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ECONOMIC INEQUALITY, ACCESS TO LAW, AND MANDATORY ARBITRATION AGREEMENTS: A COMMENT ON THE STANDARD CONCEPTION OF THE LAWYER'S ROLE

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ECONOMIC INEQUALITY, ACCESS TO LAW, AND MANDATORY ARBITRATION AGREEMENTS: A COMMENT ON THE STANDARD CONCEPTION OF THE LAWYER'S ROLE

*Sung Hui Kim**

INTRODUCTION

Since Richard Wasserstrom's seminal article almost fifty years ago,[1] academics have debated the propriety of the model that purports to guide the professional responsibility of lawyers—widely referred to as the "standard conception of the lawyer's role."[2] This model combines the principles of "partisanship" and "neutrality."[3] *Partisanship* requires lawyers to promote the interests of their clients vigorously within the bounds of the law.[4] *Neutrality* requires lawyers to subordinate their moral concerns to those of the client and maintains that only the client is entitled to make moral choices.[5] In return, the lawyer is released from moral responsibility for any lawful ends achieved or lawful means used.[6] As Wasserstrom explained, this model effectively licenses the lawyer to act as an "amoral technician" for the client:

> Once a lawyer represents a client, the lawyer has a duty to make his or her expertise fully available in the realization of the end sought by the client, irrespective . . . of the moral worth to which the end will be put or the character of the client who seeks to utilize it. Provided that the end sought is not illegal, the lawyer is, in essence, an amoral technician whose peculiar

* Professor of Law, UCLA School of Law. This Article was prepared for the *Colloquium on Corporate Lawyers*, hosted by the *Fordham Law Review* and the Stein Center for Law and Ethics on October 11, 2019, at Fordham University School of Law. The author is grateful for comments from: Rick Abel, Sameer Ashar, Miriam Baer, Bruce Green, Claire Hill, Cathy Hwang, Russell Pearce, Stephen Pepper, Eli Wald, David Yosifon, and the other workshop participants.

1. *See generally* Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975).
2. Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73 (1980) (referring to the "standard conception of the lawyer's role").
3. *Id.* at 73–74; William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 36–38; *cf.* Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 674 (1978) (referring to "professionalism" and "nonaccountability" principles).
4. *See* Postema, *supra* note 2, at 73.
5. *See id.*
6. *See id.*

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> skills and knowledge in respect to the law are available to those with whom the relationship of client is established.[7]

While Wasserstrom and others were troubled by the implications of the standard conception, some celebrated and defended the standard conception, insisting that a good lawyer, acting according to it, can be a good person. Some of these commentators advanced justifications of the standard conception, including its principle of neutrality, which were grounded in the value of autonomy.[8] Although details among the various accounts differed, they largely embraced the view that the principle of neutrality was necessary to safeguard client autonomy. They argued that the autonomy of individuals could only be fully realized if they were able to fully exercise their legal rights. In our society, legal rights are realistically only accessible through a lawyer; accordingly, when lawyers foreclose or delimit access to legal services by—for example—refusing to assist in legally permissible but immoral projects, they are not only depriving clients of full and equal access to the law but also impairing clients' autonomy.

This Article contends that these autonomy-based defenses of the standard conception cannot withstand the "economic inequality" objection. According to this objection, the moral worthiness of lawyering under the standard conception cannot be reconciled with a legal system that is so marred by gross economic inequality such that only the wealthy have access to lawyers. It can also not be reconciled with the fact that the wealthy routinely use lawyers to undermine the public interest and exploit others who cannot afford lawyers. After examining responses to the economic inequality objection, this Article concludes that these responses do not take seriously how economic inequality can interact with the principle of neutrality to exacerbate inequality. Specifically, they fail to consider the possibility that lawyers, acting according to the principle of neutrality, will foreclose others' access to lawyers (and thereby the law) and undermine their autonomy—the very value that underwrites these defenses.

The foreclosure of access to lawyers that this Article cites to is neither merely hypothetical nor an aberrational outcome of idiosyncratic lawyering. It is the systemic reality already faced by the approximately sixty million employees who are subject to employer-promulgated predispute mandatory arbitration agreements imposed as a condition of new or continuing employment in nonunion workplaces. These agreements require employees to waive their right to file all statutory and common-law employment-related claims in court even before they have or know they have claims. As will be detailed below, the most far-reaching consequence of these agreements is that they make it extremely difficult, if not impossible, for employees to find

7. Wasserstrom, *supra* note 1, at 5–6.

8. *See, e.g.*, MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS (5th ed. 2016); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613.

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lawyers willing to represent them at all, even if they have legitimate, legally cognizable complaints.

Part I examines some of the leading autonomy-based defenses of the standard conception and its principle of neutrality and their responses to the economic inequality objection. It argues that these defenses rely on woefully incomplete characterizations of lawyer-client relationships and their impact. By emphasizing the discreteness of the lawyer-client relationship and the empowering potential of legal services, they ignore the fact that lawyers not only facilitate clients' life goals but also facilitate the victimization of third persons, some of whom lack access to lawyers and therefore cannot redress that victimization. As a result, these defenses underappreciate how the principle of neutrality will interact with economic inequality to reproduce and even aggravate the socioeconomic imbalances that plague the market for legal services.

