Court’s ever-larger expansion of the FAA’s scope contrasts sharply with how other countries treat mandatory arbitration clauses in consumer contracts of adhesion.”). In the United States, there are several areas in which predispute binding arbitration clauses are curtailed. See, e.g., 12 C.F.R. § 1026.36 (2016) (prohibiting mandatory arbitration clauses in loan documents for mortgage and home equity loans); Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. 68,688, 68797 (Oct. 4, 2016) (to be codified at 42 C.F.R. § 483.70(n)) (“[W]e are prohibiting the use of pre-dispute binding arbitration agreements.”); cf. 12 U.S.C. § 5518 (2012); Arbitration Agreements, 81 Fed. Reg. 100 (May 24, 2016) (“[P]roposing regulations governing agreements that provide for the arbitration of any future disputes between consumers and providers of certain consumer financial products and services.”).

113. See, e.g., LAG OM SKILJEFÖRFARANDE (Svensk författningssamling [SFS] 1999:116) (Swed.) (The Swedish Arbitration Act).

114. See generally ZIVILPROZESSORDNUNG [ZPL] [CODE OF CIVIL PROCEDURE], §§ 1025–1066, translation at [https://www.gesetze-im-internet.de/englisch\\_zpo/englisch\\_zpo.html#p3524](https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p3524) (Ger.) (German Arbitration Act) [<https://perma.cc/2GKD-9L92>]; *Practice Guideline No. 17, Guidelines for Arbitrators Dealing with Cases Involving Consumers and*

By changing the regulatory environment, the incentives of firms and transactional attorneys would better align with the wider ethical ideal. For example, predispute binding arbitration clauses in adhesion contracts could be deemed legally unenforceable.<sup>115</sup> Instead, if firms wish to engage in binding arbitration with consumers and employees, these firms could be limited to using binding arbitration agreements that are entered into separately from the primary contract, after a dispute has arisen. Indeed, New Zealand harnesses this model of regulatory oversight.<sup>116</sup>

In this example, binding arbitration agreements would be enforceable only if they are entered into after a dispute has arisen and with the bona fide consent of both parties. This change would make it more likely that a wider ethical standard would flourish and less likely that zealous advocacy would endanger this wider ethic. As our empirical legal study suggests, members of the public learn about the meaning and significance of different dispute-resolution procedures only *after* disputes arise. Therefore, members of the public would consent to these clauses only if they perceived a benefit in doing so. For example, members of the public would enter into these agreements if they believed that binding arbitration reduces cost and delay and that binding arbitration is truly as fair, just, neutral, and trustworthy as a formal legal proceeding.<sup>117</sup> When making this assessment, many members of the

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*Parties with Significant Differences of Resources*, CIARB (2011), <http://www.ciarb.org/docs/default-source/ciarbdocuments/international-arbitration-guidelines-2011/2011significantdifferencesofresources.pdf?sfvrsn=6> (last visited Mar. 25, 2017) (“In the UK, clauses are presumed unfair (and therefore unenforceable against a consumer) in low value claims, currently below £5,000; . . . and in Germany, a consumer arbitration agreement will only be enforceable if separately agreed to by the consumer (either by being contained in a separate, signed document or in a fully notarised contract.)”) [<https://perma.cc/Q4A4-5YQ2>].

115. See Therese Wilson, *Setting Boundaries Rather Than Imposing Bans: Is It Possible to Regulate Consumer Arbitration Clauses to Achieve Fairness to Consumers?*, 39 J. CONSUMER POL’Y 349, 354–55 (2016) (arguing that predispute arbitration clauses should be unenforceable). For an example of an area in which such clauses are unenforceable, see Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 81 Fed. Reg. at 68,797 (“[W]e are prohibiting the use of pre-dispute binding arbitration agreements.”). Other plausible alternatives bearing familial resemblance include permitting a member of the public to opt out of a mandatory predispute arbitration clause or requiring that a member of the public affirm their willingness to comply with a mandatory predispute arbitration clause if a dispute arises.

