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Untangling the Privacy Paradox in Arbitration

Amy J. Schmitz*

*Paradox (n.) = "a statement etc. that seems to contradict itself or to conflict with common sense but which contains a truth (as "more haste, less speed")"*¹

I. INTRODUCTION

Arbitration is private but not confidential. This is a paradox to the extent that it is seemingly contradictory, but states a truth. Arbitration is private in that it is a closed process, but it is not confidential because information revealed during the process may become public. This has caused misperceptions and confusion regarding the arbitration process. Contracting parties often assume that arbitration's privacy denies the public access to not only arbitration hearings, but also information revealed during the hearings. These parties may then accept arbitration agreements without contracting for confidentiality. This, in turn, may negatively impact corporate parties expecting arbitration to shield their business information, as well as individuals who assume that personal information revealed in arbitration will remain secret.

It is true that arbitration proceedings generally are private and do not produce published opinions that courts infuse into public law. It is not correct, however, to assume that information revealed in arbitration is automatically confidential.² In other words, United States law does not guarantee such secrecy of arbitration information, and institutional rules parties incorporate in their arbitration agreements generally do not provide broad confidentiality protections.³ Furthermore, third party participants who do not agree to any confidentiality agreement or rules remain free to talk about the arbitration proceedings.

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1. OXFORD AMERICAN DICTIONARY 484 (1980).

2. Cindy G. Buys, *The Tensions Between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT'L ARB. 121, 129-31 (2003).

3. *Id.* at 125-30. See also *infra* notes 39-50 and accompanying text (discussing domestic and international rules).

Confusion regarding privacy and confidentiality in arbitration therefore fosters misguided contracting, as well as simplistic assumptions regarding the value of secrecy in the arbitration process.⁴ Privacy and confidentiality may be good and bad for the parties. Both may allow parties to save resources and reputation costs by arbitrating disputes outside the public purview.⁵ This may be especially true for “repeat players” that routinely incorporate arbitration clauses in their form contracts.⁶ Such routine arbitration may allow these players to enjoy efficiency benefits, which they may pass on by offering lower prices, higher wages, and better quality products.⁷ Corporate parties sometimes misperceive benefits of arbitration’s privacy, however, by assuming it will automatically ensure the secrecy of their trade and business information.

In contrast, consumer and employee advocates often focus only on drawbacks of arbitration’s privacy without considering how individuals could benefit from increased confidentiality in the process. They complain that arbitration’s privacy unduly benefits repeat players by allowing them to hide unfavorable information about their discriminatory practices, product defect and safety concerns, and other legal violations. This hinders future claimants in proving cases of repeat offenses. Some also claim that the lack of published opinions in arbitration thwarts development of the law in areas affecting public interests, such as civil rights and product defect.⁸

These critics often overlook, however, how privacy and confidentiality in arbitration may benefit individuals with cases involving sensitive personal information. Indeed, individuals would be wise to contractually protect the confidentiality of their personal information. Without such contractual protection, consumers may become subject to arbitration provisions in form credit card contracts that block public access to awards revealing the financial companies’ misconduct, but neglect to protect the confidentiality of consumers’ personal financial

4. Buys, *supra* note 2, at 122 (noting how confidentiality “is said to be one of the aspects of arbitration that is highly valued,” without any explanation why it is valuable or consideration of how its value may vary depending on context).

5. See Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 NOTRE DAME L. REV. 523, 531–32 (2005) (discussing a basic model for choosing arbitration over litigation).

6. See Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631, 1650–61 (2005) (explaining the pros and cons of the “repeat player” phenomenon).

7. See Christopher R. Drahozal, *“Unfair” Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 741, 764 (2001) (explaining how “individuals may be better off agreeing even to one-sided arbitration clauses” due to efficiency benefits of arbitration programs).

8. See Sternlight, *supra* note 6, at 1648–55 (discussing arguments against mandatory arbitration).

information. Similarly, sexual harassment claimants may be dismayed when they cannot prevent witnesses from gossiping regarding what they learn while participating in arbitration hearings.⁹ Moreover, increased transparency in arbitration may dissuade sexual harassment claimants and those with poor financial histories from asserting their claims.

These multi-textured transparency issues raise thorny questions and complications. Do we want more or less transparency in arbitration? Should this vary in domestic versus international arbitration, or in arbitration pursuant to contract versus proceedings per statutory or administrative rule?¹⁰ Should different standards apply in arbitrations involving public parties, or in the proceedings consumers or employees must pursue under form agreements?