Part II provides one concrete example of how the principle of neutrality can interact with economic inequality to exacerbate inequality. It shows how the neutrality principle has already operated in the employment context to deprive sixty million employees of their access to lawyers, making it impossible for these employees to vindicate their employment-related rights in any forum. It argues that lawyers—who act according to the neutrality principle by facilitating the imposition of mandatory arbitration agreements on behalf of their employer-clients—are foreclosing employees' access to lawyers and the law, which undermines their autonomy and impinges on the value that the defenders of the standard conception claim to embrace.[9]

Part III further examines the impact of mandatory arbitration agreements on employees and argues that what is being countenanced is far worse than merely trading off one individual's autonomy for another's. It argues that, when lawyers facilitate the promulgation of mandatory arbitration agreements for their employer-clients, they are promoting a weaker form of autonomy by depriving employees of a more fundamental form of autonomy. Specifically, lawyers are promoting employers' freedom to make unimpeded choices at the expense of employees' freedom from domination and subordination at the hands of their employers.

I. NEUTRALITY AND ECONOMIC INEQUALITY

The standard conception of the lawyer's role has been defended by many prominent academics. Perhaps the most notable autonomy-based justification was advanced in 1976 by Charles Fried, who grappled with the conception's troubling implications, as previously raised by Wasserstrom.[10] Analogizing the lawyer-client relationship to that of friendship, Fried observed that the moral right to choose and prefer friends "is a product of our

9. While there are numerous contexts in which private arbitration is the forum of choice for resolving disputes (e.g., consumer contracts), due to the fundamental nature of the relevant legal rights involved and the magnitude of the stakes for individual claimants, this Article will only address mandatory arbitration agreements in the *employment* context.

10. *See generally* Fried, *supra* note 8.

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individual autonomy"[11] and is integral to preserving the fundamental moral interests of "personality, identity, and liberty."[12] Fried then argued that the same value of autonomy supported the role of "legal friend" and morally justified the client's access to lawyers and the client's "right . . . to receive such an extra measure of care (without regard . . . to considerations of efficiency or fairness)."[13] He noted:

> [A]t the very least the law must leave us a measure of autonomy, whether or not it is in the social interest to do so. . . . It is because the law must respect the rights of individuals that the law must also create and support the specific role of legal friend. For the social nexus—the web of perhaps entirely just institutions—has become so complex that without the assistance of an expert adviser an ordinary layman cannot exercise that autonomy which the system must allow him.[14]

Accordingly, "[t]he lawyer acts morally because he helps to preserve and express the autonomy of his client vis-à-vis the legal system."[15] On Fried's account, so long as the lawyer's assistance remains lawful and does not involve so-called personal wrongs, such as lying, cheating, and humiliation,[16] lawyers are *morally* justified in servicing their clients, regardless of whether third persons suffer an injustice or the representation is contrary to the public interest.[17]

Almost a decade later, Stephen L. Pepper defended the lawyer's "amoral ethical role"[18] and, in particular, the principle of neutrality on similar grounds. Pepper maintained that law was a public good because it facilitated the private attainment of individual or group goals, which increased individual autonomy, and that increasing autonomy was "morally good."[19] Pepper further observed that "in a highly legalized society such as ours," access to law "is available only through a lawyer."[20] Therefore, so long as lawyers were facilitating "conduct which . . . [was] not unlawful," they were indeed promoting a "social good."[21] Conversely, if individual lawyers were permitted to constrain their legal services based on their moral consciences, then the legal profession would not only be infringing on the autonomy of clients but also facilitating unequal access to the law.[22] Accordingly, Pepper

11. *Id.* at 1074.
12. *Id.* at 1068.
13. *Id.* at 1073–74.
14. *Id.* at 1073.
15. *Id.* at 1074.
16. *Id.* at 1080–86 (distinguishing between "personal" and "institutional" wrongs).
17. *See id.* at 1080 (noting that "the legal system . . . must at times allow that autonomy to be exercised in ways that do not further the public interest").
18. *See generally* Pepper, *supra* note 8.
19. *Id.* at 616–17.
20. *Id*. at 617.
21. *Id*.
22. *See id.* at 617–18.

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supported the adoption of a disciplinary rule that would limit lawyers' discretion to opt out of clients' immoral but legally permissible plans.[23]

Likewise, Monroe Freedman and Abbe Smith affirmed neutrality on autonomy grounds.[24] They argued that "[t]he lawyer, by virtue of her training and skills, has a monopoly over access to the legal system and knowledge about the law. Consequently, the lawyer's advice and assistance are often indispensable to the effective exercise of individual autonomy."[25] Therefore, once a lawyer-client relationship has been formed, "the lawyer's devotion and zeal cannot be tempered by moral judgments of the client or of the client's cause."[26] If lawyers "preempt [clients'] moral decisions, or . . . depriv[e] them of the ability to carry out their lawful decisions," lawyers are acting "unprofessionally and immorally" and "depriv[ing] clients of [their] autonomy."[27] However, Freedman and Smith make an exception to the neutrality principle in one situation: the "lawyer can be 'called to account' and is not 'beyond reproof' for the decision to accept a particular client or cause."[28] That decision is a "moral decision for which the lawyer can properly be held morally accountable."[29]

To be clear, the foregoing accounts do support lawyers' expressing their own morality. They permit, and even encourage, moral dialogue between lawyers and clients.[30] However, they all agree that, where the lawyer and the client have reached an impasse on moral issues, the lawyer must and should accede to the client's lawful wishes.

There are many grounds on which to criticize these autonomy-based defenses of the standard conception and its principle of neutrality. As others have argued, these accounts improperly conflate the moral desirability of acting autonomously—i.e., without interference or coercion—with the moral desirability of the autonomous act itself.[31] For example, it may be "good" in one sense that a sixteen-year-old girl was *not coerced* by others into marrying a forty-year-old man (which is still legal in some states). But that is a separate question from whether her decision to enter into the marriage is good—from

23. *See* Stephen L. Pepper, *A Rejoinder to Professors Kaufman and Luban*, 1986 AM. B. FOUND. RES. J. 657, 659 [hereinafter Pepper, *Rejoinder*] ("A background assumption accompanying the first-class citizenship model is that it can support an enforceable professional ethic, that it can be embodied in legal rules."). It is unclear whether Pepper still holds this view. *See* Stephen L. Pepper, *Integrating Morality and Law in Legal Practice: A Reply to Professor Simon*, 23 GEO. J. LEGAL ETHICS 1011, 1018 (2010) [hereinafter Pepper, *Integrating Morality*] (noting that if the lawyer is unwilling to facilitate a morally wrongful result, "she can refuse to assist").