116. See, e.g., Arbitration Act 1996, s 11 (N.Z.).

117. Laudably, due process protocols have been developed to improve the fairness of arbitration. See, e.g., NAT’L CONSUMER DISPUTES ADVISORY COMM., AM. ARBITRATION ASS’N, CONSUMER DUE PROCESS PROTOCOL: STATEMENT OF PRINCIPLES (1998), [https://adr.org/aaa/ShowPDF?doc=ADRSTG\\_005014](https://adr.org/aaa/ShowPDF?doc=ADRSTG_005014) [<https://perma.cc/2BPE-ZTZV>]. If arbitration offers comparable fairness and outcome justice with the advantages of cost and delay reductions, then consumers will most likely agree to arbitration after disputes arise. Hence, these protocols will have an even greater influence on consumer decision making after disputes arise. Further, in this scenario, independent third-party assessments, such as an arbitration fairness index, would increase in importance. See Thomas J. Stipanowich, *The Arbitration Fairness Index: Using a Public Rating System to Skirt the Legal Logjam and Promote Fairer and More Effective Arbitration of Employment and Consumer Disputes*, 60 KAN. L. REV. 985 (2012).

public would likely consult with legal professionals about the significance of these postdispute binding arbitration clauses.

This altered legal landscape would create a social-psychological channel that would make it more likely for a wider ethical ideal to flourish. The lawyers who draft these postdispute binding arbitration clauses would need to empathize with and take the perspective of third parties while at the same time advancing their clients' interests.

This perspective taking is incredibly important in allowing the wider, more virtuous ethical ideal to flourish. Of note, especially given the dialectic of the two ethical principles that animates our discussion, when transactional attorneys *anticipate that plaintiffs' lawyers will zealously guide* members of the public into appropriate and fair dispute-resolution procedures, they will be far more likely to embrace a wider ethical ideal that considers the public's concerns. The ethic of zealous advocacy, therefore, plays a role in the social psychological dynamic that shifts defense-side interests to embrace a wider ethical ideal. Stated differently, if transactional attorneys *anticipate that plaintiffs' lawyers will serve as zealous advocates* who will direct clients to less expensive, less time-consuming procedures only if these procedures are equally just and fair, then defendants' lawyers who craft these postdispute agreements will have a wider concern for creating just and fair dispute procedures. Indeed, the success of these postdispute agreements would in large part be based upon the ability to engage in perspective taking. Further, this legal landscape would create powerful social psychological barriers that would make it far less likely for a one-sided adversarial ethic to prevail. Again, postdispute binding arbitration agreements would require both sides to provide true consent. As a result, transactional lawyers who draft and design these clauses would craft them so that the parties receive a mutual benefit sufficient to choose postdispute binding arbitration.

This wider, more virtuous ethical perspective is crucial to prevent democratic degradation and the tragedy of the commons that endangers and threatens the vitality of our legal institutions. Enhancing judicial and regulatory oversight of predispute binding arbitration clauses will both reduce the channel factors that incentivize transactional attorneys to zealously craft binding arbitration clauses within adhesion contracts, while at the same time diminishing the social psychological barriers that endanger the more virtuous, ethical ideal. Ensuring the quality of justice is a collective and fragile endeavor, one demanding that transactional attorneys who craft and design adhesion contracts balance both the interests of their client with the needs and perspective of the public. This synthesis will sustain and protect the fairness, legitimacy, and justice of our civil justice system in this era of vanishing trials.

#### APPENDIX

The following pages contain the three statistical tables referenced throughout this Article.