This Article does not tackle all these questions. Instead, it merely seeks to clarify the distinctions between privacy and confidentiality in domestic arbitration pursuant to non-public parties' private agreements, and to spark discussion of transparency reforms that respond to effects of these distinctions in that context. Part II, therefore, discusses the differences between privacy and confidentiality in such non-public arbitration. Part III addresses the benefits and drawbacks of this privacy. Part IV explores ramifications of the confusion about confidentiality in arbitration. Part V then confronts the privacy paradox, by proposing a two-pronged policy that combines increased confidentiality of personal information with decreased privacy in cases affecting public interests. The Article concludes with an invitation for further discussion and debate regarding the ramifications of conflicting tensions raised by the privacy paradox.

9. Of course, it may be practically impossible to prevent gossip due to human inclinations. See Richard C. Reuben, *The Sound of Dust Settling: A Response to Criticisms of the UMA*, 2003 J. DISP. RESOL. 99, 124–25 (2003) (noting practical difficulties of imposing liability for disclosure of mediation communications).

10. Costs and benefits of transparency vary greatly even within the international realm, especially with respect to private versus public or semi-public trade and investment arbitration. See Buys, *supra* note 2, at 121–23, 131–34 (emphasizing increased values of transparency in international trade and investment arbitration due to strong public interest in these disputes); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1539–41, 1544–45, 1625 (2005) (discussing ambiguities of transparency rules in international investment and trade arbitration despite the public nature of treaty rights at issue in many of these arbitrations under the rules of the International Centre for Settlement of Investment Disputes). Accordingly, such international and public versus private debates are beyond the scope of this Article. Instead, it focuses only on arbitration pursuant to private agreement.

II. MEANING OF PRIVACY VERSUS CONFIDENTIALITY IN ARBITRATION

“Privacy” and “confidentiality” have varied meanings.¹¹ In arbitration, privacy generally refers to arbitration’s closed and non-public process, which prevents public access to hearings or published opinions that would aid development of public law.¹² In contrast, confidentiality in arbitration refers to secrecy of information regarding or revealed through the arbitration process.¹³ Privacy thus does not ensure confidentiality of arbitration proceedings.¹⁴ Information about and learned through domestic arbitrations may become public unless the parties contractually require that this information remain confidential.¹⁵ Arbitration therefore is not entirely secret.¹⁶

A. Privacy

Arbitration developed as a means for providing self-contained dispute resolution that culminates in a third-party determination, but may be more efficient and flexible than litigation because it is not subject to judicial strictures.¹⁷ In addition, Western models of arbitration are generally private in that only the parties to the arbitration agreement and their invitees may attend the proceedings.¹⁸ Arbitration also is private to

11. See generally Orna Rabinovich-Einy, *Going Public: Diminishing Privacy in Dispute Resolution in the Internet Age*, 7 VA. J.L. & TECH. 4, ¶¶ 8–97 (2002), http://www.vjolt.net/vol7/issue2/v7i2_a04-Rabinovitch-Einy.pdf (noting the varied meanings of privacy and focusing on informational privacy in online dispute resolution (ODR), which breaks down into secrecy, anonymity, and control of information). I use “confidentiality” to refer to the secrecy of information about and learned through arbitration proceedings.

12. See OXFORD AMERICAN DICTIONARY 531 (1980) (stating various meanings of privacy, including its reference to secluded venues and non-public status).

13. See *id.* at 133 (defining confidential as “to be kept secret”).

14. See CHRISTOPHER R. DRAHOZAL, COMMERCIAL ARBITRATION: CASES AND PROBLEMS 417–18 (2002) (distinguishing privacy and confidentiality in arbitration and explaining that arbitration rules generally do not protect confidentiality of arbitration).

15. See Buys, *supra* note 2, at 130 (noting how nations’ rules differ regarding confidentiality, and finding that United States law generally provides no duty of confidentiality).

16. See Michael D. Goldhaber, *Sneak Peek: An Inside Look at More than 100 Major Disputes from the Secret World of Arbitration*, Focus Europe 22 (Summer 2005), available at <http://www.americanlawyer.com/focuseurope/scorecard0605.html> [hereinafter *Sneak Peek*] (reporting information regarding 130 disputes, and noting how information easily leaks out about arbitrations).

17. JULIUS HENRY COHEN, COMMERCIAL ARBITRATION AND THE LAW 25 (1918) (quoting JOHN MONTGOMERIE BELL, TREATISE ON THE LAW OF ARBITRATION IN SCOTLAND 1 (2d ed. 1877)).

