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Clark Freshman

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Tweaking the Market for Autonomy: A Problem-Solving Perspective to Informed Consent in Arbitration

CLARK FRESHMAN*

This article looks at shortcomings in how arbitration promotes autonomy from a problem-solving perspective:¹ How can we tweak market incentives so that arbitration really lives up to (one of) its key promises?² In contrast, some quickly assume a perfect market in which every arbitration agreement necessarily reflects a fully informed and free choice, and others quickly assume a market so unequal and imperfect that “agreements” to arbitrate reflect no meaningful choice.³ In some contexts, one set of assumptions may make far more sense: if two experienced arbitration providers reach their own agreement to arbitrate their dispute, this may represent autonomy as much as any market transaction ever could; if a poor, uneducated person signs an employment arbitration agreement, there may be no sense in which the decision reflects autonomy.

This article looks in between these extremes and across many con-

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1. On problem-solving in the law, see, for example, Paul Brest & Linda Krieger, *Lawyers as Problem Solvers*, 72 TEMP. L. REV. 811 (1999).

2. On autonomy as a key value in arbitration, see, for example, Alan Scott Rau, *The UNCITRAL Model Law in State and Federal Courts: The Case of “Waiver,”* 6 AM. REV. INT’L ARB. 223, 252 (1995). Autonomy is by no means the only possible value of arbitration. Arbitration may further other values, such as cutting the time, costs, and acrimony of ordinary litigation.

3. For a more nuanced view of choice in arbitration, but voicing the concerns about lack of choice, see, for example, Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931 (1999). For a strong defense of choice in arbitration, with some qualifications, see Stephen Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703 (1999) (arguing that arbitrators should usually be able to adopt the best rules for deciding cases and that courts compete with arbitrators for the development of the “best” law much as the post office and Federal Express compete in offering the best delivery service).

texts⁴ to look at some common barriers and common pathways to autonomy. Like many problem-solving exercises, it defines the topic of autonomy and informed consent broadly, looks at various objectives in promoting autonomy, and considers even seemingly idealistic solutions.⁵ So, too, like many problem-solving exercises, it is meant to be a collaborative enterprise, and it anticipates others will identify other problems—and other solutions! In short, the article is less an answer than a question: How can we try to make arbitration more like the exercise in autonomy and informed decision-making that so many think it should be?

The article is therefore primarily an exercise in theory and jurisprudence rather than an exploration of existing doctrine. Still, the theory implicitly has doctrinal implications: to the extent that the market shortcomings described below undercut autonomy in a particular setting, then we should treat arbitration less favorably. In extreme cases, this may mean we would not enforce any agreement to arbitrate. In other cases, this might mean the provisions would be enforced but suspect terms not enforced and/or additional terms implied into the contract. For example, if one thought that consumers had little choice in negotiating an arbitration provision with the only water company in town, then one might not enforce a provision that arbitrators be drawn only from panels of those with years of water industry experience. In a similar way, if a provision for arbitration in a medical malpractice case made no mention of how a patient could get a hospital's records, one might interpret the arbitration contract to allow the patient some access to the records.

With this problem-solving method and possible doctrinal implications in the background, this article explores the potential of arbitration to promote autonomy by addressing four questions. First, what might autonomy mean in arbitration? Second, what kind of autonomy do existing market incentives likely lead existing market actors (parties to disputes; lawyers; ADR providers like the American Arbitration Association) to provide? Third, assuming that market actors have some incen-

4. In contrast, others attempt to typologize types of dispute scenarios and the problems most associated with those particular kinds of scenarios. See, e.g., Sarah Jane Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759, 760 (2001) ("[I]t would be appropriate to provide different default rules governing arbitration depending on the status of the parties involved in the arbitration."); Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 827 (1999) (stating that a mediator should have more responsibility to ensure informed consent by parties when parties are: (1) forced to mediate; and/or (2) not represented by counsel). This is certainly another valuable enterprise; however, it overlooks the ways in which many common barriers addressed here may cut across contexts of types of disputes and types of parties.

5. See, e.g., DAVID PERKINS, ARCHIMEDES' BATHTUB: THE ART AND LOGIC OF BREAKTHROUGH THINKING 51 (2000) (suggesting that creative solutions are easier when people engage in "roving far and wide" for ideas).

tive to promote some kind of autonomy, what barriers might inhibit them? Fourth, how might we enhance the ability of arbitration to promote autonomy by changing market incentives and addressing barriers to promoting autonomy?

I. THEORIES AND PRACTICES OF AUTONOMY IN ARBITRATION

As a preliminary working definition, I define autonomy as the ability of an entity to make informed choices⁶ about its significant practices, including how it resolves disputes. Entity includes both individuals and organizations.⁷ Whenever an entity resolves a particular dispute by a particular process, be that some kind of litigation, some kind of mediation, or some type of arbitration, it implicitly chooses one kind of process over another. It makes sense to conclude this choice reflects autonomy if we think that the entity has made an informed choice.

Although it's beyond dispute that autonomy and informed consent are generally bedrock American values,⁸ it's worth considering why we should care *at all* that entities make informed choices about arbitration rather than some other set of decisions, like the interest rate on loans, the price of a car, and so on. For some, decisions about arbitration matter more because we should care more about choices about procedural justice compared to, say, choices about liquidated damages provisions.⁹ At

6. Another important topic is consent to arbitration. Consent in arbitration is itself a huge and well-explored topic, including many critiques of the way courts enforce agreements to arbitrate even when consumers may not have had much bargaining power. *See, e.g.*, Sternlight, *supra* note 3; *see also* Stone, *supra* note 3. It may well be that there is an important relationship between the kind of bargaining power a party has and the kind of information appropriate to make known to an individual, but this article instead concentrates more on what information an entity knows rather than factors like market power that make some choices less attractive.

7. By labeling both as entities, I mean to emphasize the way that individuals can be seen as a coalition of various potential selves, combining various potential obligations, commitments, communities, and cultures. *See, e.g.*, GEORGE AINSLIE, *PICOECONOMICS: THE STRATEGIC INTERACTION OF SUCCESSIVE MOTIVATIONAL STATES WITHIN THE PERSON* (1992).

8. *See, e.g.*, Nolan-Haley, *supra* note 4, at 781 ("Informed consent is the foundational moral and ethical principle that promotes respect for individual self-determination and honors human dignity.").

9. It is worth noting that the long-standing distinction between decisions about procedural justice and decisions about other types of justice popularized by such scholars as Hart and Sacks of the legal process school, *see* HENRY HART & ALBERT SACKS, *THE LEGAL PROCESS* (1994), is certainly subject to criticism. For a critical perspective, *see* generally MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987). More specifically, one might question why an individual does (or should) care more about questions of whether an arbitrator decides something compared to other aspects of a contract. From a certain purely monetary point of view, one might plausibly debate whether arbitration or some other clause has a greater effect on the probable outcome. *See generally* David Hoffer, *Decision Analysis as a Mediator's Tool*, 1 HARV. NEGOT. L. REV. 113 (1996) (illustrating how a mediator could suggest reasonable settlements in a case by using decision analysis of various potential actions, such as odds of admitting certain evidence, winning certain motions and so on, to arrive at a predicted value of a case). In some instances, for

least for the Supreme Court, the importance of some scrutiny of procedural choices matters because individuals may simply lack the background to realize the implications of their choices, such as the way some have tried to use arbitral clauses to exclude punitive damages¹⁰ or to let arbitrators decide the exact scope of what they will get to decide.¹¹ Together, these concerns give us enough reason to want some kind of informed consent that we must confront some very practical questions. Exactly how many resources we devote to the process of informed consent and exactly what tradeoffs we might make with other commitments involving arbitration (such as its private nature) will depend on some deeper thinking about the value of autonomy. This section therefore starts with some inevitable practical questions because even they will seem important to many. Still, some may be difficult to answer given the market incentives and various barriers described below. The next section considers progressively more complicated and abstract rationales for autonomy and informed consent.

Any attempt to inform entities about arbitration involves a series of questions: First, what are the essential features of arbitration to describe? Second, when and how should one describe not merely formal features but practical consequences, such as the potential for bias? Third,

example, the effect of a standard choice of law clause, by denying certain damages available in some states but not others, might have a greater probability of having an effect on the probable outcome.

In reply, some might argue that the importance of procedural choices reflects the way that individuals might actually feel, as reflected by studies of the psychology of procedural justice. See, e.g., TOM TYLER, *WHY PEOPLE OBEY THE LAW* (1990). Moreover, critical feminists and critical race scholars note that this importance of process, and the sense of respect by the process, may be particularly important in the felt experiences of women and people of color. See, e.g., Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359.

This article does not attempt to resolve these debates but rather explores the possibilities of informed consent. However, it is worth noting that the perception of satisfaction and the perception of consent may be problematic. See *infra* note 119 and accompanying text (stating that perception of satisfaction is an imperfect standard for informed consent if people do not accurately understand their choices).

10. Although it is a matter of some controversy whether arbitration clauses may explicitly prevent arbitrators from awarding punitive damages, the Supreme Court explicitly rejected the idea that a brokerage firm could get this effect simply because a choice of law clause mentioned New York law, and because New York case law prevented arbitrators from awarding punitive damages. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60 (1995) (expressing doubt that a consumer would realize that a reference to choice of law would include New York case law on the powers of arbitrators). See generally *Ex parte Thicklin*, 824 So. 2d 723 (Ala. 2002) (holding that arbitration clause cannot prevent arbitrator from awarding punitive damages).

11. *First Options, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995) (stating that “the ‘who (primarily) should decide arbitrability’ question—is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers . . .”) (citation omitted). The Supreme Court recently granted certiorari in a case that addresses the exact scope of *Kaplan*. *Howsam v. Dean Witter Reynolds, Inc.*, 122 S. Ct. 1171 (2002).

whether and how should one describe certain optional variations on arbitration? Fourth, by what media (such as written; oral; video; interactive video; and/or workshop format) should information be presented?

A. *Relatively Practical Questions*

1. *Existing Attempts at Information About Arbitration*

Existing descriptions of arbitration under-emphasize choice in arbitration and over-emphasize formal perspectives. Many descriptions fail to recognize that many features in arbitration often vary. For example, descriptions of arbitration often describe arbitration as “final” and not appealable. One state statute, for example, requires arbitration provisions to include a statement *in capital letters* that “AFTER A DECISION BY AN ARBITRATOR, NORMALLY A COURT WILL REFUSE TO HEAR THE FACTS IN A CASE IN ALL BUT THE MOST UNUSUAL SITUATIONS. . . .”¹² This statement is incomplete for many reasons. First, many leading arbitration providers, including JAMS/Endispute¹³ and the International Chamber of Commerce,¹⁴ provide that their own arbitration at least sometimes involves a second round of review of an arbitration by a new arbitrator or set of arbitrators. Second, in at least some cases, courts have shown a greater willingness to review arbitration awards. In the most prominent example, the Second Circuit vacated an arbitral panel’s decision that there was no age discrimination when the court determined that the panel must have ignored the law and/or disregarded the facts.¹⁵ Third, most courts have allowed parties to contract to have courts review arbitration awards with the same scrutiny they apply to court judgments.¹⁶

Apart from how to describe features frequently mentioned, there remain a series of often overlooked questions about what other features of arbitration deserve some discussion. What are the filing fees in arbitration versus court?¹⁷ What are the costs of paying an arbitrator? What is the availability of discovery? What are the options of joining one’s case with similar cases in a class action or class arbitration?¹⁸

12. KY. REV. STAT. ANN. § 367.865 (Baldwin 1984).

13. JAMS, *Optional Arbitration Appeal Procedure*, available at <http://www.Jamsadr.com/optionalArbAppeal.asp>.

14. INTERNATIONAL CHAMBER OF COMMERCE, INTERNATIONAL COURT OF ARBITRATION, RULES OF ARBITRATION art. 27 (2001).

15. *Haligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 202 (2d Cir. 1998).

16. *See, e.g., Gateway Techs. v. MCI Telecomms.*, 64 F.3d 993, 996-97 (5th Cir. 1995).

17. *See, e.g., Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (N.Y. 1998) (invalidating selection of International Chamber of Commerce as arbitrator in form contract when ICC charged very high minimum rates).

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

2. *Formal Comparisons Versus Practical Consequences*

Another complication is how we convey information about the way that procedures affect outcomes. One could go beyond the usual generalizations about formal features, like appeals, in three kinds of ways: (1) discussing more of the formal differences in procedure between courts and arbitrations; (2) discussing evidence of what arbitrators and courts may actually do; and/or (3) discussing some of the options for customizing arbitration.