24. *See* FREEDMAN & SMITH, *supra* note 8, at 62.

25. *Id.*

26. *Id.* at 52.

27. *Id.* at 62.

28. *Id.* at 75.

29. *Id.* at 70.

30. *See id.* at 75; Fried, *supra* note 8, at 1088; Pepper, *Integrating Morality*, *supra* note 23, at 1016–18.

31. *See* David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 639.

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a moral, social, or psychological perspective—or, alternatively, whether it is good as a public policy matter to allow child marriage.

The narrow purpose of this Article, however, is to revisit one objection that has been made against the standard conception—the "economic inequality" objection. According to this objection, the moral praiseworthiness of the standard conception cannot be reconciled with a legal system where wealth determines access to counsel and where the interests of those affected by the outcome of negotiations or litigation often go unrepresented.[32] Because the market for legal services is so tainted by inaccessibility and inequality, one cannot assume (as defenses of the standard conception tend to) that justice is done and that the public interest is served when lawyers adhere to the principles of partisanship and neutrality. Furthermore, injustice is often compounded because rich clients routinely use legal services to "avoid their obligations in justice" and to "perpetuate their (legal) domination of the very groups whose greater needs these lawyers should be meeting."[33] In short, the maldistribution of legal services resulting from gross economic inequality vitiates the moral justifications of the standard conception.

Defenders of the standard conception, who have responded to the economic inequality objection, have generally insisted that the problem of economic inequality cannot speak to the morality of the lawyer's work for her client and, accordingly, those two issues should be segregated. For example, Fried readily acknowledged the problem of the "maldistribution of a scarce resource, the aid of counsel."[34] Nevertheless, Fried concluded, "legal counsel—like medical care—must be considered a good, and . . . he who provides it does a useful thing."[35] Further, Fried insisted, maldistribution "in no way questions that conclusion."[36] After all, "[t]he lawyer-client relation is a personal relation" and "the creature of moral right"; the relation is born of clients' needs and exists to secure a "measure of autonomy" for the client.[37] Continuing with the analogy of medical care, Fried contended:

> If I have a client with legal needs, then neither another person with greater needs nor a court should be able to compel or morally oblige me to compromise my care for those needs. To hold differently would apply the concept of battlefield emergency care (*triage*) to the area of regular legal service. But doctors do not operate that way and neither should lawyers.[38]

32. JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 281 (1976).
33. Fried, *supra* note 8, at 1062 (characterizing the objection).
34. *Id*. at 1076–77.
35. *Id.* at 1077.
36. *Id.*
37. *Id.*
38. *Id.*

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Therefore, on Fried's account, "considerations of efficiency or fair distribution cannot be allowed to weaken" the lawyer-client relation, and "it is the client's needs which hold the reins—legally and morally."[39]

Similarly, Pepper insisted that the problem of unequal access to legal services remained a separate issue from the morality of the lawyer's representation of the client. He noted, "[l]ike almost everything else in our society, access to law is rationed through the market—in this case, the market for lawyers' services."[40] He continued:

> [T]here are two issues here: the distribution of legal services and the content of what is distributed. The moral content of what is distributed—the ethical nature of the lawyer-client relationship once established—is the subject of this essay. The distribution of access to the law (legal services) is a different subject.[41]

In conclusion, Pepper denied that the problem of unequal access to the law could ever generate reasons to support morally constrained lawyering: "To suggest that transforming the amoral facilitator role of the lawyer into the judge/facilitator role follows from the insufficient availability of legal services is a non sequitur."[42]

The problem with these responses is that one can no more cabin off unequal access to the law in determining whether and how to constrain the provision of legal services than one can cabin off unequal bargaining power in determining whether to enforce contracts of adhesion. Another analogy can be drawn from the absurd notion that one can ignore how economic power is distributed when attempting to reform our current dysfunctional political and constitutional system, including our system of campaign finance.[43] The legal system and the legal services market are no less skewed by the intractable problem of economic inequality than our socioeconomic and political systems are. To defend a moral (or amoral) framework of legal ethics without accounting for the radically unequal economic and social power that comprise the background conditions under which legal services are delivered is to retreat into the empty formalism that legal realists have long criticized. To put it bluntly, the legal system does not exist in a vacuum.

Also, these responses to the economic inequality objection rely on a skewed characterization of lawyer-client relationships. They emphasize the client's vulnerability and overdependence on the lawyer and exclude scenarios in which clients dominate lawyers or lawyers are financially dependent on clients. For example, by invoking the doctor,[44] Fried skillfully insinuated the image of an individual in adversity who needs a professional's care and attention. This image suppresses our instinct to constrain or ration

39. *Id.*
40. Pepper, *supra* note 8, at 619.
41. *Id.* at 619–20.
42. *Id*. at 620.
43. *See generally* Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419 (2015).
44. *See supra* notes 36–39 and accompanying text.