18. Western and English reverence for individualism and personal autonomy supports privacy in a manner foreign to some Asian cultures. In Chinese arbitration and mediation, for example, there is no high regard for privacy, and parties do not necessarily expect or want privacy. See Carlos de Vera, *Arbitrating Harmony: ‘Med-Arb’ and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China*, 18 COLUM. J. ASIAN L. 149, 186–88

the extent that arbitrators do not publish reasoned opinions that provide information to the public regarding arbitrated cases and further development of the law.¹⁹ Arbitration may therefore “privatize” the law.²⁰

1. Private Process

Arbitration’s private process limits its transparency by precluding the public’s observation of and participation in the process.²¹ Judges, juries, and court clerks do not attend or participate in arbitrations. Instead, arbitration proceedings are closed to government officials, the press, and other uninvited third parties. The public therefore has access to little information regarding the conduct and outcomes in arbitration proceedings.

This privacy intends to provide “an atmosphere of relative coziness” that may foster friendly peacemaking.²² Generally, an arbitration hearing is more “cozy” than a court in that it takes place in a conference room and only the arbitrators, the parties, their attorneys (if they have them), a few witnesses, and perhaps a stenographer are present.²³ Disputants usually sit across the table from one another in fairly close quarters without the physical and procedural protections of a court. The formality and degree of privacy of an arbitration proceeding depends on the parties’ agreement, any rules they incorporate in their agreement, and norms that exist in the given context or forum.

Many have defended arbitration’s private process as necessary to foster open communications, relax tensions that often exist in the courtroom, and allow for flexible and efficient dispute resolution. Whether these things occur, however, depends on the arbitrator’s skill and willingness to move proceedings along and restore order when stress-driven contentions and arguments breed “chaos.”²⁴ The absence of public policing of arbitration procedures, however, makes it tough to

(2004) (discussing how Chinese med-arb focuses on creating harmony over protecting privacy).

19. See Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 707–08 (1999) (distinguishing between private and government adjudication).

20. *Id.* at 706–26.

21. See Rabinovich-Einy, *supra* note 11, at ¶¶ 47–48 (discussing how the introduction of ODR is likely to breakdown “the traditional dichotomy between transparent, public court proceedings and private ADR”).

22. Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 864 (1961).

23. See *id.* (describing the atmosphere of commercial arbitrations in 1961). This has also been my experience.

24. *Id.*

measure the successes and failures of arbitral "coziness." We can only speculate about what happens in closed arbitration proceedings, and are left wondering whether less powerful parties are treated fairly behind these closed doors.²⁵

2. No Published Opinions

Arbitration also is private to the extent that arbitration awards generally are not published. This affects the transparency of arbitrated cases, as well as "the law" they produce.²⁶ Parties' arbitration agreements set forth required procedures, and define the arbitrators' authority in determining the parties' disputes. Although arbitrators must remain unbiased and ensure fundamentally fair hearings, their first priority is to obey the scope of their authority under a given arbitration agreement.²⁷ This generally allows arbitrators to decide disputes based on flexible conglomerations of law, equity, practicalities, and applicable norms and standards.²⁸ In this way, arbitration's privacy essentially allows parties to contract out of, or privatize, law.²⁹

Professor Ware argues that arbitration agreements allow for privatization of substantive law, including mandatory rules parties would not otherwise be permitted to waive contractually.³⁰ For example, product safety rules may be privatized through enforcement of arbitral determinations of product defect disputes in accordance with parties' contracts, instead of legal rules.³¹ Professor Ware proposes that this privatizes product defect law because courts generally confirm and enforce arbitration awards as judgments regardless of whether arbitrators apply the law.³² He thus concludes that "[m]andatory law is jeopardized by the enforcement of arbitration agreements."³³

Although evidence is mixed, some studies show that arbitrators do not necessarily apply the law in deciding disputes.³⁴ Courts nonetheless

25. See Rabinovich-Einy, *supra* note 11, at ¶¶ 70–71 (noting how private process in ADR "disproportionately works against less powerful groups such as minorities and women").

26. See Wesley A. Sturges, *Arbitration—What Is It?*, 35 N.Y.U. L. REV. 1031, 1032–33 (1960) (emphasizing arbitration's self-contained and conclusive process).

27. See *id.* at 1032–34 (emphasizing arbitration's distinct process).

28. *Id.* at 1034.

29. See Ware, *supra* note 19, at 707 (arguing that "vast areas of law are, contrary to the received wisdom, privatizable" through arbitration).

30. *Id.* at 710–11.

31. *Id.*

32. *Id.* at 710–12.

33. *Id.* at 710–11.