Even without much empirical study, one could try to give further information about formal differences. Consider the examples of appeals and juries. Many state statutes require that arbitration provisions in certain contracts include specific language that parties, by agreeing to arbitrate, lose their rights to appeal and/or jury trials.¹⁹ By itself, the stark

19. CAL. HEALTH & SAFETY CODE § 1363.1 (West 2002) (requiring that any health care service plan that includes terms that require binding arbitration to settle disputes include, in clear and understandable language, a disclosure which states whether the subscriber is waiving his or her right to a jury trial); OHIO REV. CODE ANN. § 2711.23(D) (West 2002) (requiring that any arbitration agreement for controversies involving hospital or medical care which are entered prior to rendering such care provide, if appropriate, that its terms constitute a waiver of any right to a trial in court, or a waiver of any right to a trial by jury); CAL. CIV. PROC. CODE § 1295 (West 1982) (requiring that in any contract for medical services which contains a provision for arbitration there appear the following, in at least ten-point bold red type: "NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL"); KY. REV. STAT. ANN. § 367.865 (Baldwin 1984). The statute provides that in order for the informal dispute resolution system, offered by a motor vehicle manufacturer to a buyer, to be binding on both parties, the written agreement whereby the dispute is submitted to the system must include in conspicuous, bold-faced type the following statement:

YOU SHOULD REMEMBER THAT BY ENTERING INTO THIS AGREEMENT
YOU ARE DECIDING TO USE THIS DISPUTE RESOLUTION SYSTEM TO
SETTLE YOUR DISPUTE INSTEAD OF GOING TO COURT. AFTER A
DECISION BY AN ARBITRATOR, NORMALLY A COURT WILL REFUSE TO
HEAR THE FACTS IN A CASE IN ALL BUT THE MOST UNUSUAL
SITUATIONS

Id. See also N.Y. PUB. HEALTH LAW § 4406-a (McKinnie 1986) (requiring that arbitration election notices provided by health maintenance organizations to enrollees contain the following provision: "By signing this form, I am agreeing to have any issue of alleged health care malpractice decided by neutral arbitration rather than by a court trial before a judge or jury . . ."); S.D. CODIFIED LAWS § 21-25B-3 (Michie 1976) (requiring that arbitration agreements between hospitals or physicians and patients contain the following provision in twelve-point boldface type: "By signing this contract you are agreeing to have any issue of medical malpractice decided by neutral arbitration and you are giving up your right to a jury or court trial"); TEX. REV. CIV. STAT. ANN. § 4590i (Vernon 1993) (providing that no physician, professional association of physicians, or other health care provider shall request or require a patient to execute an agreement to arbitrate a health care liability claim unless the form of agreement delivered to the patient contains the following written notice: "THIS AGREEMENT CONTAINS A WAIVER OF IMPORTANT LEGAL RIGHTS, INCLUDING YOUR RIGHT TO A JURY. YOU SHOULD NOT SIGN THIS AGREEMENT WITHOUT FIRST CONSULTING WITH AN ATTORNEY"); CAL. FIN. CODE § 17331 (West 1999) (providing that when an escrow agent is applying for a Fidelity Corporation

statement that arbitration proceedings are subject to only limited appeals may imply far more of a tradeoff of rights than doctrine and practice really suggest. Rather than merely saying that arbitration involves relatively limited appeals, one could more precisely compare appeals from court judgments with appeals from arbitration. Although most court judgments are subject to some appeal, many key questions are not subject to any meaningful appeals: where judgments may turn on questions of whether a jury believed one witness or another, courts of appeal apply a very deferential review.²⁰ Apart from these complications with

Certificate, the application form shall include a provision for binding arbitration regarding disputes as to a decision by Fidelity Corporation which includes the following notice: "UPON AN AGREEMENT TO SUBMIT TO BINDING NEUTRAL ARBITRATION, THE APPLICANT HAS NO RIGHT TO HAVE ANY DISPUTE CONCERNING THIS CERTIFICATE APPLICATION LITIGATED IN A COURT OR JURY TRIAL NOR ANY JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, EXCEPT AS SPECIFICALLY PROVIDED IN THE ESCROW LAW . . ."); CAL. BUS. & PROF. CODE § 1298 (West 1994). The statute provides that when a provision for binding arbitration is included in a printed contract to convey real property or in a printed contract between principals and agents in real property sales transactions, there appear the following notice:

NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION

Id. See also COLO. REV. STAT. ANN. § 13-64-403 (West 1997) (requiring that any agreement for the provision of medical services which has a provision for binding arbitration contain the following notice in at least ten-point boldface type: "NOTE BY SIGNING THIS AGREEMENT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL BINDING ARBITRATION RATHER THAN BY A JURY OR COURT TRIAL"); VT. STAT. ANN. tit. 12, § 5652 (1985) (requiring that any agreement to arbitrate include a written acknowledgment of arbitration which shall provide substantially as follows: "I understand that [this agreement] contains an agreement to arbitrate. After signing [this] document, I understand that I will not be able to bring a lawsuit concerning any dispute that may arise which is covered by the arbitration agreement"); *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 761 (9th Cir. 1997) (holding that arbitration clause in employee handbook was unenforceable even though employee signed a form acknowledging receipt of revised employee handbook, where nothing in the form notified employee either that the handbook contained arbitration clause or that acceptance of handbook constituted a waiver of his right to judicial forum); *Wolfman v. Herbstritt*, 495 N.Y.S. 201, 220 (N.Y. App. Div. 1985) (holding that an arbitration agreement signed by patient prior to surgery was unenforceable where the agreement failed to inform the patient that she was waiving her right to trial by judge or jury); *Broemmer v. Abortion Servs. of Phoenix, Ltd.*, 840 P.2d 1013 (Ariz. 1992) (holding that an adhesion contract that required patient receiving abortion services to arbitrate medical malpractice disputes was unenforceable where there was no conspicuous or explicit waiver of fundamental right to jury trial).

20. See FED. R. CIV. P. 52 (providing that factual determinations will not be set aside on appeal unless clearly erroneous); see also, e.g., *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 948-49 (1995) (holding that when there is basically just a dispute about facts, the standard of

appeals from court, we saw above that parties often may appeal an arbitration award to other arbitrators and/or court.²¹

In a similar way, statements that arbitration involves the waiving of a "right to a jury" also overstate the differences between court and arbitration in at least two ways. First, not every kind of a claim involves the right to a jury.²² Second, even when there is a right to a jury trial, courts may still dismiss a case by motion.²³

In principle, information about arbitration could also go still farther by looking not just at formal features but at empirical evidence. In some instances, there may be relatively reliable empirical evidence. For example, studies show that courts formally dismiss many claims in the federal courts on some kind of motion to dismiss in one-third of cases.²⁴ Even here, however, some might question the statistics. Perhaps one-third seems too high if, as many believe, state courts grant fewer motions to dismiss. Or, one-third might seem too low because courts may not dismiss all of a claim but rule on a motion that substantially affects the likely outcome, such as ruling out punitive damages or a major legal theory.

To give an even fuller picture of arbitration, one might consider other evidence about what arbitrators actually do. There are several widely held beliefs about arbitration. Many presume arbitration is faster and cheaper, yet there is intense disagreement in different studies about this. Most recently, a RAND Institute study concluded that arbitration often does not save time when compared to court.²⁵ Many, including at

review is deferential). A trial court judge, on the other hand, has discretion to order a new trial if she thinks the jury went against the weight of the evidence. *See* FED. R. CIV. P. 59(a), (d); *see also* *Allied Chem. Corp. v. Daiflon, Inc.*, 499 U.S. 33 (1980) (holding that a trial court's order for a new trial is left to the discretion of the trial judge). But this very discretionary power of the trial judge may not be what someone reading about waiving a right to appeal has in mind.

21. *See supra* text accompanying notes 13-16.

22. *See, e.g.*, *Parsons v. Bedford*, 28 U.S. 433, 447 (1830). Instead, the United States Constitution only requires a jury when there was such a right at common law. *Id.*

23. *See* FED. R. CIV. P. 12(b)(6); FED. R. CIV. P. 56; *Celotex Corp. v. Catrell*, 477 U.S. 317 (1986) (holding that court may dismiss claim if party with burden of production has had time for discovery but cannot identify any supporting evidence); *Conley v. Gibson*, 355 U.S. 41, 45-48 (1957) (holding that court can dismiss claim based on pleadings alone if it is clear that no set of facts would lead to different result).

24. Of those cases filed in court, only a very small percentage are resolved by a trial. MURRAY ET AL., *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* 218 (2d ed. 1996). Decisions short of a verdict, however, do affect a substantial number of cases. *Id.* (stating that courts dismiss about one-third of cases on a motion to dismiss or a motion for summary judgment); *see also* Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1, 9 n.21; Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1521-22 (1995) (providing recent statistics on cases dismissed on motion).

25. JAMES S. KAKALIK ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, *AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT* 87, 93 (1996). Critics of

least one Supreme Court opinion,²⁶ presume that arbitrators tend toward compromise decisions, avoiding both outright dismissals of claims and huge awards. Should such beliefs be discussed also, or should they be omitted until there is clearer empirical study?

Another popularly held belief is that arbitrators may not follow the same law as courts, but instead apply industry or community norms. There is certainly some support for this view since some court decisions defer to arbitrators as the experts in an industry.²⁷ In a similar way, many suggest that arbitrators may base decisions on their own sense of efficiency rather than what the law requires.²⁸ Sometimes this broad statement is tied to formal provisions that give arbitrators such power, such as the formal provisions of some Latin American arbitration laws.²⁹

the study have taken a two-pronged approach, sometimes criticizing the accuracy of the study in considering costs and time, and other times criticizing it for not focusing on values other than cost and time. See, e.g., Bryan Garth, *Civil Procedure and Empirical Research*, 49 ALA. L. REV. 103, 107 (1997) ("RAND simply could not make comparative evaluations of fairness or equality."). One critic summarizes both sets of critiques:

According to the mediation defenders, the programs studied were not representative of those in federal courts; they were poorly implemented examples of mediation; they were studied in their early stages before improvements were implemented; and the research too narrowly construed the impact of mediation, focusing primarily on time and cost rather than on the less tangible benefits relating to quality and party satisfaction.

CRAIG A. McEWEN, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 1, 2 (1998) (citation omitted). Moreover, as Carrie Menkel-Meadow noted, the study did not consider the long-term effects of ADR programs, particularly whether the availability of mediation programs leads to more or fewer claims in the future, and how it may affect the types of claims brought. CARRIE MENKEL-MEADOW, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 56-57 (1999).

[W]e do not really know how the availability of ADR in courts (and in the private sector) affects choices about claiming behavior—whether more will claim in the first place (the increased "access" argument) or whether the choice of how or where to claim will change (whether claimants will resist ADR and pursue litigation, pursue both, or whether more litigants are "lumping it" after "losing" in ADR).

Id. (citations omitted). On the sometimes slow pace of arbitration, see also *Engalla v. Permanente Med. Group, Inc.*, 938 P.2d 903 (Cal. 1997) (holding arbitration agreement void for fraud when information on arbitration claimed it was faster than court, but arbitrations for the particular party seeking arbitration generally took longer than in court).

26. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280-81 (1995) (finding that arbitration will not necessarily help or hurt all consumers but may help those with smaller claims and hurt those with stronger claims).

27. See generally *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) ("The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment.").

28. See, e.g., Ware, *supra* note 3.

29. As one experienced arbitrator and scholar sees it, arbitrators sometimes practice as if they had such broad powers:

On occasion, even arbitrators not acting as mediators or empowered to decide as

On the other hand, at least when it comes to some statutory questions, the Supreme Court and others suggest that arbitrators should follow the law.³⁰

3. *Optional Features, Selection of Arbitrators, and Community-Making*

Another increasingly important complication to describing arbitration involves the varieties of arbitration. Most of the comparisons above, like comparisons included in statutes, compare court and arbitration. One can readily imagine standard contrasts of other processes as well (such as mediation, negotiation, and litigation).³¹ Many would also add some increasingly familiar "hybrid" processes such as mediation-arbitration³² and minitrials.³³ But these are really the very least of arbitration varieties.

We also face the far harder question of how to describe *potential* processes. The Supreme Court tells us arbitration is a creature of contract, and the lower courts seem frequently willing to let parties mix, match, and create arbitration in a variety of ways on the theory that arbitration is simply another contract.³⁴ Some of these choices involve the relatively mechanical questions that fill the many continuing legal education classes on drafting arbitration clauses, such as the number of arbitrators, the costs of arbitration, the amount of discovery, and so forth.³⁵ Many of these options, like appeals of arbitral awards, seem

amiables compositeurs may be tempted to abandon the rules of law in favor of the more fluid principles of fairness. The arbitrators' motivation seems to be that ad hoc justice, according to their sense of fairness rather than according to legal rules, permits finer distinctions to suit the particularities of a specific case.