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the scarce resource. But this image is misleading. As Rick Abel has remarked about a similar image, it

> obscures the fact that lawyers devote most of their efforts to counseling business enterprises about familiar, repetitive situations, seeking to facilitate future transactions in which gain, not need, is the motive and in which only the economic interests of large corporate entities are at stake, not individual property, much less freedom or life.[45]

Fried's analogy also ignores a key distinction between the nature of medical and legal services. A doctor's care for her patient—typically, by examining the patient and then prescribing treatment—will rarely generate direct, concrete harms to third persons. In the unusual case where treatment of a patient leads directly to the harm of others—for example, repairing the hand of someone who then uses it to abuse her spouse—the doctor will rarely anticipate or even know about the harm. By contrast, lawyers routinely perform or facilitate acts in which lawyers knowingly, and sometimes intentionally, inflict harms (justified or not) on third persons. The point is that, unlike doctors, lawyers often find themselves in positions where they can actually take action that might avert or minimize harm to third persons.

Similarly, Pepper's framing of the lawyer-client relationship obscures the fact that lawyers knowingly inflict harms on third persons. This obfuscation is achieved through repeated, overly benign characterizations of law as an instrument by which an individual (or group) can attain her (or their) life goals. For example, in defending the "premise . . . that law is a public good," Pepper observed:

> "[L]awmakers" . . . ha[ve] created various mechanisms to ease and enable the private attainment of individual or group goals. The corporate form of enterprise, the contract, the trust, the will, and access to civil court to gain the use of public force for the settlement of private grievance are all vehicles of empowerment for the individual or group . . . . In addition to these structuring mechanisms are vast amounts of law, knowledge of which is intended to be generally available and is empowering: landlord/tenant law, labor law, OSHA, Social Security . . . . Access to both forms of law increases one's ability to successfully attain goals.[46]

By highlighting the lawyer's role in helping clients reach their goals, Pepper emphasized the discreteness of the lawyer-client relationship, as well as the empowering potential of legal services. It is thus not surprising that, when Pepper addressed the economic inequality objection, he assumed that the plight of the *have-nots* who are unable to pursue their own goals *cannot be helped* by insisting that lawyers for the *haves* change the way they serve their clients.[47] On Pepper's account, it would seem to be an exercise of

45. Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 677–78 (1981).

46. Pepper, *supra* note 8, at 616.

47. For purposes of this Article, the *haves* are elite individuals and large organizations who tend to have greater power, wealth, status, and access to lawyers than the *have-nots*. *See generally* Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). Pepper might reply that his defense of

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futility to ask lawyers for the *haves* to forbear and to level the playing field for the sake of the *have-nots*. It would be akin to telling higher-achieving students to study less so that lower-achieving students can catch up.

But if we zoom out from this image of the discrete and detached lawyer-client relationship, we can more easily visualize an alternative framing of the lawyer-client relationship—one that is much less atomistic and that exposes the destructive potential of legal services. That framing more fully acknowledges that the lives of the *haves* and the *have-nots* intersect in complex, often troubling ways.[48] In fact, the plight of the *have-nots* can actually depend on how lawyers for the *haves* provide their legal assistance. Indeed, some of the *have-nots* seeking lawyers need them not because they have grand plans to execute or big life goals to reach but because they have been wronged or victimized by one of the *haves* (whose lawyers facilitated the victimization).[49] Therefore, the *have-nots* require legal help either to remediate the wrong or to stop further victimization. In other words, sometimes the *have-nots* are the hapless third parties who have been harmed by the lawyer-*have* relationship.

Moreover, situations where *haves* and *have-nots* directly interact in problematic ways are not exactly rare. Just think about the ubiquity of landlord-tenant, employer-employee, health insurer–insured, retailer-consumer, and manufacturer-consumer relationships. And intersections are not confined to relationships of contractual privity. Think about how the *have-nots* are disproportionately impacted by environmental pollutants generated from well-counseled, large-scale businesses or how the *have-nots* are affected when the public fisc is chronically depressed because lawyers have helped billionaires successfully dodge taxes.

Given how commonplace such intersections are, it is reasonable (and thus *not* a non sequitur)[50] to implore lawyers for the *haves* to exercise restraint and avoid placing the *have-nots* in situations where they need lawyers but cannot access them. By refusing to forbear and, instead, assisting immoral (but legally permissible) plans, lawyers for the *haves* can aggravate the economic, social, and psychological standing of the *have-nots*. In doing so, lawyers are exacerbating the consequences of economic inequality and assaulting the very value of autonomy that underwrites defenses of the standard conception.

In sum, the foregoing autonomy-based defenses of the standard conception and its principle of neutrality cannot withstand the economic inequality

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neutrality was not intended for the corporate client. But that claim would be tough to square with his explicit references to corporations and groups. *See* Pepper, *supra* note 8, at 616 (referring to the "private attainment of . . . group goals" and "corporate form of enterprise"); *id.* at 622–23 (citing the example of Sears's in-house lawyer drafting form consumer contracts covering consumer-plaintiffs).

48. *Cf.* Eli Wald & Russell G. Pearce, *Being Good Lawyers: A Relational Approach to Law Practice*, 29 GEO. J. LEGAL ETHICS 601, 612–37 (2016) (rejecting the extreme individualist/atomistic approach to legal ethics in favor of a relational approach).

49. *See, e.g.*, *infra* Part II.

50. *See supra* note 41 and accompanying text.

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objection. These defenses rely on woefully incomplete characterizations of lawyer-client relationships and their impact. By emphasizing the discreteness of the lawyer-client relationship and the empowering potential of legal services, they ignore the reality that lawyers not only facilitate clients' life goals but also facilitate the victimization of third persons, some of whom lack access to lawyers and therefore cannot redress that victimization. As a result, these defenses underappreciate how the principle of neutrality will interact with the problem of economic inequality to reproduce and even aggravate the socioeconomic imbalances that plague the market for legal services.