34. See *id.* at 719–21 (referencing Professor Soia Mentschikoff's survey of arbitrators which revealed that ninety percent of those surveyed believed they were free to ignore legal rules to reach

confirm these awards under the Federal Arbitration Act (FAA) and Uniform Arbitration Act (UAA) unless the arbitrators clearly exceeded their authority in reaching their results.³⁵ This is because these acts limit a court's review of an arbitrator's award to procedural grounds and direct courts to strictly enforce arbitration awards to protect arbitration's independent process.³⁶ The Supreme Court of the United States has emphasized this finality, and most other federal and state courts have followed suit.³⁷ Courts have looked to the goals and functions of arbitration to guide them in reinforcing arbitration's finality as necessary to guard its privacy, flexibility, and efficiency.³⁸

Despite this general privacy, however, some non-governmental adjudication proceedings remain open to the public and media attention (e.g., some Olympic and sporting adjudications). Such proceedings nonetheless fail to produce public law. The privacy of arbitration awards in these cases continues to foster privatization of law, which may be problematic when it allows matters of health and safety to escape public scrutiny. When closed arbitrations of manufacturing defect claims produce no published opinions, for example, the public fails to learn about these defects. This leads arbitration critics to call for more transparency in arbitration.³⁹

"just" decisions). *But see* Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT'L L.J. 449, 514–15 (2005) (concluding that "it is fair to say that arbitrators usually do try their best to model their awards on what courts would do in similar cases—and that as often as not they succeed in doing so. That is at least what the scanty empirical evidence seems to suggest . . .").

35. *Id.* See also Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 GA. L. REV. 123, 124–32 (2002) (emphasizing the finality of arbitration awards under the FAA and UAA).

36. *See id.* at 124–35 (discussing finality of arbitration under the FAA). Section 10 of the FAA prescribes limited grounds for judicial review focused on preservation of basic procedural fairness, and section 11 allows for judicial modification or correction of certain apparent errors in an award. *Id.* The FAA does not, however, permit a court to question the merits of an arbitration award. *Id.*

37. *Id.*

38. *See* *Brennan v. King*, 139 F.3d 258, 266 n.7 (1st Cir. 1998) (finding a dispute resolution procedure in an employment contract was not arbitration governed by the FAA because it constrained the scope of the arbitrator's authority and limited the effect of the arbitral decision, leaving "little ground for a 'reasonable expectation' that the procedure will resolve the dispute") (citation omitted); *see also* *Harrison v. Nissan Motor Corp.* in U.S.A., 111 F.3d 343, 349 (3d Cir. 1997) (refusing to apply the FAA to non-binding arbitration pursuant to state Lemon Law procedures that allowed parties to pursue litigation if the arbitration delayed for more than forty days).

39. *See infra* Part III. A–B (discussing pros and cons of privacy).

B. Confidentiality

Confidentiality goes beyond privacy. It connotes secrecy. In arbitration, such confidentiality would preclude disclosure of any evidence, communications, or other information about or gleaned through an arbitration proceeding. Parties, arbitrators, witnesses, and any others involved in the process would have to keep everything learned in arbitration secret. The press and the public would therefore lose access to not only hearings and awards, but also underlying information about arbitrated cases. Furthermore, arbitration submissions, testimony, and communications would be inadmissible in court proceedings.

This is not reality. Such confidentiality generally does not exist in arbitration, and underlying information may become public.⁴⁰ The FAA does not address arbitral confidentiality and United States law does not otherwise ensure secrecy of information about or disclosed in arbitration.⁴¹ The majority of American courts therefore permit discovery of arbitration materials in later cases.⁴²

This means arbitration is less confidential than mediation and other non-binding alternative dispute resolution processes.⁴³ Unlike these non-binding processes, arbitration does not rely on secrecy of shared information to foster voluntary settlements.⁴⁴ Arbitration is more like a trial in that it culminates in a binding award, ending parties' disputes regardless of whether they can reach a voluntary settlement. Accordingly, arbitrating parties must contract for confidentiality.⁴⁵ They

40. See DRAHOZAL, *supra* note 14, at 417–26 (discussing the law's silence regarding confidentiality in arbitration).

41. See Steven Kouris, *Confidentiality: Is International Arbitration Losing One of Its Major Benefits?*, 22 J. INT'L. ARB. 127, 134–35 (2005) (noting how United States law, in contrast to law in some other countries, does not protect confidentiality in arbitration in the absence of specific agreement).