William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 661 (1989) (footnotes omitted).

30. *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 79 (1998).

31. See, e.g., Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 11 (1976).

32. See, e.g., STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION, NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 235 (3d ed. 1999).

33. *Id.* at 239.

34. See *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 469 (1989) ("[P]arties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate . . . so too may they specify by contract the rules under which the arbitration will be conducted.").

35. See generally, e.g., RICHARD CHERNICK, *MIX & MATCH: CREATING TAILORED DISPUTE RESOLUTION CLAUSES* (1996); see also MODEL DISPUTE RESOLUTION PROVISIONS FOR USE IN COMMERCIAL AGREEMENTS BETWEEN PARTIES WITH EQUAL BARGAINING POWER (1999); Alan S. Kaplinsky & Mark J. Levin, *Anatomy of an Arbitration Clause: Drafting and Implementation Issues Which Should Be Considered by a Consumer Lender*, 1302 PRAC. LAW INST. 7, 127 (2002).

Exactly how often entities take the advice to customize arbitration provisions, and exactly what custom forms they use, is unclear. I know of no empirical research on how often entities customize arbitration agreements on such dimensions, which is understandable given the difficulties of accessing arbitrations themselves, let alone agreements to arbitrate.

quite radical to arbitration purists. Yet, as we saw, most lower courts now allow parties to provide that courts will review arbitration awards as if they were court judgments rather than under the highly deferential review usually given arbitration awards.³⁶

At a minimum, entities should know that arbitration involves many potential choices. Consider a simple statement like: "Arbitration ordinarily involves _____, but parties may agree to customize arbitration in a variety of ways, such as _____." There is still room to debate which features to treat as essential, and how to describe them; that simple sentence simply opens individuals to understand that their choices are not simply binary between "court" and "arbitration." Such advice may seem more appropriate the more that parties seem to have the power to bargain over contracts, but it may seem unhelpful in seemingly "take-it-or-leave-it" situations such as form contracts with lenders, landlords, or employers. Still, the information may have some value. First, it may be difficult for a single party to change arbitration in a particular transaction, but information about options over time may prompt enough questions to check the over-reaching of more powerful parties. Second, individuals may have more opportunities than they think to negotiate over terms in an arbitration agreement. In many form agreements in the securities industry, for example, individuals have the option to select one of several listed providers.³⁷ Even in seemingly take-it-or-leave-it con-

36. See, e.g., *Gateway Techs. v. MCI Telecomms.*, 64 F.3d 993 (5th Cir. 1995).

37. See, e.g., UBS Paine Webber, Account Application and Agreement for Individuals, their Estates, Trusts, and Custodial Accounts, available at http://www.ubspainewebber.com/PWIC/CMA/workflow/FILE_DATA/PWA/pdf/account_application_for_individuals_estates_trusts.pdf (last visited June 7, 2002). The agreement provides:

Any arbitration under this Agreement shall be held under and pursuant to and be governed by the Federal Arbitration Act, and shall be conducted before an arbitration panel convened by the New York Stock Exchange, Inc. or the National Association of Securities Dealers, Inc. Client may also select any other national securities exchange's arbitration forum in which UBS PaineWebber is legally required to arbitrate the controversy with Client, including, where applicable, the Municipal Securities Rulemaking Board.

Id. See also Merrill Lynch, Client Relationship Agreement, available at <http://www.mldirect.ml.com/publish/Mldirnewacct.pdf> (last visited June 7, 2002) (providing that "[a]ny arbitration pursuant to this provision shall be conducted only before the New York Stock Exchange, Inc., an arbitration facility provided by any other exchange of which you are a member, or the National Association of Securities Dealers, Inc., and in accordance with its arbitration rules then in effect"); Charles Schwab, Schwab IRA Application, available at <https://investing.schwab.com/servlet/SchwabIRAApplication> (last visited June 7, 2002). The application provides:

This arbitration will be conducted by, and according to the securities arbitration rules and regulations then in effect of the National Association of Securities Dealers (NASD), New York Stock Exchange (NYSE), Pacific Stock Exchange, or Chicago Board Options Exchange. Either of us may initiate arbitration by filing a written claim with the NASD or one of the other organizations specified above.

Id. See also American Express Brokerage, IRA Client Agreement for Brokerage Accounts,

tracts, such as with car dealers, there may be room for negotiation. A colleague who teaches ADR was successful in getting an auto sales person to change the provider of arbitration in the sales contract.

Although there may be many candidates for the kind of options that deserve attention, the option to choose the specific arbitrator or type of arbitrator (such as specifying that arbitrators have specific experiences or community ties) has both especially important practical consequences and theoretical significance for autonomy. Even on relatively narrow economic terms, the choice of arbitrator may matter both to parties and to society. Many experts on arbitration think that the choice of arbitrator has more effect on the outcome than many other factors. Some characterize the selection merely as finding the arbitrator with the appropriate expertise: some think industry insiders will get at the facts faster and/or more accurately.³⁸ And from a conventional macroeconomic viewpoint,

available at <https://finance.americanexpress.com/trade2/apply/ira/apps/iraapp.asp> (last visited June 7, 2002). The agreement provides:

Any controversy arising out of, or relating to, my accounts, to transactions with you or your Brokers and/or employees for me or to this agreement or the breach thereof, shall be settled by arbitration and conducted pursuant to the Federal Arbitration Act, before the American Arbitration Association, or the National Association of Securities Dealers Inc., Chicago Stock Exchange, Inc., the New York Stock Exchange, the American Stock Exchange to the extent you may be a member of such exchange or the Municipal Securities Rulemaking Board or the independent nonindustry arbitration forum as I may elect.

Id. See also Salomon Smith Barney, Qualified Retirement Account and IRA Client Agreement, available at http://www.salomonsmithbarney.com/pdf/account_management_forms/ps2018.pdf (last visited Apr. 2002) (providing that claims and controversies "shall be determined by arbitration before, and only before, any self-regulatory organization or exchange of which SSB is a member. I may elect which of these arbitration forums shall hear the matter . . ."); Morgan Stanley, Plan Disclosure Statement and Participation Agreement, available at http://www.msdwadvice.com/accountoptions/529/pdf/plan_disc_pa.pdf (last revised Feb. 28, 2002). The agreement provides:

[An] arbitration under this Participation Agreement shall be conducted only before the New York Stock Exchange, Inc., an arbitration facility provided by any other exchange of which the Manager (or the Independent Distributor, if applicable) is a member, of the National Association of Securities Dealers, Inc., and in accordance with its arbitration rules then in force.

Id. See also Quick & Reilly, Account Agreement and Information Guide, available at http://www.quickandreilly.com/pdf/agree_Info_Guide.pdf (last revised Dec. 2001). The account agreement provides:

[A]ny controversy between you and Quick & Reilly, Inc., U.S. Clearing and/or any of its officers, directors, employees, agents or affiliates relating to the account agreement, your account and the transactions therein, or in any way arising out of your relationship with Q&R and/or USC, will be settled by arbitration in accordance with the rules then in effect of the New York Stock Exchange or National Association of Securities Dealers

Id.

38. See generally, e.g., *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) (stating that an arbitrator familiar with practices of a particular workplace will

the outcome of individual cases may encourage actors to behave in ways more or less helpful to the economy.³⁹

An example of practical consequences: A clothing designer client of mine once found himself in what he thought would be a "garment industry" arbitration. When a dispute arose, it was decided by three garment manufacturers rather than the creative types he expected. Even if we do not want to frame his earlier agreement to arbitrate before people in the "garment industry" in the language of community, it is a more significant commitment than the usual contractual commitment. It involves well above usual uncertainty about potential changes in what his contract means as the views of people in his industry change. As the designer's case illustrates, arbitration often does not merely involve a commitment, but a commitment to a relatively broad set of future commitments defined by a relatively narrow set of practices.⁴⁰

Choices of arbitrator may not merely affect outcome in cases but even reflect—and change—our sense of identity and community. When we choose to arbitrate before some kind of arbitration organization, such as international commercial arbitration,⁴¹ Orthodox Jewish arbitration, Islamic arbitration, or gay and lesbian arbitration, we define ourselves as international business persons, Jews, Muslims, or gays and lesbians.⁴²

identify the relevant facts more quickly and accurately); *Smith v. Am. Arbitration Ass'n*, 233 F.3d 502 (7th Cir. 2000).

39. Cf. Menkel-Meadow, *supra* note 25, at 56-57 (noting that arbitration may effect the likelihood that people will bring claims in the future).

40. The contrast with other commercial cases should not be exaggerated. We often might imagine a contract involves only a commitment to known commitments at this time (including the knowledge of who bears the risk of some uncertainty, such as the risk of inflation). However, modern contract theory, exemplified by the Uniform Commercial Code (UCC), sometimes involves a commitment to be bound by the changing norms of a particular industry. Moreover, as Lisa Bernstein's recent empirical work shows, this mainstay of the UCC may rest on an inaccurate assumption that there are shared norms within an industry. See generally Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Study: A Preliminary Study*, 66 U. CHI. L. REV. 710 (1999). In another similar example, contracts sometimes include commitments to be bound by an agreement whose terms may be changed from time to time in the future, but this commitment often includes an ability to exit when the terms change. Cf. *Bradie v. Bank of Am.*, 79 Cal. Rptr. 2d 273, 278-80 (1998) (finding that Bank of America could not impose arbitration merely because its form agreements with consumers reserved a right to amend terms when there was not a term that would give notice of possible amendment to add arbitration). I am extremely grateful to Michael Froomkin for prompting me to think about these other cases.

41. See generally YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1995) (discussing the ways in which arbitrators may create norms for international business through their decisions).

42. See, e.g., E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 275 n.1 (1999) (addressing the ability of arbitration to protect in general "an individual whose core religious, political or social values and beliefs differ meaningfully and substantially from majoritarian norms," and particularly lesbians and gays); Clark Freshman, *Privatizing Same-*

Moreover, as I have suggested elsewhere of mediation, particular communities may see such dispute resolution as community-enhancing, designed not just to resolve disputes but to inculcate participants with the values of a particular community.⁴³ These choices may apply even in commercial cases: one widely used textbook includes a Jewish arbitration of a claim over rent due on a commercial property!⁴⁴

4. *The Medium of Presentation & The Individual Presenters of Information*

The discussion above opens a lot of room to convey more and better information about arbitration, but it is easy to get stuck on technical limits to conveying information. In particular, it is easy to assume that it will be too time consuming and costly to explain so many options. Many assertions of the "tragic" choices between conveying information and doing substantive justice assume that information may only be conveyed by relatively busy and expensive professionals. Of course, this is certainly one option: in medicine, doctors may discuss options with clients in person; likewise one option to enhance informed consent regarding dispute resolution is to strengthen requirements that lawyers themselves discuss options with clients.

Other individuals and other media, however, may also convey information. In the experiment of the multi-door courthouse, for example, court officers may discuss different dispute resolution options with those who come to file a suit: litigation, mediation, arbitration, and so on.⁴⁵ More importantly, there may not always be a need for individuals to convey information in a one-on-one basis. Some information may be conveyed by other media, such as video tapes, web sites, and other interactive media.⁴⁶ In the medical arena, some studies show that patients

Sex "Marriage" Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation, 44 UCLA L. REV. 1687, 1693 (1997) (citing Irshad Abdal-Haqq & Qadir Abdal-Haqq, *Community-Based Arbitration as a Vehicle for Implementing Islamic Law in the United States*, 1 J. ISLAMIC L. 61 (1996)); see also Freshman, *supra* at 1743 (citing JAMES YAFFE, *SO SUE ME! THE STORY OF A COMMUNITY COURT* (1972) (discussing Jewish arbitration)); see also ISRAEL GOLDSTEIN, *JEWISH JUSTICE AND CONCILIATION: HISTORY OF THE JEWISH CONCILIATION BOARD, 1930-1968* (1981).

43. Freshman, *supra* note 42, at 1759 (discussing both how communities may look to community dispute resolution to strengthen "the" community and how such community-enhancing mediation may be problematic because it enhances and even elevates one kind of potential community at the expense of other real or potential communities).

44. See *Mikel v. Scharf*, 432 N.Y.S.2d 602 (N.Y. Sup. Ct. 1980) (declining to enforce the submission of a commercial leasing dispute submitted to Jewish court for arbitration).

45. Thomas J. Stipanowich, *The Multi-Door Courthouse and Other Possibilities*, 13 OHIO ST. J. ON DISP. RESOL. 303, 320-21 (1998).