II. MANDATORY ARBITRATION AGREEMENTS

But it is not just that the leading defenses of the standard conception underappreciate how the neutrality principle will interact with economic inequality to exacerbate inequality. They also fail to consider the possibility that this interaction can lead to the systematic deprivation of individuals' *access to lawyers*. This Part provides one concrete example, among many,[51] of such an interaction. Approximately sixty million employees, representing an estimated 56 percent of the nonunion private sector workforce,[52] are covered by employer-promulgated predispute mandatory arbitration agreements (MAAs), which have been imposed as a condition of new or continuing employment.[53] MAAs require employees to waive their right to file all statutory and common-law employment-related claims in court even before they have or know they have claims.[54] As will be argued below, lawyers, who adhere to the principle of neutrality[55] and facilitate the implementation of MAAs for their employer-clients, are foreclosing employees' access to lawyers and the law and undermining their autonomy.

Although the Federal Arbitration Act[56] (FAA) was passed in 1925 to provide an alternative forum for the fair and efficient resolution of

51. *See infra* note 115.

52. ALEXANDER J. S. COLVIN, ECON. POLICY INST., THE GROWING USE OF MANDATORY ARBITRATION 5 (2017), http://www.epi.org/files/pdf/135056.pdf [https://perma.cc/YHQ2-Y8UU]. This estimate excludes those categories of agreements listed in *infra* note 53, as well as unionized workplaces, which constitute less than 7 percent of the private sector. Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1313 (2015).

53. As with most of the literature on the subject, this Article excludes from the definition of MAAs (i) individually negotiated arbitration agreements, typically entered into by high-salaried professional or managerial employees; (ii) collective bargaining agreements; and (iii) postdispute agreements to arbitrate. These excluded agreements are "more likely to be a mutually beneficial alternative to either litigation or labor-management strife." Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 683 (2018).

54. *See* Sternlight, *supra* note 52, at 1310 n.7.

55. This Article adopts the assumption that corporate lawyers adhere to the principle of neutrality, albeit sometimes unconsciously, which operates to favor their clients' self-serving understandings of their own interests. *See generally* Sung Hui Kim, *Naked Self-Interest?: Why the Legal Profession Resists Gatekeeping*, 63 FLA. L. REV. 129 (2011).

56. 9 U.S.C. §§ 1–16 (2018).

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commercial disputes,[57] it has been reinterpreted over the last few decades in unprecedented ways to divest employees of their legal rights. The most relevant history begins in 1991, when the U.S. Supreme Court opened the door to mandatory arbitration of nonunion employment claims in *Gilmer v. Interstate/Johnson Lane Corp*.[58] In *Gilmer*, the Court held that a broker could be compelled to arbitrate his age discrimination claim against his brokerage firm pursuant to an arbitration clause embedded in a standard stock exchange registration form.[59] The broker was required to sign this form as a condition of registering as a member of the stock exchange.[60] While *Gilmer* did not involve an employment contract per se,[61] the decision's applicability to a statutory claim that typically arises in the employment context emboldened employers to adopt MAAs for their own workforce.[62]

Any lingering doubts about whether courts would apply the FAA to employment settings were dispelled in 2001. In *Circuit City Stores, Inc. v. Adams*,[63] the Court clarified that employers could require their employees to arbitrate their claims against employers, despite language in the FAA that had long been thought to foreclose the arbitration of employment-related claims.[64] After *Circuit City*, however, it remained unclear whether employers could use MAAs to compel a waiver of the right to participate in class or group actions. This right had long been seen as critical because minimum wage, overtime, or unfair wage claims brought by low-wage employees or involving incremental pay disparities under the Fair Labor Standards Act of 1938[65] (FLSA) or the Equal Pay Act of 1963[66] rely on the ability to aggregate multiple small recovery claims as the only feasible means of justifying the costs of litigation and thus of securing legal representation.[67]

In 2011 and 2013, in *AT&T Mobility LLC v. Concepcion*[68] and *American Express Co. v. Italian Colors Restaurant*,[69] the Court enforced group action

57. KATHERINE V. W. STONE & ALEXANDER J. S. COLVIN, ECON. POLICY INST., THE ARBITRATION EPIDEMIC 7 (2015), https://www.epi.org/files/2015/arbitration-epidemic.pdf [https://perma.cc/VM62-7LAA] (noting that the "drafters, legislators, and advocates of the FAA assumed that the statute applied only to business disputes").

58. 500 U.S. 20 (1991).

59. *Id.* at 23–35.

60. *Id.* at 23.

61. *See* STONE & COLVIN, *supra* note 57, at 10 (noting that the arbitration clause was embedded "in a contract between an employee and the agency with which the employee was required to register to get the job").

62. Sternlight, *supra* note 52, at 1317.

63. 532 U.S. 105 (2001).

64. *Id.* at 109 (interpreting the FAA exemption for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" to include *only* employees involved in the physical movement of goods across state lines).

65. Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended in scattered sections of 29 U.S.C.).

66. 29 U.S.C. § 206 (2018).

67. *See* Estlund, *supra* note 53, at 695; Sternlight, *supra* note 52, at 1347.

68. 563 U.S. 333 (2011) (enforcing a class action waiver in a boilerplate consumer contract).

69. 570 U.S. 228 (2013) (enforcing a group action waiver in a merchant credit card agreement).