42. See DRAHOZAL, *supra* note 14, at 425 (also citing cases for this proposition).

43. See, e.g., *Princeton Ins. Co. v. Vergano*, 883 A.2d 44, 61–67 (Del. Ch. 2005) (emphasizing role of confidentiality in fostering settlement through mediation, and finding confidentiality considerations barred testimony of a mediator regarding parties' representations during the mediation); PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION, IN UNCITRAL MODEL LAW JURISDICTIONS 326–31, 353 (2d ed. 2005) (explaining confidentiality rules applicable to conciliation under the international model law, and the absence of such rules regarding arbitration).

44. See Rabinovich-Einy, *supra* note 11, at ¶ 47 (noting how arbitration is less confidential than mediation).

45. See Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 285–86 (1999) (discussing how parties must

nonetheless rarely expend resources to negotiate such provisions because they often assume that arbitration is naturally confidential or that the institutional arbitration rules they incorporate in their agreements will otherwise protect the secrecy of information disclosed during the arbitration process.⁴⁶

In reality, institutional arbitration rules generally preserve privacy but do not ensure confidentiality of arbitration proceedings. The commonly used American Arbitration Association (AAA) Commercial Arbitration Rules and Mediation Procedures, for example, do not address confidentiality of general arbitration proceedings.⁴⁷ At most, some domestic arbitration rules require that arbitrators and administrators refrain from disclosing certain information or otherwise maintain some level of confidentiality.⁴⁸

Similarly, international arbitration rules often go no further than requiring that arbitrators maintain limited levels of confidentiality in the processes they administer. The AAA's International Arbitration Rules, for example, provide for a presumption that hearings remain private, but that selected awards may be publicly available unless the parties agree otherwise.⁴⁹ They also require the arbitrators, but not the parties, to maintain the confidentiality of arbitration proceedings and awards.⁵⁰ The Internal Rules of the International Chamber of Commerce (ICC) similarly require arbitrators and administrators to maintain the "confidential nature" of their arbitral tribunals' internal operations by refraining from disclosing evidence or information they learn through their participation in arbitration.⁵¹ These rules generally do not,

stipulate to confidentiality in litigation, but finding "[c]onsensual secrecy pervades virtually every phase of modern civil litigation").

46. See DRAHOZAL, *supra* note 14, at 425 (noting commentators' suggestion that parties add confidentiality provisions in their arbitration agreements).

47. AMERICAN ARBITRATION ASSOCIATION (AAA) COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (July 1, 2003), available at <http://www.adr.org> (including no confidentiality provision for arbitration, but requiring confidentiality with respect to mediation disclosures). Instead of dictating confidentiality rules for its arbitrations, the AAA suggests the parties take steps to draft their own confidentiality clauses. DRAHOZAL, *supra* note 14, at 425.

48. See, e.g., JAMS EMPLOYMENT ARBITRATION RULES & PROCEDURES R-24 (Feb. 19, 2005), available at http://www.jams-enddispute.com/images/PDF/Employment_Arbitration_Rules.PDF (providing that "JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing," but allowing disclosure in any award challenge or confirmation proceeding, or if "otherwise required by law"); NATIONAL ARBITRATION FORUM (NAF) CODE OF PROCEDURE R-4 (Jan. 1, 2005) (ambiguously stating that "[a]rbitration proceedings are confidential, unless all Parties agree otherwise," but seeming to refer to the arbitrators' duty of confidentiality by adding that parties may disclose awards and orders).

49. See Buys, *supra* note 2, at 127-28 (explaining AAA rules).

50. Kouris, *supra* note 41, at 137 (describing the AAA rules).

51. *Id.* at 134-35, 137 (discussing the Internal Rules of the ICC Court and a United States court's interpretation of these rules in an international arbitration case). See also ICC, RULES OF

however, restrict the parties' rights to disclose such information. Moreover, most rules leave the meaning of "confidential nature" unclear.

Even when institutional rules or agreements require that arbitrations remain confidential, parties are often left wondering whether courts will enforce the confidentiality provisions. Some courts have found confidentiality provisions unconscionable,⁵² or that parties have waived confidentiality requirements.⁵³ They also have pierced confidentiality provisions when a compelling government need or statutory mandate makes disclosure of information or materials necessary.⁵⁴ For example, some state statutes or court rules expressly bar enforcement of confidentiality agreements that seek to restrict public access to information affecting public health or safety.⁵⁵ Some commentators also have urged courts to vigilantly police confidentiality agreements to protect public access where the public's interest in a dispute overrides the disputants' freedom to contract for confidentiality.⁵⁶