Table 1: Binding Arbitration

Dependent Measure	News Article			No Information			Definition			Sample Clause		
	<i>n</i> = 66			<i>n</i> = 90			<i>n</i> = 91			<i>n</i> = 82		
	M (SD)	95% CI		M (SD)	95% CI		M (SD)	95% CI		M (SD)	95% CI	
<i>Familiarity</i>	3.74 (1.67)a	[3.33, 4.15]		3.32 (1.70)a	[2.97, 3.68]		3.65 (1.89)a	[3.26, 4.04]		3.63 (1.67)a	[3.27, 4.00]	
<i>Fairness</i>	3.27 (1.58)a	[2.88, 3.66]		3.99 (1.36)b	[3.70, 4.27]		5.00 (1.37)c	[4.72, 5.28]		4.57 (1.43)c	[4.26, 4.89]	
<i>Unfairness</i>	5.00 (1.54)b	[4.62, 5.38]		3.61 (1.55)a	[3.29, 3.94]		3.21 (1.64)a	[2.87, 3.55]		3.34 (1.45)a	[3.02, 3.67]	
<i>Justness</i>	3.03 (1.62)a	[2.63, 3.43]		4.12 (1.44)b	[3.82, 4.42]		4.92 (1.45)c	[4.62, 5.22]		4.43 (1.49)b, c	[4.10, 4.75]	
<i>Accuracy</i>	3.47 (1.52)a	[3.10, 3.84]		4.02 (1.38)b	[3.74, 4.31]		4.69 (1.29)c	[4.42, 4.96]		4.35 (1.26)b, c	[4.08, 4.63]	
<i>Effectiveness</i>	3.59 (1.86)a	[3.13, 4.05]		4.27 (1.54)b	[3.95, 4.59]		5.26 (1.29)c	[5.00, 5.53]		4.49 (1.36)c	[4.64, 5.24]	
<i>Legitimacy</i>	3.59 (1.69)a	[3.18, 4.01]		4.71 (1.66)b	[4.36, 5.06]		5.51 (1.49)c	[5.19, 5.82]		5.02 (1.58)b, c	[4.68, 5.37]	
<i>Feelings</i>	2.58 (1.53)a	[2.21, 2.96]		3.93 (1.47)b	[3.62, 4.24]		4.74 (1.42)c	[4.44, 5.03]		4.26 (1.62)b, c	[3.90, 4.62]	
<i>Favorability</i>	2.61 (1.53)a	[2.23, 2.98]		4.00 (1.61)b	[3.66, 4.34]		4.78 (1.35)c	[4.50, 5.06]		4.35 (1.67)b, c	[3.99, 4.72]	
<i>Experiences of Justice</i>	3.21 (1.29)a	[2.90, 3.54]		4.20 (1.20)b	[3.95, 4.46]		4.99 (1.16)c	[4.75, 5.23]		4.61 (1.27)b, c	[4.33, 4.88]	

Note: Means on the same row with unlike subscripts different at alpha = .05 according to the Tukey HSD procedure.

Table 2: Statistical Reporting of Justice and Legitimacy Items

<i>Omnibus F-statistic, effect size, contrasts between New York Times condition and other conditions</i>		C4 vs. C1		C4 vs. C2		C4 vs. C3	
<b>Dependent Measure</b>	<b>Omnibus F-statistic</b>	<b><math>\eta^2</math></b>	<b>Difference, 95% CI</b>	<b>p-value</b>	<b>Difference, 95% CI</b>	<b>p-value</b>	<b>Difference, 95% CI</b>
<i>Fairness</i>	F(3, 325) = 21.07, $p < .000$	0.16	[-1.31, -0.12]	$p = .011$	[-2.32, -1.13]	$p < .000$	[-1.91, -0.69]
<i>Unfairness</i>	F(3, 325) = 19.87, $p < .000$	0.16	[0.74, 2.04]	$p < .000$	[1.14, 2.44]	$p < .000$	[0.99, 2.32]
<i>Justness</i>	F(3, 325) = 21.34, $p < .000$	0.17	[-1.72, -0.47]	$p < .000$	[-2.52, -1.27]	$p < .000$	[-2.03, -0.76]
<i>Accuracy</i>	F(3, 325) = 11.20, $p < .000$	0.09	[-1.12, 0.02]	$p = .060$	[-1.79, -0.66]	$p < .000$	[-1.46, -0.30]
<i>Effectiveness</i>	F(3, 325) = 18.62, $p < .000$	0.15	[-1.31, -0.05]	$p = .030$	[-2.30, -1.04]	$p < .000$	[-1.99, -0.71]
<i>Legitimacy</i>	F(3, 325) = 19.05, $p < .000$	0.15	[-1.79, -0.45]	$p < .000$	[-2.58, -1.25]	$p < .000$	[-2.12, -0.75]

Note: Contrasts were conducted using Tukey tests. C1 indicates no-information condition, C2 indicates definition condition, C3 indicates sample clause condition, and C4 indicates *New York Times* article condition.

Table 3: Bivariate Correlations Between Items Forming Anticipated Experience of Justice

Measure	1	2	3	4	5	6	7
1. Fairness	-						
2. Unfairness (rx)	.658**	-					
3. Justness	.854**	.630**	-				
4. Accuracy	.738**	.541**	.769**	-			
5. Effectiveness	.665**	.446**	.692**	.622**	-		
6. Legitimacy	.716**	.544**	.757**	.678**	.679**	-	
7. Feelings	.797**	.626**	.771**	.682**	.632**	.704**	-

Note: \*\* p &lt; .01