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waivers in nonemployee contexts against challenges under a state's unconscionability doctrine and federal antitrust law.[70] Finally, in 2018, in *Epic Systems Corp. v. Lewis*,[71] the Court enforced group action waivers against employees, rejecting the argument that such waivers violated employees' right to engage in "concerted activities for the purpose of . . . mutual aid or protection," as provided for by the National Labor Relations Act.[72] With *Epic Systems*, the Court basically eliminated the only means for certain types of employment claims to be vindicated in any forum. *Epic Systems* is expected to accelerate the already growing trend of employers incorporating group action waivers in their MAAs. As of 2017, an estimated 24.7 million private-sector, nonunion employees are subject to group action waivers contained in arbitration clauses.[73]

Many aspects of the private arbitration of employment disputes are troubling. Enforceable arbitration clauses are often embedded in contracts of adhesion, written in fine print, neither negotiated nor signed, and neither known nor understood by employees.[74] There is no external regulation of private arbitration to ensure that arbitrators are qualified and impartial, despite the concern voiced by academics and journalists that employers overwhelmingly benefit from a structural, "repeat player" advantage over employees.[75] As commentators have long observed, private arbitration is afflicted with a pro-employer bias, delivering second-class justice to employees subject to them.[76] Moreover, it is difficult to ascertain what type of second-class justice private arbitration delivers, as there is almost no transparency in arbitral forums.[77] Most importantly, for purposes of this Article, MAAs threaten to deprive employees of access to law by eroding their ability to obtain legal representation.

A recent empirical analysis of available data, performed by Cynthia Estlund, suggests that MAAs are systematically suppressing the filing of meritorious employment claims, even in arbitration,[78] a conclusion also reached by other employment law experts.[79] As a starting point for Estlund's analysis, in 2016, an estimated 5126 employment cases were filed in

70. *Italian Colors*, 570 U.S. at 233–37; *Concepcion*, 563 U.S. at 338–43.

71. 138 S. Ct. 1612 (2018).

72. 29 U.S.C. § 157 (2018).

73. COLVIN, *supra* note 52, at 6.

74. Sternlight, *supra* note 52, at 1320–22.

75. *See* STONE & COLVIN, *supra* note 57, at 22–23. *See generally* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189 (1997).

76. Katherine V. W. Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1046 (1996).

77. Estlund, *supra* note 53, at 685, 687–88; *see also* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2932–33 (2015) (also noting the eroding transparency of litigation).

78. Estlund, *supra* note 53, at 690–93.

79. *See* Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 6 (2011); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3091–92 (2015); Resnik, *supra* note 77, at 2936; David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 240 (2012); Sternlight, *supra* note 52, at 1313–14.

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arbitration by the approximately sixty million employees covered by MAAs.[80] By comparison, in the same year, an estimated 26,300 employment cases were filed in *federal* courts.[81] For *state* courts of general jurisdiction, the volume of filings is notoriously difficult to verify; however, one analysis, based on two large studies of state court litigation, concluded that approximately 195,000 employment suits are filed each year in state courts.[82] If we reflect the fact that a significant subset of the federal filings represent federal class or collective actions under the FLSA, then the estimated number of federal and state court filings in 2016 would balloon to a conservative estimate of approximately 571,300 cases.[83]

Extrapolating from that figure, Estlund estimates that one would have expected anywhere between 320,000 and 727,000 arbitration cases filed for the year,[84] instead of the estimated 5126 that appear to have been filed.[85] What this means is that between 315,000 and 722,000 arbitrations in 2016 were likely "missing"—that is, between 315,000 and 722,000 employment claims were suppressed by virtue of being subject to MAAs.[86] In other words, it is possible that *less than 2 percent* of the employment claims that one would expect to be filed in any forum, but that are covered by MAAs, end up being filed in arbitration.[87] As a result, the "overwhelming majority of claims that would have been litigated but for the presence of an MAA are simply dropped without being filed in any forum at all."[88] As Estlund concludes, "[m]andatory arbitration is less of an 'alternative dispute resolution' mechanism than it is a . . . black hole into which matter collapses and no light escapes."[89]

The most likely explanation for the significantly lower filing rates in arbitration is that lawyers are dramatically less willing to represent employee claims that are destined for arbitration rather than for litigation. To be sure, it is important *not* to overstate the ability of employees, who are *not subject to MAAs*, to find lawyers. Indeed, only about 10 percent of employees seeking lawyers for litigation actually succeed in finding representation.[90] Because employees ordinarily cannot afford to pay legal fees at hourly rates out of pocket, especially if they have just lost their jobs, they must obtain legal representation on a contingent fee basis, whereby the lawyer only recovers if the plaintiff prevails. In fact, most plaintiff-side employment lawyers represent the bulk of their clients on a partially or entirely contingent fee basis.[91] Contingent fee arrangements are known to discourage lawyers

80. Estlund, *supra* note 53, at 690–93.
81. *Id.* at 691–93.
82. *Id.* at 693–94 (citing studies).
83. *Id*. at 695–96.
84. *Id.* at 696.
85. *Id.* at 692.
86. *Id.* at 697 fig.2.
87. *Id.* at 696.
88. *Id.* at 698.
89. *Id.* at 682.
90. *Id.* at 702 (citing a study).
91. *See* STONE & COLVIN, *supra* note 57, at 21 (citing a study).

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from taking on employment claims with low expected recoveries, even if they are meritorious.[92] Such claims may be riskier to win on the merits (e.g., they lack "smoking gun" evidence); they may require substantial upfront cash expenditures (e.g., due to the case being factually complex or requiring statistical proof or expert testimony); or the financial recoveries at stake may be relatively small (e.g., the plaintiff is a low-wage employee).[93] The same general dynamic is magnified for private arbitration because MAAs can further lower the expected recoveries of employment claims, impairing the economic feasibility for plaintiffs' lawyers to bring such claims.