46. Merely requiring an arbitration agreement to be conspicuous does not guarantee that it will be understood; neither does a signature requirement. While a

may better understand the potential benefits and risks of some treatments when they see videos rather than when they meet with professionals in person.⁴⁷ Even if individuals must convey information and answer questions, this may be done—at least in part—in classes or seminars. In some mediation programs, for example, those referred to mediation must first attend a seminar with many other persons on the basic process of mediation.⁴⁸

Likewise, it is easy to worry that individual entities will not have the time to adequately consider different varieties of arbitration. Perhaps entities are too busy with other considerations.⁴⁹ Perhaps some entities simply cannot focus on so many choices without getting emotionally upset.⁵⁰ These concerns, too, should not be exaggerated. Even if some parties are too busy, overwhelmed, powerless, and so on, to discuss arbitration, other parties in similar situations may have the time, emotional stability, and bargaining power to press for different kinds of arbitration. In at least some circumstances, the arbitration agreements such parties craft may become the models for others.⁵¹ In particular, when such parties identify arbitration agreements that simply create more value, such as reducing overall costs by providing for an amount of discovery sufficient to settle a case without a full hearing, such provisions may benefit others in other situations. As in any situation where law permits parties to bargain, there also remains a danger that more powerful parties bargain for provisions that instead allow them a greater chance of success—effectively claiming the probability of value.⁵²

requirement that lawyers also sign may be too onerous, a “notice provision” explaining some of the basic distinctions between court trial and arbitration and providing a ready means of obtaining more information might be a meaningful compromise.

Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 897.

47. Peter H. Schuck, *Rethinking Informed Consent*, YALE L.J., 899, 937-38 (1994).

48. Frances Butler, *Questions that Lead to Answers in Child Custody Mediation*, in WHEN TALK WORKS: PROFILES OF MEDIATORS 17, 22 (Deborah M. Kolb ed., 1994).

49. Cf. CHARLES S. CARVER & MICHAEL F. SCHEIER, ON THE SELF-REGULATION OF BEHAVIOR 130-31 (1998) (noting that at times individuals may be juggling many different commitments and may simply “coast” when they are doing well enough on one project).

50. See generally Sheena S. Iyengar & Mark R. Lepper, *When Choice is Demotivating: Can One Desire Too Much of a Good Thing?*, 79 J. PERS. & SOC. PSYCHOL. 995 (2000) (noting that some people experience anxiety and decrease in satisfaction when they have many choices).

51. Cf. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950) (providing that personal service is not required where “[t]he individual interest does not stand alone but is identical with that of a class,” and where “notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objections sustained would inure to the benefit of all”).

52. See generally, e.g., ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES (2000) (stating that negotiation often involves both the creation of value that may benefit all parties and the claiming of some share of value by particular parties); Clark Freshman et al., *The Lawyer-Negotiator as Mood Scientist: What We Know and*

To review, then, conveying information about arbitration raises a number of complicated questions. Some of these may well involve questions of degree: how many features does one describe, or how many different sources of information, or how many different options? The answer to some of these questions may well vary with particular circumstances. For example, given the advances of technology, one *might* think that an attorney or other person *should* be expected to offer more information and more explanations. Or, perhaps, an individual could be expected to offer more information about topics that seemed to matter more to the individual decision-maker. To some degree, too, the kind of information and the extent of information will vary depending on deeper questions of why we value autonomy. The next section presents relatively theoretical alternatives about such values, and the remaining section present more practical problems—and potential solutions—for many different kinds of informed consent.

B. *Concepts of Autonomy in Arbitration*

We now turn to more theoretical questions about the value of autonomy and informed consent. In the context of informed consent and arbitration, one can identify at least four principal kinds of autonomy. These four reflect the interaction of two distinct questions: First, should we look at autonomy only as a means towards an end of some version of economic efficiency or from some other intrinsic commitment, such as respect for an individual's dignity, or for the development of certain capacities,⁵³ like the capacity for deliberative judgment? Second, should we look at autonomy merely from an individual's perspective or from a perspective that includes some larger body, be it a community, the state, nation, or world society?

1. *Alternative Concepts of Autonomy*

The first concept of autonomy is individual efficiency autonomy. This involves a narrow focus on economic consequences and a narrow focus on the individual. Individual efficiency simply looks to what kind of information is relevant for an individual to make efficient decisions about his express preferences.⁵⁴ Will I win more or less in arbitration?

Don't Know About How Mood Relates to Successful Negotiation, 2002 J. DISP. RESOL. 1, 20 (reviewing evidence that people in simulated negotiations often overlook the chance to create value).

53. See Schuck, *supra* note 47, at 900 (1994) ("To say that one cannot be bound by a promise that one did not voluntarily and knowingly make is to say that the individual should be the author of her own undertakings, that a genuine respect for her dignity requires a broad deference to her choices."). "[C]onsent is instrumental to economic efficiency." *Id.* at 901.

54. For expository purposes, I am presenting a relatively cramped version of efficiency.

Will I save money? Will it be faster? This is the kind of narrow version of autonomy often recognized by tort law: Would the failure to give certain information have made a difference in some outcome that can be tied to a dollar figure? Even within this narrow paradigm, however, there will still be occasions when autonomy means questioning what an entity says it wants. For example, some may say that they want arbitration because it is faster, and a competent attorney might correct such a misunderstanding (in those circumstances when it is not accurate).⁵⁵ Or a party may say they do not want arbitration because they want not merely an award but some guidance on what a contract means, and the attorney might note that arbitration can be customized in many instances to involve written opinions and even judicial review.⁵⁶ In most cases, however, the notion of individual efficient autonomy will call for relatively little information and relatively little deliberation.

The second closely related concept of autonomy is socially efficient autonomy. Here, too, the relevant consideration is confined to things that might make a difference in some relatively narrow economic way, but includes consideration not just of parties but of a larger body, such as society. A paradigm example is the question of "compliance." The socially efficient version of autonomy would be concerned if people felt they were so uninformed about arbitration that they failed to abide by arbitration awards and/or contested them in court in ways that consumed public resources, like court time. As studies of the psychology of procedural justice suggest, people may be very quickly satisfied when there has been *any* discussion, even if one may criticize the outcome of the discussion.⁵⁷ Therefore, this socially efficient version of autonomy might well call for relatively little information and relatively little discussion.⁵⁸

Since what is efficient depends on what one specifies as one's sources of utility, one can easily imagine a concept of efficiency that expands to cover a far wider range. If an individual derived utility from consideration of wider values, such as deliberating about many choices, and learning more about choices, then individual efficient autonomy would collapse into broader notions of autonomy.

55. See *supra* text accompanying note 25 (discussing the controversy about whether arbitration is faster and cheaper).

56. See *supra* text accompanying note 16.

57. See, e.g., TYLER, *supra* note 9 (discussing problem of how to interpret tendency of individuals to express satisfaction with certain processes regardless of outcome).

58. On the other hand, the focus on societal consequences might call for more scrutiny of arbitration for reasons other than autonomy; the societal perspective might well concern itself with making certain arbitrators follow the law, at least to enforce some important public values. See *supra* text accompanying note 16 (discussing greater scrutiny by some courts of arbitral awards). Likewise, a societal perspective might focus on how well arbitration served to deter future wrongdoing. See generally Menkel-Meadow, *supra* note 25 (noting that efficiency of arbitration should include not just cost savings in individual cases but whether arbitration in a set of cases

The third concept of individual self-development is a far richer notion of autonomy. This notion is not simply concerned with answering specific questions about arbitration or in addressing the express values that someone articulates. Instead, individual self-development seeks to expose a person to alternatives so thoroughly that we may confidently say an individual's decision reflects the individual's considered judgment and not merely a choice based on a cramped sense of possibilities. Left at that, the notion of autonomy might be simply autonomy as dignity, reflecting a concern that an individual be informed because the individual is an individual.⁵⁹ A richer variant might go further: the process of exposing an entity to such a process may be not merely to identify the best choice in a particular instance. Instead, the process also reflects a commitment to the development of certain capacities for deliberative judgment. This often requires engaging a person in difficult questions that may not increase utility in the short-run—or even in the long-run.⁶⁰ Rather than seeking happiness, this concept of autonomy seeks to develop a person so the person's life is intrinsically more valuable. In popular culture terms, it is less Nike's "Just do it!" and more Woody Allen hand-wringing.⁶¹ This stronger notion of individual self-development will generally be more appropriate when the entities involved are individuals and less appropriate when the entities are organizations.

The fourth concept of autonomy is citizen self-development. Like the notion of individual self-development, it does not seek to promote informed consent for the sake of happiness but rather based on the development of certain capacities in themselves. Unlike the individual variant, however, the focus is not on an individual's development as an individual but an individual's development as part of some commu-

leads to more or less cases being filed, and the mix of relatively frivolous versus relatively meritorious cases).

59. See generally Jerry L. Mashaw, "Rights" in the Federal Administrative State, 92 YALE L.J. 1129 (1983).

60. Cf., e.g., Else Frenkel-Brunswik, *Comprehensive Scores and Summary of Interview Results*, in THE AUTHORITARIAN PERSONALITY 468, 482 (Max Horkheimer & Samuel H. Flowerman eds., 1950).

It is only when conflicts, shortcomings, and unacceptable impulses are frankly faced that their mastery may be furthered to the point of perfection and the maximum potential for dealing adequately with varying conditions may be achieved. Temporarily, however, such frankness may well lead to increased anxieties and depressions, and some contestants may, for better or for worse, be left by the way.

Id.

61. Apart from the particular end of developing this individual capacity, there might be values to autonomy to develop other capacities or for other intrinsic ends.

nity.⁶² This means that the consideration of choices for some kinds of communities will be far more cramped than individual self-development. Some communities will not want an individual to think about arbitration in ways that lead her away from the community. For example, those who favor Islamic arbitration to preserve Islamic culture would likely not want to expose Islamic women to ideas about arbitration that might be organized not along the community of Muslims but instead along a community of women.⁶³ In principle at least, one might imagine societies so thoroughly individualistic that citizen self-development would collapse into individual self-development.⁶⁴ As with the stronger version of individual self-development, this stronger version of citizen self-development may be more appropriate when the entities involved are individuals.

2. *Implications of Concepts of Autonomy*

The various concepts of autonomy have several implications for how we think about informed consent. At least two kinds of implications roughly correspond to their two dimensions. First, the more one wants autonomy to develop the capacities of individuals—either for her own development or for some part of society—one will want to devote more resources in terms of time and money to informed consent. By extension, this may also mean that one will also be more willing to compromise other interests that may conflict with this kind of autonomy. For example, to the extent that the privacy of arbitration inhibits auton-

62. See generally MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENTS* (1996) (arguing that individuals should be more engaged in debate about the ends of society).

63. Freshman, *supra* note 42, at 1754 (noting that Islamic community arbitration would "[p]rovide a forum for clarifying and establishing Islamic values"). As I have suggested elsewhere, this is a general failure of community-enhancing dispute resolution: it enhances the ties of an individual to one kind of community rather than to another (real or potential) community or individual value. See Freshman, *supra* note 42, at 1757-60. Others, however, imply we may only exercise autonomy in the context of some kind of community. CHARLES TAYLOR, *THE POLITICS OF RECOGNITION* 34 (1992).

Thus my discovering my own identity doesn't mean that I work it out in isolation, but that I negotiate it through dialogue, partly overt, partly internal, with others. That is why the development of an ideal of inwardly generated identity gives a new importance to recognition. My own identity crucially depends on my dialogical relations with others.

Id. Some critical race theorists make similar points. John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2195 (1992) (criticizing the idea of "the voice of a distinct individual, one separated in an operational sense from colored community, culture and peoplehood") (emphasis added).

64. Cf. Ronald R. Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983) (arguing that some religious communities place greater emphasis on individual's consideration and commitment to religion and others place greater emphasis on faith itself).

omy,⁶⁵ one will be more willing to expand public access to information about particular arbitrations. Second, to the extent that one favors individual autonomy, one will want to make greater efforts to make sure that individuals know about different providers of arbitration and different options for naming individual arbitrators. By extension, an individualist would consider ways to enhance the ability of an individual to shift commitments to different communities. For example, one might limit the ability of someone to identify arbitrators from a particular commercial or ethnic community. Or, in a less radical way, one might sunset such provisions: an agreement to arbitrate future disputes before, say, Islamic arbitrators, would not be enforceable for more than ten years.⁶⁶ Third, to the extent one favors various kinds of public-oriented autonomy one would also develop ways to encourage individuals to consider choices about arbitration more seriously. Where a purely individual orientation might, for example, encourage attorneys only to discuss arbitration so long as the entity expresses some interest, a broader orientation would encourage the attorney to discuss issues even when the entity expressed little interest—and perhaps even when the entity said it was quite satisfied with the type of arbitration or other dispute resolution under consideration.