ARBITRATION app. I at Art. 6 (2003), available at <http://www.iccwbo.org/court/english/arbitration/rules.asp> (requiring that confidentiality "must be respected by everyone who participates in that work in whatever capacity"); AMERICAN ARBITRATION ASSOCIATION, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon VI (2004), available at <http://www.adr.org/sp.asp?id=21958> (ambiguously stating that an arbitrator "should keep confidential all matters relating to the arbitration proceedings and decision," but failing to explain what this entails). But see LCIA, ARBITRATION RULES Art. 30.1 (1998) (providing that unless parties have agreed otherwise, they must keep the award and all materials prepared for arbitration confidential, except as required by law or to protect a legal right); Buys, *supra* note 2, at 126 (finding United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules provide no duty of confidentiality, but preserve privacy of hearings and awards).

52. See, e.g., *Plaskett v. Bechtel Int'l*, 243 F. Supp. 2d 334, 340-45 (D.V.I. 2003) (finding arbitration agreement with a confidentiality provision unconscionable).

53. See, e.g., *AT&T Corp. v. Pub. Serv. Enters.*, Nos. CIV. A. 99-4975, CIV. A. 99-6099, 2000 WL 387738, at *2 (E.D. Pa. Apr. 12, 2000) (dismissing breach of a confidentiality contract claim on grounds that the claimant waived the confidentiality provision to the extent it sought to use that provision in the same litigation).

54. See *Omaha Indem. Co. v. Royal Am. Managers, Inc.*, 140 F.R.D. 398, 400 (W.D. Mo. 1991) (finding that federal prosecutors could use arbitration testimony transcripts subject to the arbitrating parties' stipulation of confidentiality for impeachment in a criminal trial involving these parties); *City of Newark v. Law Dep't*, 760 N.Y.S.2d 431, 436-37 (N.Y. App. Div. 2003) (finding that an arbitration panel's confidentiality order was ineffectual to the extent it conflicted with the public's access to such information under the Freedom of Information Law).

55. See Ronald J. Hedges, *Mediation Developments & Trends*, ALI-ABA COURSE OF STUDY MATERIALS: CIVIL PRACTICE AND LITIGATION TECHNIQUES IN FEDERAL AND STATE COURTS 1485, 1521-31 (2005), available at SK042ALI-ABA1485 (Westlaw) (citing various state statutes and court rules limiting enforcement or effect of confidentiality agreements in litigation and settlement processes, but generally not addressing or allowing more enforcement with respect to private processes).

56. See Doré, *supra* note 45, at 402 (proposing courts perform such balancing in determining enforceability of confidentiality contracts); Calvin William Sharpe, *Integrity Review of Statutory Arbitration Awards*, 54 HASTINGS L.J. 311, 315-17, 353-60 (2003) (proposing a system requiring publication of arbitration awards in statutory employment claims to foster judicial review of these awards and make arbitrators more accountable to public policy requirements).

Additionally, confidentiality agreements precluding disclosure of evidence and testimony may not bar parties from publicly revealing underlying information.⁵⁷ They also will not bind witnesses and other third party attendees unless these parties agree to the confidentiality requirements. Such global confidentiality contracts are not, however, a norm in arbitration. Arbitrators rarely require that all attendees sign confidentiality agreements, and institutional arbitral rules usually do not require such agreements.⁵⁸ Furthermore, third parties often have no incentive to sign confidentiality agreements. If anything, repeat players and others with bargaining power are more likely than inexperienced individuals to consider the need, let alone have the resources, to convince third parties to sign confidentiality agreements.

Regardless of any confidentiality precautions parties may take, information regarding the proceedings may nonetheless become public.⁵⁹ Human nature drives us to talk about our experiences.⁶⁰ *Focus Europe*, for example, “ruffled feathers” in 2003 when it published information researchers gathered regarding forty arbitrations involving over \$200 million.⁶¹ It also raised eyebrows in 2005 with its publication of information it gathered regarding 130 arbitrations, which mapped “an uncharted universe” of the drama and players in “traditionally secret” arbitrations.⁶² The surveyor reported that attorneys and other players in arbitration were willing to talk about their experiences, and that information about arbitrations “often leaks out” through securities disclosures, press coverage, and arbitration or court papers. He concluded that “the momentum of public disclosure is unstoppable.”⁶³

57. *Doe 1 v. Superior Court*, 34 Cal. Rptr. 3d 248, 252–58 (Cal. Ct. App. 2005) (concluding that California law precluded disclosure of materials the Archbishop prepared for mediation, but did not bar the Church from revealing the underlying information contained in the materials).