One way in which MAAs further lower expected recoveries is by incorporating provisions that impede the full and fair adjudication of otherwise valid claims. Those provisions may

> bar the claim altogether (like a very short limitations period or unaffordable arbitrator fees), or impede investigation (like very limited discovery), or sharply skew proceedings against the complainant (like a biased arbitrator pool or a skewed selection process), or curtail recovery even in the event of "success" (like provisions against attorney fee shifting or punitive damages, or damage limits).[94]

Group action waivers, as noted above, make certain employment claims economically infeasible for plaintiffs' lawyers to take on.[95] Even if a provision is vague or potentially invalid, it can still deter lawyers from representing the claim in the first place. After all, any challenges to an arbitration agreement will likely be decided by the arbitral forum itself, and arbitrators are likely to strike and sever the invalid portion, rather than invalidate the entire MAA.[96]

Even without the baggage of particularly prohibitive or especially unfair provisions, the expected recoveries on claims in arbitration will generally be lower than those in litigation and often below the threshold of economic viability for plaintiffs' lawyers. Expected recoveries are, of course, based on lawyers' estimates of *actual* recoveries. The limited data available suggest that not only are actual recoveries significantly lower in arbitration (than in litigation)[97] but also that employees are less likely to prevail in arbitration and recover anything.[98] Much less is known about pro se employee-claimants, but existing studies on pro se claimants in other contexts suggest

92. *See* Sternlight, *supra* note 52, at 1335–36.
93. *Id.* at 1336.
94. Estlund, *supra* note 53, at 700–01.
95. *See supra* notes 64–72 and accompanying text.
96. Estlund, *supra* note 53, at 701. Moreover, courts have the power under the separability doctrine to find valid arbitration clauses in invalid contracts. *See* STONE & COLVIN, *supra* note 57, at 9.
97. Alexander J. D. Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 INDUS. & LAB. REL. REV. 1019, 1028 tbl.1 (2015).
98. Estlund, *supra* note 53, at 688 (citing studies reporting comparatively lower success rates in arbitration).

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that they fare even worse.[99] As Estlund concludes, "it looks as though the presence of a mandatory arbitration provision dramatically reduces an employee's chance of securing legal representation, as well as her chance of any kind of recovery, any kind of hearing, or any formal complaint being filed on her behalf."[100]

If MAAs have the claim-suppressive effect that a growing chorus of experts believe they do,[101] then the lawyers who adhere to the principle of neutrality and facilitate MAAs for their employer-clients are complicit, wittingly or not, in the foreclosure of employees' access to lawyers. Accordingly, those lawyers are facilitating the systematic divestment of employees' legal rights—statutory and common-law rights that are supposed to be nonwaivable as a matter of positive law.[102] And those divested rights, such as the right to be free of discrimination and sexual harassment, the right to be free of lie-detector tests and retaliation for whistleblowing, and the right to be paid a fair wage and provided a safe and healthful workplace,[103] are not trivial. They are rights "constitutive of civil society," and they are intended to safeguard the autonomy and equal dignity of citizens with respect to the nonelective activity of earning a living.[104]

Moreover, this systematic divestment of critical legal rights cannot be easily remedied. Even assuming that an employee is lucky enough to secure pro bono representation before the employment relationship is formed (and before the MAA is imposed), it is highly unlikely that bargaining power dynamics would be altered such that an employer would agree to relinquish its MAA. And reliance on pro bono representation to pursue a claim in arbitration will rarely be worth the effort, considering that most lawyers lack the training to competently handle employment disputes.[105] Also, walking away from the employment relationship will not be a realistic option for many employees, as MAAs are becoming the norm for some industries, such as the national restaurant chain and retail industries.[106] And Congress is

99. Russel Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 44–66 (2010) (reviewing studies).

100. Estlund, *supra* note 53, at 702–03.

101. *See supra* note 79.

102. *See* Estlund, *supra* note 53, at 703.

103. MAAs generally bar access to courts for claims arising under the Civil Rights Act of 1866, Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967, the Employee Retirement Security Act of 1974, the Fair Labor Standards Act of 1938, the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, the Family and Medical Leave Act of 1993, and "any other federal, state or local statute, regulation or common law doctrine, regarding employment discrimination, conditions of employment or termination of employment." E. PATRICK MCDERMOTT & ARTHUR ELIOT BERKELEY, ALTERNATIVE DISPUTE RESOLUTION IN THE WORKPLACE: CONCEPTS AND TECHNIQUES FOR HUMAN RESOURCE EXECUTIVES AND THEIR COUNSEL 110–11 (1996).

104. *See* Margaret Jane Radin, *Boilerplate: A Threat to the Rule of Law?*, *in* PRIVATE LAW AND THE RULE OF LAW 288, 296 (Lisa M. Austin & Dennis Klimchuk eds., 2014).

105. *Cf.* Abel, *supra* note 45, at 686 ("[M]ost lawyers lack the training to qualify them to represent pro bono clients.").

106. STONE & COLVIN, *supra* note 57, at 15.

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unlikely to move anytime soon to overrule Supreme Court precedent or meaningfully regulate private arbitration. Finally, lobbying for comprehensive law reform, though welcomed, is likely futile, as employers have far superior economic resources than advocates for employee rights.

This example demonstrates how the interaction between the principle of neutrality and the problem of economic inequality can lead to the wholesale divestment of fundamental legal rights of the *have-nots*. What is more, this outcome was accomplished by depriving individuals of their *access to lawyers*, which—according to some defenses of the standard conception—is critical for supporting the autonomy of persons.[107] Therefore, those lawyers, who are promoting their clients' goals consistently with the principle of neutrality, are not only depriving individuals of access to the law but are also undermining their autonomy—the very value that defenders of the standard conception claim to embrace. Unless these defenders can offer persuasive reasons why supporting the autonomy of one's own clients morally justifies depriving others of their autonomy,[108] the autonomy-based justifications must fail on their own terms.

III. AUTONOMY REDUX

Unfortunately, what is being countenanced is actually far worse than merely trading off one person's autonomy for another's. Lawyers' promotion of clients' autonomy at the expense of others' cannot be regarded as an equivalent exchange. There are, after all, multiple conceptions of autonomy, with some considerably weightier than others. What in fact is being condoned when lawyers facilitate the promulgation of MAAs is the promotion of a *weaker* form of autonomy at the expense of a more *fundamental* form of autonomy.