II. WHAT AUTONOMY WILL THE MARKET PROMOTE?

Once we have seen the various ways one might inform entities about arbitration, and once we have seen how these ways may differ according to different theoretical goals, it is worth exploring the kind of autonomy that existing market forces may promote. After all, as Stephen Ware has argued elsewhere, if a relatively unregulated market for

65. As discussed later, privacy is a difficult case for autonomy. See *infra* text accompanying notes 136-40. On the one hand, one key aspect of autonomy may be the right to be left alone, including the right to resolve one's disputes in a private and secret forum. On the other hand, to the extent I resolve my disputes in private, I deny your ability to make informed choices about disputes based on how various private fora actually resolve disputes. For example, I may well want to know whether private justice really involves compromise awards, see text accompanying note 26 *supra*, but I will not get this information as readily if you hide what happened in your arbitration.

66. As with privacy, the commitment to communities also involves a complicated tradeoff. In part, my autonomy may include my ability to bind myself in the future; autonomy may also include the ability to identify with certain communities. These two considerations favor allowing me to commit to resolve my disputes before a particular community—now and in the future. On the other hand, autonomy may also include a commitment to the ability to change over some relevant range. Mill famously identified the easy case: my autonomy cannot include my ability to sell myself into slavery. JOHN STUART MILL, *ON LIBERTY* 152-53 (Edward Alexander ed., Broadview Press 1999) (1869). For more recent analyses in terms of concepts of future selves, see *infra* text accompanying notes 108-11. Arbitration raises difficult intermediate cases: for how long may I commit to resolve my disputes before a particular community?

arbitration services will deliver better legal decisions—and indeed even development of more efficient legal rules!⁶⁷—then there may be little need to tinker with the status quo. On the other hand, the more that existing market forces may diverge from the kinds of autonomy we value, the more that some tweaking of market conditions may be appropriate.

A story by Hart and Sacks illustrates the promise and limit of the market for autonomy in arbitration:

Within broad limits . . . private parties who submit an existing dispute to arbitration may write their own ticket about the terms of submission if they can agree to a ticket. [The authors refer to an old story about a person who, in a dream, was threatened by an ominous character and who asked, tremulously, “What are you going to do now?”—only to receive the answer, “How do I know? This is *your* dream.”] The arbitration of an existing dispute is the parties’ dream, and they can make it what they want it to be.⁶⁸

As an abstraction, the dream story suggests that individuals exercise autonomy in arbitration as much as they like. If they only asked about how to modify arbitration, they might get it; if they forget to ask, it must not matter that much. Moreover, if individuals would be happy with the information, we would expect the market to promote information. Particularly when lawyers bill by the hour, one would expect lawyers to be more than happy to offer such information. And yet, as we will see, the autonomy that arbitration promotes may be limited by the capabilities and incentives of all market actors: individual parties involved in arbitration, attorneys, and providers of arbitration services.

A. *Limits on Participant Incentives*

The account of autonomy presented in the dream scenario above *at best* fulfills the potential of individual efficient autonomy. It does little to satisfy us that a person has made choices based on an informed consideration of alternatives. A person may not know what to make of his “dream” of arbitration because he does not know about various alternatives. By analogy, it is telling that consumers exposed to greater information about professional choices in other areas, do want to ask additional questions. Patients who have more access to medical information, via such sources as the Internet, ask more questions.⁶⁹

The danger of knowing too little to even ask is particularly striking

67. See Ware, *supra* note 3, at 703.

68. MURRAY ET AL., *supra* note 24, at 691 (quoting HENRY HART & ALBERT SACKS, *THE LEGAL PROCESS* 310 (1994)).

69. Christine Wiebe, *Doctors Swept Up by Connected Consumers*, available at www.medscape.com/home/moneyMedicine/medscapeArticles/ehealth.html (last visited Dec. 12, 1999).

with procedural choices generally, not just discussion of arbitration. Teachers of civil procedure regularly complain that first year law students have no basis in their lives for thinking about procedural choices.⁷⁰ For example, studies show that many individuals do not know that car dealers typically will negotiate with purchasers about the price of a car. This is particularly troublesome, too, because the lack of information may correspond to other kinds of disadvantages: African-Americans, for example, are less familiar with this ability to negotiate than others.⁷¹ (Of course, to some extent, this may actually reflect correct knowledge about different information; as Ian Ayres has shown, dealers in fact spend more time negotiating with African-American men, which may mean that African-American men pay a higher cost in terms of wasted time).⁷² At least when an individual knows something about a topic, the individual may ask questions and learn even if she gets no answers. The refusal of a dealer to discuss car history itself conveys information about its history; so, too, the refusal of a car dealer to discuss why a contract specifies one arbitration provider rather than another may raise questions. It therefore becomes plausible that even drafters of take-it-or-leave-it arbitration provisions will disclose some relevant information about arbitration when they suspect people already know something about arbitration.⁷³ On the other hand, when many individuals little understand arbitration, it is far easier for arbitration simply to go undiscussed.

B. *Limits on Lawyer Incentives*

Existing market conditions give lawyers⁷⁴ little incentive to discuss

70. STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 2-3 (5th ed. 2000); Martha L. Fineman, *Unmythological Procedure*, 63 S. CAL. L. REV. 141, 149 (1989) (arguing that Civil Procedure is difficult without any understanding of the systematic interrelationship between different procedural choices).

71. See IAN AYRES, *PERVASIVE PREJUDICE: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION* 79 (noting that sixty-one percent of African-Americans believed the sticker price of a car was not negotiable while only thirty-one percent of whites thought so).

72. *Id.* at 38.

73. Suppose the seller refused to assist the buyer in securing a particular piece of information that the seller already had. If the information could have either a positive or negative value on the buyer's evaluation of the worth of the business, a rational buyer would infer from the seller's refusal to cooperate that the information must be unfavorable. Thus, the seller has little incentive to withhold the information.

Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 270 (1984).

74. In some instances, nonlawyers may be advocates in arbitration. This is historically quite common in arbitration involving union disputes. See HERBERT M. KRITZER, *LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK* 151 (1998) (noting that arbitration of labor grievances "regularly pits experienced nonlawyer advocates against experienced lawyer advocates").

arbitration thoroughly. Instead, as suggested further in the next section, the lawyer may assume a client has such a negative view of litigation and such a cramped view of alternatives that any kind of arbitration will exceed the client's expectations. In addition, existing applications of ethics rules and malpractice law do not provide much of an incentive either. Ethics rules do not clearly address whether the choice of arbitration properly falls to the lawyer as a tactical question or to the client.⁷⁵ For its part, tort law provides little incentive because it only permits a client to recover if it may show that some advice regarding the arbitration would have led to a different result.⁷⁶ A client may not recover in tort merely by showing that further discussion of alternatives would have furthered her autonomy.

Another large limit on market incentives involves principal-agent problems. For both individuals and organizations, there will be gaps in information and power between those affected by decisions and those empowered to make decisions. In organizations, in-house counsel may often make decisions about the choice of procedures, including how to use arbitration. Managers, employees, shareholders, and others affected by the decision may have little say in such a decision. Moreover, such other stakeholders may not even realize that there may have been choices at all. Instead, in-house counsel may respond to their own career incentives in picking types of dispute resolution. In-house counsel; for example, may respond to the way they are evaluated for staying within budget in a particular year or avoiding large verdicts that attract attention.⁷⁷ Other stakeholders, however, may be more concerned with a longer time frame and/or aggregate effects on profitability. For individuals, the problem may often involve the role of insurance in litigation. As Gross and Syverud have shown, a large share of litigation by "individuals" is financed and (nearly always) controlled by insurers.⁷⁸ Here, insurers may well value the speed and privacy of arbitration, because it may set limited precedential value, but individuals may prefer the possibility of public vindication of trial.⁷⁹

75. See, e.g., Nolan-Haley, *supra* note 4, at 784-85; Freshman, *supra* note 42, at 1771; see generally Robert F. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819 (1990).

76. See, e.g., Cochran, *supra* note 75, at 873.

77. See generally Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831, 842-44 (1998).

78. See Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319 (1991).

79. *Id.* at 361-63 (discussing that because physicians stand to lose their reputation, "[m]any

C. *Limits on Incentives of Arbitration Providers*

If individual lawyers have little incentive to discuss different kinds of arbitration, what about the incentive for providers of arbitration? At any given time, providers will want to "inform" individuals about alternatives that make the alternatives they provide seem most valuable. In principle, at least those who provide arbitration, such as the American Arbitration Association, JAMS, or other organizations and individuals, should have an incentive to develop better accounts of arbitration. In practice, however, competition may be limited for several reasons. First, individuals may reasonably place a high value on experience and stability of arbitration providers. Existing institutions have a special advantage in this area. Many commitments to arbitration are embodied in long-standing contracts, and disputes arising out of such agreements will continue to go to such providers. Second, one might imagine that individuals may modify such contracts, but market signaling makes that difficult. Raising a question about a dispute resolution provision in a long-standing contract may raise suspicions about the prospect of future litigation.⁸⁰ Third, to the extent that providers do compete, they may compete in a race to the bottom in services offered to repeat players rather than a race to the best information about the process to less experienced parties.⁸¹

Though seemingly an exception to this description, the recent adoption of the due process protocols confirms some of the combined limitations of lawyer and provider incentives. As recounted in detail elsewhere, lawyers for plaintiffs threatened to veto many arbitration providers if they did not do more to provide for fair arbitrations. In response, various providers agreed to limitations on arbitration of employment and consumer disputes.⁸² In many ways, these rules are very significant in reducing the potential of bias in arbitration. At the same time, the rules are most explicit in addressing the potential for

professional liability insurance policies sold to physicians in the United States require the consent of the physician to any nonzero settlement . . . and will likely insist that the case be tried").

80. See *infra* text accompanying note 105.

81. Consider one particularly harsh indictment of the American Arbitration Association:

When the American Arbitration Association was the only national provider of ADR services, it honorably fulfilled the role assigned to it in its bylaws of educating the public and administering arbitration, mediation and other "voluntary" forms of dispute resolution. But in recent years, when confronted with competition from "for-profit" competitors, AAA appears to have abandoned its public service, nonprofit mission and transformed itself into a new corporation that markets "do it yourself tort reform" instead of neutrality.

Cliff Palefsky, *The CPR-Georgetown Ethical Principles for ADR Providers Only a Start ARA Provider Ethics Principles Don't Go Far Enough*, 7 DISP. RESOL. MAG. 18, 20 (2001).

82. See, e.g., Menkel-Meadow, *supra* note 25, at 42-48.

economic consequences: the rules try to make fair substantive outcomes more likely by such things as providing for some discovery and some limits on bias of arbitrators.⁸³ It is true that the rules also make some reference to informing individuals about the nature of arbitration. These rules, however, are significantly more general and less detailed.⁸⁴ Perhaps these more general rules reflect some notion that there may be many ways to provide such relevant information. On the other hand, such less detailed rules may well reflect the market incentives of lawyers described above: the lawyers who threatened a boycott if there were no due process protocols want to make sure that their clients do well—particularly when they get paid on a contingency basis—and may be less concerned that the individual understand other aspects of arbitration.

III. BARRIERS TO PROMOTING AUTONOMY

As we have seen, market actors only have very limited incentives to promote autonomy. The market for arbitration also falls short of promoting autonomy for a second set of reasons. Even if market actors tried to engage in more nuanced and deliberative conversations with entities about choices about arbitration, there would be additional barriers in getting entities to understand arbitration sufficiently. To put these barriers in perspective, however, we need to sift some easily exaggerated barriers from more troublesome barriers.

A. *Easily Exaggerated Barriers*

Discussions of informed consent in arbitration and more generally in academic scholarship often exaggerate barriers to promoting auton-

83. American Arbitration Association Dispute Resolution Services Worldwide, Rules and Procedures, *available at* http://www.adr.org/index2.1.jsp?JSPssid=13137&JSPsrc=upload\LIVESITE\Rules_Procedures\National_International\.\.\focusArea\commercial\AAA235-0900.htm#R-33 (discussing discovery provisions under rule 33); http://www.adr.org/index2.1.jsp?JSPssid=13137&JSPsrc=upload\LIVESTIE\Rules_Procedures\National_International\.\.\focusArea\commercial\AAA235-0900.htm#R-19 (last visited June 1, 2002) (discussing disclosure and limit on bias under rule 19).

84. AMERICAN ARBITRATION ASSOCIATION, Consumer Due Process Protocol (1998), *available at* http://www.law.du.edu/dauer/ADR%20Spring%202002/5D_6_AAA_Protocol.doc. The Protocol provides in part:

PRINCIPLE 2. ACCESS TO INFORMATION REGARDING ADR PROGRAM—Providers of goods or services should undertake reasonable measures to provide Consumers with full and accurate information regarding Consumer ADR Programs. At the time the Consumer contracts for goods or services, such measures should include (1) clear and adequate notice regarding the ADR provisions, including a statement indicating whether participation in the ADR Program is mandatory or optional, and (2) reasonable means by which Consumers may obtain additional information regarding the ADR Program. After a dispute arises, Consumers should have access to all information necessary for effective participation in ADR.