58. AAA Commercial Arbitration rules and other similar rules do not require such agreements. See AAA, COMMERCIAL DISPUTE RESOLUTION PROCEDURES, 1499 WL 1627984, at *4 (outlining confidentiality rules). At most, some international rules mandate that arbitrators require *their* invitees to respect the confidentiality of arbitration proceedings. See ICC, RULES OF ARBITRATION, app. II at Art. 1 (2003), at 35, http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_arb_english.pdf (allowing arbitration Chairman to invite persons to attend proceedings in exceptional circumstances if these invitees respect “the confidential nature” of the proceedings).

59. See *Fahnestock & Co. v. Waltman*, No. 90 CIV. 1792 (PKL), 1990 WL 124354, at *3 (S.D.N.Y. 1990) (relying on an arbitrators’ broad discretion in rejecting a claim that disclosure of arguably privileged filings in an arbitration provided basis for vacating the award even though it was unclear whether the arbitrator properly found waiver of the privilege).

60. Reuben, *supra* note 9, at 124–25 (noting human inclination to disclose innocently arbitration information).

61. *Sneak Peek*, *supra* note 16, at 22.

62. *Id.* (emphasizing that the survey was controversial because arbitration is generally considered “secret”).

63. *Id.*

Despite these limitations of arbitration's confidentiality, its private proceedings are generally less transparent than court proceedings.⁶⁴ The press and the public may not freely attend and observe arbitration hearings, and some parties agree to various levels of secrecy. Furthermore, arbitration fosters a culture of secrecy that participants often observe even when they do not sign confidentiality agreements. Still, arbitration proceedings are not as confidential, or secret, as most assume, and this unexpected transparency may disproportionately burden those with less legal sophistication or power.

III. ACCOLADES AND ACCUSATIONS OF ARBITRATION'S PRIVACY

The public often has no interest in the resolution of others' private disputes.⁶⁵ In such cases, private and confidential arbitration may best promote flexible, efficient, and independent dispute resolution. In other cases, however, such secrecy may improperly limit public access to important information regarding unsafe, deceptive or otherwise improper corporate practices. It also may impede necessary development of clear and consistent public law.⁶⁶

A. Benefits of Privacy

1. Communal Dispute Resolution

Privacy of arbitration is especially beneficial for resolving disputes among parties who share commercial, cultural, or other communal understandings and norms. Close-knit business and cultural communities have long used arbitration systems to resolve their disputes quickly and efficiently in closed forums in accordance with private rules and local norms.⁶⁷ These communities are usually more concerned with

64. See Doré, *supra* note 45, at 285–86 (discussing how courts sanction confidentiality in ADR to promote settlement).

65. See Llewellyn Joseph Gibbons, *Private Law, Public "Justice": Another Look at Privacy, Arbitration, and Global E-Commerce*, 15 OHIO ST. J. ON DISP. RESOL. 769, 771–72 (2000) (noting reasons why secrecy is generally sanctioned in arbitration).

66. See *id.* at 769–71, 790–93 (proposing published opinions to preserve access where necessary to protect public interests in on-line ADR). Although parties' ability to contract out of all public laws through arbitration agreements is hotly debated, some have proposed that arbitrators have more incentive than judges to apply parties' privately chosen contract rules regardless of whether they comport with public law. See Drahozal, *supra* note 5, at 524–25 (exploring empirical support for parties' contracting out of all national law through arbitration contracts).

67. See COHEN, *supra* note 17, at 24–27 (noting utility of arbitration despite development of a judicial system in mercantile cases); see also James A.R. Nafziger, *Arbitration of Rights and Obligations in the International Sports Arena*, 35 VAL. U. L. REV. 357, 357–60 (2001) (noting

privacy and “saving face” than with establishing judicial precedent. In addition, procedural safeguards of the judicial system are largely unnecessary in communal disputes because the parties generally resolve disputes informally. Furthermore, they usually share understanding of applicable rules and norms, and enjoy relatively equal bargaining power.⁶⁸

Merchant and trade groups are prime examples of communities that have benefited from arbitration’s private adjudication of disputes.⁶⁹ By the early twentieth century, nearly every trade or profession had developed arbitration systems that determined intra-community disputes in accordance with local norms, standards, and rules.⁷⁰ The New York Chamber of Commerce, for example, established an arbitral regime at the Chamber’s inception in 1768.⁷¹ It even relied on arbitration’s privacy and independence to foster efficient resolution of disputes among American and British merchants during and after the American Revolutionary War.⁷²

Merchant groups also have preferred arbitrators’ equitable determinations pursuant to industry norms over courts’ legalistic judgments.⁷³ Arbitrators earn community respect and acceptance by making determinations based on field-specific knowledge and expertise.⁷⁴ Furthermore, arbitrators are not “hemmed in” by legal

communal benefits of arbitrations based on norms and standards in modern international sports arbitrations).