When defenders of the standard conception assert that lawyers enhance the autonomy of clients by facilitating clients' lawful objectives, they are referring to the *freedom to do what one wants*—choosing freely without external constraints.[109] This particular understanding of autonomy is nothing less than the dominant, negative conception of liberty[110] at the heart of the

107. *See supra* notes 18–23 and accompanying text.

108. Distinguishing between "personal wrongs" and institutional wrongs, Fried argued that lawyers are morally entitled to commit institutional wrongs, provided they act in a "formal, representative way" because the legal system has "authorize[d] both the injustice . . . and the formal gesture for working it." Fried, *supra* note 12, at 1084. In my view, these arguments "put[] too much faith in existing legal institutions and too much faith in procedure at the expense of substantive justice." *See* David Luban, *Misplaced Fidelity*, 90 TEX. L. REV. 673, 678 (2012).

109. This meaning of autonomy is gleaned solely from the works described in the text of Part I. Of course, it is possible that those authors today hold more complex understandings of autonomy as expressed in other works. *See, e.g.*, Stephen L. Pepper, *Autonomy, Community, and Lawyers' Ethics*, 19 CAP. U. L. REV. 939, 944 (1990).

110. *See* ISAIAH BERLIN, TWO CONCEPTIONS OF LIBERTY 7 (1969) (identifying positive and negative conceptions of freedom); *see also* THOMAS HOBBES, LEVIATHAN 262 (C. B. Macpherson ed., Penguin Books 1968) (1651) ("A Free-Man, *is he, that in those things, which by his strength and wit he is able to do, is not hindred to doe what he has a will to*.").

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classical liberal tradition—the notion that people are free simply to the extent that their choices are not *interfered* with: "to be free, more or less, is to be left alone to do whatever one pleases: to not be blocked by the obstructions of others and, in most versions, to not be burdened by their coercive threats."[111] Because Fried, Pepper, Freedman, and Smith apparently consider the *freedom to act without interference* as a preeminent moral value, they regard any constraints imposed by lawyers on clients' ends, beyond the minimum demanded by positive law, to be an undue infringement on clients' autonomy.[112] Accordingly, lawyers *must* promote their clients' *freedom—understood as noninterference*—by maximizing clients' lawful goals.

There is, however, an alternative conception of autonomy that is implicated when employees are divested of their critical legal rights. An individual enjoys this more fundamental form of autonomy only insofar as she is *not dominated or subordinated by others*. And she is not dominated by others only insofar as she is protected by laws, institutions, and social norms against the *arbitrary exercise of power* over her with respect to a socially defined set of fundamental life choices.[113] This alternative understanding of autonomy is nothing less than the classical republican notion of *freedom—understood as nondomination*.[114]

When lawyers help employers deprive employees of critical legal rights by promulgating MAAs, they are not merely constraining employees' free exercise of choice. Rather, they are dismantling the legal and institutional protections intended to secure employees' freedom from domination by their employers. Devoid of protections that safeguard their free and equal status as citizens vis-à-vis the fundamental activity of earning a living, employees become exposed to the arbitrary exercise of their employers' power. And, undeterred and unconstrained by laws that protect the basic liberties to be free from discrimination, harassment, and retaliation in the workplace, employers are more or less free to exercise arbitrary power over their employees—i.e., they are free to do as they please with their employees. By promoting their employer-clients' free exercise of choice, lawyers are undermining employees' freedom from domination at the hands of their employers.[115] Those employees are rendered second-class citizens.

111. Frank Lovett & Philip Pettit, *Neorepublicanism: A Normative and Institutional Research Program*, 12 ANN. REV. POL. SCI. 11, 14 (2009).

112. *See supra* Part I.

113. Lovett & Pettit, *supra* note 111, at 17.

114. *See* Frank Lovett, *Republicanism*, STAN. ENCYCLOPEDIA PHIL. (June 4, 2018), https://plato.stanford.edu/entries/republicanism/ [https://perma.cc/KN8H-MVKQ]. For other works on republicanism and legal ethics, see, for example, Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 14 (1998); Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 241 (1992).

115. One might object that the alternative is worse—that if lawyers refuse to facilitate privately minted commands, then lawyers would be *dominating* clients. This objection confuses domination and interference. For the distinction, see Lovett & Pettit, *supra* note 111, at 14. Whether such interference in the form of refusal is morally problematic depends (partly) on whether (and the degree to which) the client's intended project is morally problematic. *See* Luban, *supra* note 31, at 641–43.

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CONCLUSION

Far from mitigating the problem of economic inequality that afflicts our socioeconomic, political, and legal systems, the standard conception of the lawyer's role can and does exacerbate it. Not merely entrenching power, lawyers—by simply doing what they routinely do when they privately order their clients' affairs—can amplify power, potentially undermining the autonomy and equal dignity of individuals. Unfortunately, the example discussed herein is not an isolated one, as there are numerous contexts in which lawyers have deprived individuals of their critical legal rights.[116] Indeed, the systemic nature of this problem suggests that systemic solutions—not piecemeal legislative band-aids—are needed. To that end, this Article calls for an alternative model of legal ethics based not on thin versions of autonomy heretofore embraced but on a more demanding conceptualization of autonomy based on the value of freedom as nondomination.

116. Other potential examples of this type of interaction include defendant-friendly forum-selection clauses, waivers of the right to sue, and nondisclosure clauses used in the settlement of mass tort and sexual assault claims. Regardless of their enforceability, such provisions deter the filing of at least *some* meritorious claims.

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