Id.

omy. In the most specific instance, doctrinal approaches often do not look closely enough at existing state regulations before concluding that there is some larger problem with federal arbitration law. At a more general level, some academic approaches in economics and psychology more generally exaggerate the difficulties of providing information and overlook some potential benefits.

1. *Exaggerated Doctrinal Limits: Room for State Regulation*

Conventional understanding teaches that *any* state attempts to advise entities about what arbitration entails are entirely preempted by federal law. And at first blush, this interpretation has much support. In the best known example, the Supreme Court struck down a Montana law that required that arbitration clauses be placed in bold print on the first page of a contract.⁸⁵

On close examination, however, existing state regulations often really are not about informed consent, so much as one-sided warnings about arbitration. A number of statutes appear designed simply to alert people to the presence of an arbitration clause. These statutes impose some combination of requirements that arbitration clauses appear on the first page of a contract,⁸⁶ in capital letters,⁸⁷

85. See generally *Doctor's Ass'n v. Casarotto*, 517 U.S. 681 (1996).

86. ALASKA STAT. § 09.55.535(b) (Michie 1988) (requiring that any agreement to arbitrate supplied by a health care provider and executed before medical treatment is provided clearly provide in bold print on the face of the agreement that execution of the agreement by the patient is not prerequisite to receiving care or treatment); CAL. CIV. PROC. CODE § 1295 (West 1982) (requiring that any contract for medical services which contains a provision for arbitration of any dispute as to professional negligence of a health care provider have such provision as the first article of the contract); S.C. CODE ANN. § 15-48-10 (Law. Co-op. 1976) (providing that notice that a contract is subject to arbitration shall be typed in underlined capital letters on the first page of the contract) (holding preempted as to arbitration affecting interstate commerce by *Munoz v. Green Tree Fin. Corp.*, 542 S.E. 2d 360 (2001)).

87. See, e.g., KY. REV. STAT. ANN. § 367.865 (Baldwin 1984) (providing that in order for the informal dispute resolution system, offered by a motor vehicle manufacturer to a buyer, to be binding on both parties the written agreement whereby the dispute is submitted to the system must include a notice in conspicuous capital letters and bold-faced type reminding the buyer that by entering into the agreement he is deciding to use the dispute resolution system to settle his dispute); NEB. REV. STAT. § 25-2602.02 (1997) (requiring that any standardized agreement in which binding arbitration is the sole remedy for dispute resolution contain the following statement in capitalized, underlined type adjoining the signature block: "THIS CONTRACT CONTAINS AN ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES"); CAL. BUS. PROF. CODE ANN. § 1298 (West 1994) (providing that when a provision for binding arbitration is included in a contract to convey real property or in a contract between principals and agents in real property sales transactions, it shall be set out in capital letters when the provision is included in a typed contract); S.C. CODE ANN. § 15-48-10 (Law. Co-op. 1976) (providing that notice that a contract is subject to arbitration shall be typed in underlined capital letters on the first page of the contract) (holding preempted as to cases affecting interstate commerce by *Munoz v. Green Tree Fin. Corp.*, 542 S.E. 2d 360 (2001)).

in bold⁸⁸ or underlined type,⁸⁹ or even in a separate document or a separately initialed or signed provision of the same document.⁹⁰ One might read requirements that a person's attorney sign an arbitration clause as a variation: the assumption may be that the attorney will explain the provision to the client—or at least assume responsibility if she fails to do so adequately.⁹¹ The warnings are not just one-sided in the sense of flag-

88. CAL. CIV. PROC. CODE § 1295 (West 1982) (requiring that in any contract for medical services which contains a provision for arbitration there appear a notice in at least ten-point bold red type informing the patient that by signing the contract he is agreeing to have issues of malpractice decided by arbitration); N.Y. PUB. HEALTH LAW § 4406-a (McKinney 1986) (requiring that arbitration election notices provided by health maintenance organizations to enrollees contain a provision in at least twelve-point boldface type which puts the enrollee on alert that by signing that form he is agreeing to have any issue of alleged health care malpractice decided by neutral arbitrator); S.D. CODIFIED LAWS § 21-25B-3 (Michie 1976) (requiring that arbitration agreements between hospitals or physicians and patients contain a provision in twelve-point boldface type putting the patient on alert that by signing the contract he is giving up his right to a court trial); CAL. BUS. & PROF. CODE § 1298 (West 1994) (providing that when a provision for binding arbitration is included in a printed contract to convey real property or in a printed contract between principals and agents in real property sales transactions, it shall be set out in at least eight-point bold type); COLO. REV. STAT. ANN. § 13-64-403 (West 1997) (requiring that any agreement for the provision of medical services which has a provision for binding arbitration contain a notice in at least ten-point, boldface type putting the patient on alert that by signing the agreement he is agreeing to have any issue of medical malpractice decided by neutral binding arbitration); ALASKA STAT. § 09.55.535(b) (Michie 1988) (requiring that any agreement to arbitrate supplied by a health care provider and executed before medical treatment is provided clearly state in bold print on the face of the agreement that execution of the agreement by the patient is not prerequisite to receiving care or treatment).

89. See, e.g., NEB. REV. STAT. § 25-2602.02 (1997) (requiring that any standardized agreement in which binding arbitration is the sole remedy for dispute resolution contain the following statement in capitalized, underlined type adjoining the signature block: "THIS CONTRACT CONTAINS AN ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES"); S.C. CODE ANN. § 15-48-10 (Law. Co-op. 1976) (providing that notice that a contract is subject to arbitration shall be typed in underlined capital letters on the first page of the contract).

90. TENN. CODE ANN. § 29-5-302 (1955) (requiring that in contracts relating to farm property, structures or goods, or to property and structures utilized as a residence of a party, arbitration clauses be signed or initialed by the parties); KY. REV. STAT. ANN. § 367.865 (1984) (providing that before a dispute between a buyer and a car manufacturer may be submitted to an informal dispute resolution system which is legally binding on both parties, the buyer shall sign the disclosure contained in the parties' written agreement to arbitrate their dispute, which reminds him that by using the dispute resolution system he is giving up his right to go to court); VT. STAT. ANN. tit. 12, § 5652 (1985) (providing that an agreement to arbitrate is unenforceable unless accompanied by a written acknowledgment of arbitration signed by each of the parties); GA. CODE ANN. § 9-9-2 (Harrison 1988) (requiring that an arbitration clause in any employment contract or in any sales agreement for the purchase of residential real estate be initialed by all signatories in order to be enforceable).

91. TEX. REV. CIV. STAT. ANN. § 4590i (Vernon 1993) (providing that no physician, professional association of physicians, or other health care provider shall request or require a patient to execute an agreement to arbitrate a health care liability claim unless the form of agreement delivered to the patient contains the following written notice: "UNDER TEXAS LAW, THIS AGREEMENT IS INVALID AND OF NO LEGAL EFFECT UNLESS IT IS ALSO SIGNED BY AN ATTORNEY OF YOUR OWN CHOOSING . . ."); TEX. CIV. PRAC. & REM.

ging only issues involving arbitration; as we saw above, they also speak only in terms of what one loses in arbitration—such as losing a right to appeals or jury trials. The statutes mention nothing about potential advantages of arbitration, such as potentially greater speed, privacy, informality, and expertise.⁹²

These cases about one-sided warnings tell us very little about how much room states would have to make more balanced and accurate warnings, like those suggested in the next section. I have identified no state statute that attempts to describe arbitration in balanced terms that compare it with other alternatives. The closest kind of provision is a requirement by a small number of states that attorneys discuss alternatives to litigation in certain cases with their clients.⁹³ Because the warnings generally considered by state courts are currently not balanced, there is to ponder that the Supreme Court might allow more balanced warnings by states.⁹⁴ In addition, under some recent case law, some courts may allow even the unbalanced warnings if the contract at issue—even if not the arbitration clause itself—includes a choice of state law.⁹⁵ Furthermore, apart from whether the Supreme Court would allow more balanced warnings by states, there remains the possibility that federal legislation, too, could adopt more balanced descriptions.

2. *Exaggerated Theoretical Limits: Inevitability vs. Opportunity*

Apart from doctrine, many scholars of decision-making also exaggerate barriers to informed consent. After surveying some limits on informed decision-making similar to those discussed below, some schol-

CODE ANN. § 172.001 (Vernon 1997) (providing that an arbitration provision in a consumer contract for \$50,000 or less is unenforceable unless signed by consumer's attorney).

92. An open question would be whether those drafting the disclosures required by the state might also add in additional descriptions of potential benefits. While the statutes themselves do not purport to prohibit such additional descriptions on their face, a party including such descriptions might fear a court would not enforce a provision. *Cf. Engalla v. Permanente Med. Group, Inc.*, 938 P.2d 903 (Cal. 1997) (refusing to enforce arbitration provision on ground that hospital perpetrated a fraud by describing arbitration as faster when, as run by the hospital, it typically took longer than court).

93. *See supra* text accompanying note 91; *see generally* Cochran, *supra* note 75.

94. Some legal realists might question whether Supreme Court jurisprudence might really be less about careful consideration of competing policies than simply a results-oriented attempt to send everything possible to arbitration. While this might be a plausible interpretation of some earlier Supreme Court cases, the Court has shown a willingness to uphold limitations in arbitration in at least two recent cases. *See Kaplan v. First Options*, 514 U.S. 938 (1995) (holding that a case could not go to arbitration until a court, not an arbitrator, decided that the matter was intended to go to arbitration); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 475-79 (1989) (upholding the stay of an arbitration because there was a routine choice of California law clause, and California law gave state judges discretion to stay arbitration when there was related court action involving another party).

95. Rau, *supra* note 2, at 249-50.

ars abandon hope of letting individuals make informed choices and instead suggest further government regulation.⁹⁶ An alternative path, however, involves trying to develop different procedures for enhancing decision-making. This is a general feature of scholarship on psychological processes: some people identify a certain kind of feature and label it as an immutable failure of human nature. Some evolutionary psychology scholarship too quickly assumes certain traits are “hardwired” into our brains.⁹⁷

Instead, one could adopt a problem-solving approach to develop certain better kinds of faculties by individuals,⁹⁸ identifying different processes that will enhance individual decision-making. Civilization, after all, is not about giving into our first instincts, but rather learning how to better tap some, such as creativity and diligence, and tame others, such as anger and violence.⁹⁹ Likewise, as we have seen with the development of interactive technology, one can develop better technology to make informed decision-making more effective and more affordable. In other words, barriers are not anchors for some inevitable necessity but rather markers for the opportunity for creative ways to build a civilization that overcomes such barriers.

Likewise, economic theory sometimes emphasizes the costs of information without emphasizing the potential benefits of further information. This problem illustrates part of a more general problem with attempts to think about the efficient consideration of information. At a high level of generality, economics understands that there are costs to searching for information, conveying information, and considering

96. See, e.g., Russel Korobkin, *The Efficiency of Managed Care “Patient Protection” Laws: Incomplete Contracts, Bounded Rationality, and Market Failure*, 85 CORNELL L. REV. 1 (1999).

97. See generally, e.g., TERRY BURNHAM & JAY PHELAN, *MEAN GENES: FROM SEX TO MONEY TO FOOD, TAMING OUR PRIMAL INSTINCTS* (2000) (describing the genetic predisposition to many aspects of behavior, but noting individuals still have room to affect outcomes by changing their behavior).

98. *Id.* at 10-11 (“The twig of human nature is indeed bent from the start. [But i]t must be seduced, not bullied, into behaving.”).

99. Consider Bentham’s (racist) description of how civilization tames the desire for revenge:

An Indian receives an injury, real or imaginary, from an Indian of another tribe. He revenges it upon the person of his antagonist with the most excruciating tortments: the case being, that cruelties inflicted on such an occasion gain him reputation in his own tribe. The disposition manifested in such a case can never be deemed a good one, among a people ever so few degrees advanced, in point of civilization, above the Indians.

Jeremy Bentham, *Elements of Human Disposition*, in BENTHAMIANA OR SELECT EXTRACTS FROM THE WORKS OF JEREMY BENTHAM 13 (1998); AARON T. BECK, *PRISONERS OF HATE: THE COGNITIVE BASIS OF ANGER, HOSTILITY, AND VIOLENCE* 292-93 (1999) (“There is no evidence that people have a ‘need’ for opponents or enemies. Misperceiving others as enemies is a cognitive problem.”).

information.¹⁰⁰ (Some psychologists and legal theorists make similar points in arguing for the “need” to make decisions based on some kind of stereotypes and generalizations rather than more information).¹⁰¹ Economics and psychology have a harder time modeling the benefits of more information and deliberation. Even if we focus narrowly on utility, it may be efficient to engage someone about the possibilities of tinkering with different kinds of arbitration for a variety of reasons. Perhaps the person will, after more deliberation and information, fix on an alternative that makes him happier. Or, perhaps the individual may reach the same decision but be more satisfied that the decision is the best alternative.

B. *More Difficult Barriers*

Though it is easy to exaggerate barriers to informed decision-making, it is important to recognize some very real obstacles.

1. *Lack of Experience*

The first difficult barrier is the limited experiential capacity of individuals to imagine different types of dispute resolution. This involves two kinds of limited experience. First, individuals lack realistic experience with the court system because of the unrepresentative way in which the public sees courts in the media. The selection of cases, like the Simpson trial, is atypical. Moreover, the coverage of litigation itself does not reflect the realities of litigation. In some ways, coverage exaggerates the difficulty of litigation by focusing solely on trials; few would know from media coverage that judges dispose of many cases by motion.¹⁰² In other ways, coverage underestimates the difficulty of litigation by giving little sense of the time and money involved in gathering documents, responding to discovery, and other pretrial activity.¹⁰³

100. The making of decisions is costly, and not simply because it is an activity which some people find unpleasant. In order to make a decision one requires information, and the new information must be analyzed. The costs of searching for information and of applying the information to a new situation are such that habit is often a more efficient way to deal with moderate or temporary changes in the environment than would be a full, apparently utility-maximizing decision.

George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum*, AM. ECON. REV., Mar. 1977, at 76, 82.

101. See generally Clark Freshman, *Whatever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between “Different” Minorities*, 85 CORNELL L. REV. 313, 396-98 (2001) (arguing that when psychologists label discrimination as a “normal” cognitive phenomena, this may be misleading and reflect—in part—responses to the professional incentives of academic psychologists).

102. See *supra* text accompanying note 24.

103. A rare exception to this rule is the publicity surrounding the pretrial affidavits of Monica Lewinsky and deposition of President Clinton in his civil trial. Many individuals, however, might

The experiential distortions are far worse, however, with arbitration. The case selection is not poor, but virtually non-existent. Arbitration, even when not secret (in the sense of legally privileged from access) is often private.¹⁰⁴ This privacy raises a paradox for autonomy. On the one hand, parties may value private resolution highly; to resolve disputes privately may be a core exercise of autonomy. On the other hand, such individually rational decisions raise a collective action problem. The more that arbitration occurs in private, the less that any individual has sufficient experiential knowledge to make an informed choice.

2. *Lack of Future Focus*

Even if individuals knew enough about arbitration and court to realize it might matter to some people, a second barrier that may apply is the limited incentive of individuals to focus on the choice of dispute resolution. Prior to any particular dispute, individuals may find it hard to contemplate a dispute. Even individuals who know about the frequency of disputes may find it hard to believe they will become involved in a dispute—much as many couples report knowledge of high divorce rates, but doubt it will affect them!¹⁰⁵ Even when individuals do appreciate the risk of a dispute, they may fear that discussing possibilities for dispute resolution will signal their potential litigiousness to others. Again, the problem in exaggerated form involves intimate relations: the person to raise a premarital agreement often raises doubts about his commitment.¹⁰⁶ Organizations may also face similar problems of focus. Even if a particular firm is a repeat player in disputes, recent empirical research suggests particular managers and decision-makers within a firm often will not have experience with disputes.¹⁰⁷ Therefore, even when managers in one decision get involved in disputes, and realize the need to consider arbitration clauses early, managers in other divisions may not share this insight.

3. *Future Selves and Future Communities*

Even if individuals realize the importance of arbitration to their own transactions, and *try* to focus on future events, their focus may be

believe the extensive pretrial discovery and motion work reflected the special complications of litigation involving the President, or perhaps high stakes litigation generally.

104. See *infra* text accompanying notes 136-39.

105. See, e.g., Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 194 (1998).

106. *Id.*

107. See generally Rogers & McEwen, *supra* note 77 (reporting on study of different use of ADR by several different firms).

difficult. Individuals often have difficulty thinking about how they, and those around them, may evolve. This is often associated with the problem of future selves.¹⁰⁸ As I suggested in an earlier article on mediation, however, the rhetoric of future selves may be needlessly yoked to individualist perspectives; we might also wonder about an individual's commitment to future communities as well, including commitments to communities (such as communities of women) that may not be developed at a particular point in an individual's life.¹⁰⁹ At a particular point when an individual commits to arbitration, he may indeed make an informed choice that a particular kind of arbitration better fits his values than some other type of arbitration, Alternative Dispute Resolution (ADR), or the default regime of court. He can be less sure this will be true when a dispute arises. At that time, there may be a gap through changes in the individual, the forum for arbitration, or other potential fora. For example, partners in a law firm might commit to resolve their disputes by arbitration by partners at other law firms. This originally may reflect a better match with their needs than litigation. When a dispute finally arises, however, there may have been changes. Perhaps some law firms have changed, finally including accountants and other professionals, but our original law firm still restricts itself largely to lawyers. The firm partners may be disappointed to learn its arbitration may now involve partners at "other firms" that differ from their own. Or vice versa: the firm may have evolved to include other professionals, but not the arbitral forum. Finally—though perhaps least likely—the default regime of litigation may have evolved, perhaps becoming faster, cheaper, or more just. (Or, more realistically, it may have evolved specialized fora to address certain disputes, such as commercial courts, the World Intellectual Property Organization (WIPO) forum¹¹⁰ for intellectual property disputes, or the forum for domain name disputes on the internet).¹¹¹

A thought experiment: imagine agreeing in high school that if we ever have a dispute with anyone, our friends from high school will resolve it. Our high school selves might very well agree—who has better friends, our high school self might think, than now? But our high

108. See, e.g., JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (1979); DEREK PARFIT, *REASONS AND PERSONS* 282, 282-93 (1984); Richard A. Posner, *Are We One Self or Multiple Selves?*, 3 *LEGAL THEORY* 23, 26-27 (1997).

109. Freshman, *supra* note 42, at 1759.

110. World Intellectual Property Organization, Arbitration and Mediation Center, *available at* <http://arbiter.wipo.int/arbitration/arbitration-rules/index.html> (last visited May 30, 2002).

111. See generally A. Michael Froomkin, *Form and Substance in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 *DUKE L.J.* 17 (2000); see also Stephen J. Ware, *Domain-Name Arbitration in the Arbitration-Law Context: Consent to, and Fairness in, the UDRP*, 6 *J. SMALL & EMERGING BUS. L.* 129 (2002).

school self may be hampered by a lack of experience and a lack of a sense of possibility. Lack of awareness: people may change. Lack of sense of possibility: one may discover other friends in the future.

4. *Choice Overload*

A related objection is the fear of cognitive overload. I think of this as the New York apartment objection. The New York apartment is small and only has room for so much; to add more, one has to let something else out.

This objection can be easily overstated. First, research suggests that many individuals may only focus on so many things *at one time*. Classic research, for example, suggests that individuals can only hold seven items in short-term memory, though some can hold as few as five, and some as many as nine.¹¹² A simple technical solution to this limitation is dealing with sets of issues in sequence, much as computer hyperlinks allow more information for those interested in particular topics. In discussing arbitration, for example, individuals might first be exposed to a number of broad topics and then discover more particular information on the options that seem most appropriate for them and their particular set of disputes.

A related objection notes that too many choices lead to anxiety or lack of satisfaction in some people.¹¹³ While it is important to give some weight to the psychological consequences of different rules,¹¹⁴ such weight should not preclude any discussion. Instead, it is worth noting that choice overload plagues some, not all, individuals; namely, those who feel the need to make perfect decisions.¹¹⁵ In addition, it is possible that better presentation of choices, or other innovations, might reduce this overload for such sensitive individuals.

A second related objection is that individuals might focus on arbitration—and might have some ability to negotiate different arbitration terms, but individuals rationally would rather concentrate on other terms. For example, if an individual feels he can bargain over only so many items with a car salesperson, he may find it more rational to bargain for the extra seat mats he knows he will use rather than preserving some litigation option that would have value only if both: (1) he had some disputes; and (2) litigation had a different probability of success

112. See, e.g., George Miller, *The Magic Number Seven, Plus or Minus Two*, 63 PSYCHOL. REV. 81 (1956).

113. See, e.g., Iyengar & Lepper, *supra* note 50.

114. See generally DENNIS P. STOLLE ET AL., PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (2000) (discussing how legal scholarship, policy, and teaching should consider therapeutic consequences as one value).

115. See generally Iyengar & Lepper, *supra* note 50.

than arbitration.¹¹⁶

In part, such objections bring us back to the question of the value of autonomy. Neither objection says that a consumer could not process information about arbitration, but only that the consumer, considering only her interests, might be more likely to focus on other kinds of information. Richer versions of autonomy, however, may require that an individual consider more information about arbitration rather than consider seat mats because the public values about developing information about resolving disputes are more valuable than the seat mats.

5. *Market Signaling Barriers*

A final set of barriers involves discussing arbitration without signaling to individuals that arbitration is a problem—as opposed to a process with some imperfections compared to other institutions with other imperfections. As we saw above, this difficulty haunts many state efforts to regulate arbitration.¹¹⁷ Such state regulations require “disclosures” reminiscent of tobacco labels or Miranda warnings. Partly the message is the medium: when attorneys mention an “issue,” or that a contract includes a “disclosure,” it is easily experienced as a danger and a problem. Moreover, studies of psychology suggest that such disclosure of rights “waived” will distort decision-making beyond even the obvious reason that it does not disclose potential benefits gained: individuals are loss-averse, and they resist making decisions that they experience as sacrificing something.¹¹⁸ Therefore, as we will see in the next section, adding discussion of advantages and disadvantages to all discussions of procedural choices—including even the choice to stick with the default regime of litigation—would remove the danger of signaling discussion of any one option (like arbitration) meant that option was especially dangerous.

IV. PROMOTING AUTONOMY THROUGH ARBITRATION: UTOPIAS OF INFORMED CONSENT

As we have seen, there are many reasons to care about informing individuals more about arbitration, many reasons to supplement the limited incentives of the market, and many obstacles to conveying information—some exaggerated and some more complex. This last section

116. I am grateful to my friend, George Lindemann, for suggesting this point when we discussed negotiating over commercial leases.

117. See *supra* text accompanying notes 85-92.

118. See, e.g., Daniel Kahneman et al., *The Endowment Effect, Loss Aversion, and Status Quo Bias in CHOICES, VALUES, AND FRAMES* 159, 165 (Daniel Kahneman & Amos Tversky eds., 2000) (“[C]hanges that make things worse (losses) loom larger than improvements or gains.”).

suggests a number of possibilities. In addition, in the problem-solving tradition, it invites further discussion of possibilities to explore other ways to promote informed consent. Just as we earlier saw the limits of market incentives to convey information and the subsequent barriers to conveying that information, so too, this section first looks at tweaking incentives and then overcoming barriers.

A. Incentives

1. Individual Incentives

More empirical research about how individuals already view arbitration would make changing incentives easier to think about. We should better understand what people know and, to some extent, want to know, about arbitration. Proponents of arbitration and other forms of ADR often cling to satisfaction studies that show those who use arbitration or ADR report more satisfaction than those who go to court. These satisfaction studies tell us little about autonomy. As many critics of ADR note, proponents of ADR often engage in false comparisons: an ideal of ADR versus an imperfect reality of litigation.¹¹⁹ One study of arbitration funded by a major arbitration provider reports that fifty-nine percent of adults would choose to arbitrate becomes eighty-two percent of adults when they are “informed” about arbitration.¹²⁰ That “information”? the “cost [of arbitration] would be 75% less than the cost of a lawsuit.”¹²¹ The study does not even purport to provide a citation for this “information”; nor does it discuss what “information” adults might have about the range of awards given by arbitrators versus judgments given by courts.

More useful research might instead study what participants in arbitration thought their alternatives were. We might also compare this sense of alternatives with what lawyers and others know. For example,

119. See, e.g., Robert A. Baruch Bush, “What Do We Need a Mediator For?": *Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 6 (1996) (“Viewed in proper perspective, mediation and other third-party processes are alternatives not to court, but to unassisted settlement efforts . . .”); see also Richard L. Abel, *Introduction*, 1 POLITICS INFORMAL JUSTICE 9 (Richard L. Abel ed., 1982) (noting that advocates of “informal justice” deploy various “rhetorical devices” including “false comparisons,” such as when “[m]ediation is compared with adjudication . . . but most mediated cases would have been handled by negotiation”).

120. Roper Starch Worldwide, Legal Dispute Study, <http://www.arb-forum.com/library/roperpoll.html>>> 5 (visited Dec. 13, 1999). See also American Financial Services Association, *Lenders Adopt Voluntary Standard on Arbitration Agreements*, available at <http://www.americanfinsvcs.com/meetings/admin/uploads/ArbitrationAgreements-June2000.doc> (last visited June 14, 2002).

121. State Bar of Texas, *Roper Poll Reveals Americans' Preferences for Resolving Legal Issues: Majority Believe Arbitration Is Their Best Option*, available at http://www.texasadr.org/news_items1.htm#roper.

those satisfied with the imperfections of, say, arbitration by the American Arbitration Association (AAA), may not know about other providers of arbitration. The satisfaction of clients today may be analogous to imperfect measures of satisfaction in medical decision-making. Patients may express satisfaction with a certain medication that involves substantial side effects because they view the side effects as the “inevitable price” of the positive effects; consumers might be far less satisfied if made aware of other alternatives without side effects. Treatment of depression is a classic example. Many antidepressant medications make people feel much better, but an extraordinarily high percentage of people report side effects.¹²² Indeed, recent research on antidepressants suggests that placebos work as well in many studies as some of the best known anti-depressants—and that the sugar pills may even lead to some of the same changes in brain chemistry.¹²³ With such better research on what individuals already believe about arbitration, and what they care about in arbitration, we may develop better targeted messages to educate individuals.

2. Attorneys

Although improving incentives for individuals to ask attorneys and others about arbitration may help, attorneys, too, may need other clear incentives. There is room for clearer obligations for attorneys to discuss different kinds of arbitration with clients.¹²⁴ If lawyers have a clearer duty to discuss dispute resolution, it may promote client attention. Some clients may be less suspicious that lawyers are simply discussing choices to run up their hourly bills.¹²⁵

3. Arbitration Providers

Exactly how we improve the incentives of arbitration providers,

122. See generally Lindsay DeVane, *Keeping Depression at Bay*, available at 2002 WL 11470228 (Aug. 6, 2001); see also Tammy Chernin, *Maintaining Mental Health: The New Focus is on Maximizing Benefits and Minimizing Side Effects*, available at 2001 WL 8119261 (June 4, 2001).

123. See Andrew F. Leuchter et al., *Changes in Brain Function of Depressed Subjects During Treatment with Placebo*, 159 AM. J. PSYCHIATRY 122 (2002). In both medicine and law, existing payment arrangements may distort decision making. Medication without side effects may be more expensive, but consumers with insurance will often bear little of the cost of the other medication. In a similar way, individuals with insurance coverage might be more satisfied with other types of dispute resolution, but will typically bear none of any additional cost of other dispute resolution because insurers typically bear all of the costs of covered dispute resolution.

124. See *supra* text accompanying note 75 (discussing how existing law makes it unclear how much attorneys need to discuss arbitration with clients).

125. Of course, if bars lobby to impose a requirement that their members discuss arbitration in greater detail, clients might still blame lawyers in general, but not their own lawyer—much as Congress is held in disrepute, but incumbents regularly re-elected.

such as the AAA, is a very difficult problem. As we saw earlier, established arbitration providers face very little competition for understandable reasons. If an individual tries to designate a new provider in a contract, this may signal a danger to other parties to the contract. Moreover, courts may reasonably be skeptical that a party that designates a new provider is designating a biased provider. Yet competition between providers is crucial to the market success of arbitration. Even if arbitration's only appeal is to improve efficiency, competition is important. Moreover, if we take seriously Ware's suggestion that arbitrators might develop not just better procedures but even better substantive legal principles,¹²⁶ competition becomes even more important.

One solution to the lack of information is to increase oversight by some other set of actors. In a private form, this might involve monitoring by trade organizations or groups of in-house counsel. Unfortunately, as we saw, the incentives of in-house counsel may themselves represent a principal-agency problem.¹²⁷ Therefore, one alternative may be a greater role for government regulation and licensing. If private parties and courts are suspicious of the credentials and bias of new arbitrators and new arbitral providers, then government agencies might serve to validate these credentials. A more modest version might involve certification of credentials,¹²⁸ but allowing parties to use non-certified arbitrators; a stricter version would require licensing and permit using only licensed arbitrators.¹²⁹ In addition to improving incentives, licensing might be an opportunity to gather more information about arbitration results so individuals can learn enough about what actually happens in arbitration to make better informed decisions.

B. *Overcoming Barriers*

1. *Improving Comparisons by Attorneys and State Statutes*

As we have seen, one of the largest areas for improvement involves

126. See generally Ware, *supra* note 3.

127. See *supra* text accompanying note 77.

128. For an example of a related proposal, see the draft report of the ABA Task Force on e-commerce, page 9, available at <http://www.abanet.org/dispute/webpolicy.html#>.

129. Such licensing schemes might play a larger role as an alternative to greater review of arbitral awards. One objection to greater review of arbitral awards is that it denies parties to a particular arbitration the finality that may have attracted them, in part, to arbitration. A licensing scheme might allow a government agency to discipline—or remove—arbitrators who behaved badly in a set of arbitrations without disturbing the finality of any particular arbitration. The nature of the licensing review, in turn, would depend on how we resolve the question of whether arbitrators should follow the same rules of decision as courts. If we think that arbitrators should, then one basis to a complaint about an arbitrator or provider would be that the arbitrator deviated from the proper rules of decision.

the way that comparisons are conveyed between arbitration and various alternatives. This involves two distinct kinds of changes.

First, discussions of informed consent about arbitration need to be tied more generally to informed consent about dispute resolution. Current state regulation attempts largely warn only about the dangers of arbitration and rights “waived.”¹³⁰ When only agreements with arbitration mention “waiving” rights, ordinary habits of loss aversion will make people not want to “lose” something. Instead, one might require disclosure not just where there was an arbitration clause, but also where there was not. For example, law might provide that contracts should include a provision along these lines: “This contract does not include an arbitration, mediation, or alternative dispute resolution clause. In the event of a dispute, you agree instead that you may go to court or reach an agreement later to enter arbitration, mediation, or some other kind of alternative dispute resolution.” Proposals requiring that arbitration provisions be part of a separate contract¹³¹ could be similarly broadened: one might require that any provisions to modify dispute resolution, whether to limit damages, to change the location of the forum, and so on, be part of a separate contract. Or, one might require that any contract (or some subset of contracts) have a separate agreement that specified the method for dispute resolution—even if this were the default method of going to court. One intermediate way to enact such a provision would be to make it an ethical principle that lawyers drafting certain contracts should include such a separate dispute resolution agreement.¹³²

The second set of changes involves the more particular content of comparisons. As we have seen, there is a great need to make disclosures more balanced and comparative. As we saw earlier, comparisons of the formal features of appeal in court and in arbitration may be deceptive. Likewise consider the question of “costs” and “fees.” Like several other lower courts, an Eleventh Circuit opinion refused to enforce an arbitration agreement when there was a danger that the amount of fees would deter consumer complaints. Although the Supreme Court in *Green Tree* formally reversed the lower court’s decision on the ground there was not sufficient proof of the amount of fees and the effect of such fees on the dispute, the Court majority and dissent both narrowly focused on the single element of fees.¹³³

130. See *supra* text accompanying notes 85-92.

131. For California legislation, see California Assembly Bill 2504 (2002).

132. It is also worth noting that the state statutes that have come before the Court have addressed the enforcement of existing contracts rather than advice about drafting. I am grateful to Rick Williamson for making this suggestion.

133. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92-97 (2000).

It would be more useful to expand the comparisons. At a very formal level, the courts are correct to note that courts do not require individuals to pay for individual judges, while arbitrations, in contrast, typically require parties to pay sometimes hefty fees for arbitrators. On the other hand, the emphasis only upon these costs may be deceptive in at least two ways. First, because of its lack of evidentiary rules and other kinds of formal procedures, individuals may be more able to make do without an attorney.¹³⁴ What individuals pay for arbitrators may be more than offset by the savings in attorneys' fees. Second, what individuals pay up front for arbitration may be balanced by savings in time in the shortness of arbitration. Of course, the familiar claims of the speed and informality of arbitration may, in particular cases or even most cases, not occur in practice.¹³⁵ Lack of evidentiary rules and discovery may lead to higher costs. (Discovery may take place in hearings with the fees of attorneys and arbitrators running; the tendency to admit every bit of evidence may increase the hearing time.) At the end of the day, it may be difficult to calculate in advance precisely when arbitration saves time and/or money taking into account all the costs and potential savings. Overall, however, the formalism of emphasizing only one aspect of the costs is deceptive and a poor basis for helping individuals make informed choices.

2. *Reconsidering Secrecy in Arbitration*

Ultimately, the quest for autonomy may lead us to reconsider the commitment to the secrecy of arbitration. If we try to move away from formal features, we face the difficulty of describing experiences about which we "know" very little. In part, this reflects the often denounced lack of empirical research. But, also in part, this shortcoming reflects again the paradox of privacy in arbitration: we cannot study what happens in arbitration because private providers rarely make meaningful data available. This shortcoming highlights a crucial need for rethinking our commitment to the secrecy of arbitration. It is true that many parties seek arbitration because of its private nature.¹³⁶ Nevertheless, some arbitral forums involve some degree of public access.¹³⁷ Even when

134. See KRITZER, *supra* note 74, at 151 (discussing how parties in labor arbitration represented by nonlawyers did as well as those represented by lawyers).

135. See *supra* text accompanying note 25.

136. DEZALAY & GARTH, *supra* note 41, at 5 (noting that an appeal of international commercial arbitration is its secrecy); Freshman, *supra* note 42, at 1743-48 (noting that an appeal of community resolution of disputes involving lesbians and gays is privacy).

137. The Jewish Conciliation Board of New York was designed as a community dispute resolution forum, but was open to the public. See GOLDSTEIN, *supra* note 42, at 91. The Board, however, declined to let its live proceedings be broadcast. *Id.* at 97. But see Freshman, *supra* note 42, at 1758 (suggesting that a major appeal of the Jewish Conciliation Board was to protect

there is not access to arbitration itself, parties typically have the right to disclose arbitration awards and any other material from the arbitration.¹³⁸ And arbitration involves enough attractions other than privacy that it could still function even if it were made more accessible to the public.¹³⁹ Opening up such arbitration will likely require new legislation. This does not necessarily require opening all arbitration to the public. Just as some argue that the law may develop sufficiently as long as “enough” cases do not settle, so too there may be optimal information about arbitration if “enough” arbitrations are more public.¹⁴⁰

V. CONCLUSION

Renewed attention to the values of ADR and arbitration gives us occasion to take more seriously the rich potential of arbitration. That potential includes not merely private values like cost or time savings, but public values such as the promotion of real autonomy, including the kind of autonomy crucial to a deliberative democracy. As it has evolved, however, the market for arbitration only imperfectly promotes autonomy. If we take the potential of arbitration to promote autonomy more seriously, then we must begin rethinking how we approach arbitration. Some of this involves relatively mechanical details, such as rethinking how lawyers and others describe arbitration. In part, however, this also involves rethinking some established practices of arbitration, including its secretive nature.

the reputation of the Jewish community by keeping disputes within the community out of the public eye).

138. See, e.g., *A.T. v. State Farm Mut. Auto. Ins. Co.*, 989 P.2d 219, 223-24 (Colo. Ct. App. 1999); Andrew Ross Sorkin, *Trading Dispute Is Shrouded in Accusations of Bias*, N.Y. TIMES May 15, 2002, at C1 (reporting claim in securities arbitration that broker treated an Arab client worse). Rules of some arbitration providers, however, attempt to limit the right of parties to disclose information learned in the arbitration. See, e.g., National Arbitration Forum, Code of Procedure Rule 4, available at http://www.arb-forum.com/arbitration/NAF/Code_linked/PartI.htm#Rule%204 (last visited June 1, 2002) (“Arbitration proceedings are confidential, unless all Parties agree otherwise arbitration orders and awards are not confidential. A Party who improperly discloses confidential information shall be subject to sanctions. The Arbitrator and Forum may disclose case filings, case disposition, and other case information as required by applicable law.”).

139. By analogy, many say that secrecy in settlements is a sine qua non of settlements. Nevertheless, several states have limited the ability of private parties to keep settlements secret, and yet settlements continue to occur. In Florida, for example, insurers must report in detail the settlement of any malpractice claim by doctors, dentists, HMOs, attorneys, and certain other professionals. FLA. STAT. ANN. § 627.912 (West 2002). In addition, the Florida Department of Insurance has made a summary of such reports, including the name of the person/entity allegedly committing malpractice and the settlement amounts available on a publicly accessible website. See <http://www.doi.state.fl.us/Consumers/Indextext.html>.

140. See Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 500-02 (1985).