68. See Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. PA. L. REV. 132, 144 (1934) (noting how equitable determinations contributed to peace preservation in merchant communities).

69. *Id.* at 134–35; see also LUJO BRENTANO, ON THE HISTORY AND DEVELOPMENT OF GILDS, AND THE ORIGIN OF TRADE-UNIONS 33–39 (1870) (highlighting application of “guild law” in England during Anglo-Saxon times); Mentschikoff, *supra* note 22, at 850–52 (discussing trade association’s need for convenience and improved certainty of private arbitration systems in which arbitrators could determine disputes according to trade rules and standards, instead of murky law, especially in disputes regarding foreign trade).

70. Harry Baum & Leon Pressman, *The Enforcement of Commercial Arbitration Agreements in the Federal Courts*, 8 N.Y.U. L. Q. REV. 238, 246–47 (1930) (reporting trade associations’ use of arbitration systems).

71. William Catron Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U. L.Q. 193, 207 (1956).

72. See *id.* at 208–09 (describing how New York Chamber of Commerce arbitrations continued during British occupation in 1779, and continued to thrive after the Revolutionary War).

73. See, e.g., *id.* 211–13 (depicting prevalence of mercantile arbitrations in North America).

74. See *id.* at 161 (noting that traders dating back to the Oxyrynchus Papyri from 427 A.D. willingly accepted arbitrators’ decisions because they were based on understandings and expertise in the field). For example, construction arbitration has continually thrived since the 1800s primarily because parties value having their disputes decided by experts in the field. See *id.* at 215 (“In the case of construction contracts, it may be that the builder desired that technical disputes be decided by a technician.”).

precedents because their proceedings are private.⁷⁵ This also means arbitrators may order equitable remedies, regardless of judicial limitations.⁷⁶

In addition, arbitration's private proceedings allow parties to resolve their disputes quietly without suffering public embarrassment of litigation.⁷⁷ Trade groups may then encourage compliance with awards by threatening disclosure that could harm a non-compliant party's reputation.⁷⁸ Arbitration has gained prominence in the labor industry, for example, as a means for fostering self-government and peace preservation.⁷⁹ Similarly, the Court of Arbitration for Sport (CAS) provides the athletic community with means for resolving disputes in accordance with internal standards and customs.⁸⁰ This may include ordering equitable and creative remedies not available in court.⁸¹ CAS

75. *Id.* at 149–50.

76. *See Oregonian Ry. v. Oregon Ry. & Nav.*, 37 F. 733, 734 (C.C.D. Or. 1885) (noting remedial limitations applicable in court).

77. *See* Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1785 (2001) (noting arbitrations' utility in preserving relations in the cotton industry).

78. *See* Philip J. McConaughay, *Rethinking the Role of Law and Contracts in East-West Commercial Relationships*, 41 VA. J. INT'L L. 427, 453 (2001) (noting importance of privacy in Asian commercial arbitration, and how it may reduce "humiliation and loss of face" associated with public dispute resolution processes); Thomas J. Stipanowich, *Reconstructing Construction Law: Reality and Reform in a Transactional System*, 1998 WIS. L. REV. 463, 481 (noting how construction disputants benefit from relational values of private processes such as arbitration and mediation); *see also* Bernstein, *supra* note 77, at 1731–34 (explaining cotton industry arbitration's application of industry-specific terms and rules, and even damage measures that differ from those applied in the courts).

79. *See* *Textile Workers Union of Am. v. Lincoln Mills of Ala. Inc.*, 353 U.S. 448, 462–63 (1957) (Frankfurter, J., dissenting) (observing that judicial intervention in arbitration threatened "the going systems of self-government"). Likewise, trade associations have relied on arbitration's private and independent process. *See* Bernstein, *supra* note 77, at 1725–33 (discussing the cotton industry's creation of a private legal system (PLS) through its arbitration scheme). Although Professor Bernstein concludes that industry arbitrators have applied written trade association rules instead of field-specific norms, she emphasizes the importance of the arbitration system's privacy and independence in reducing transaction, error, legal system, and collection costs. *Id.* at 1725; *c.f.*, Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L L. 79, 81–84 (2000) (offering an empirical rejoinder in the international arbitration context to Professor Bernstein's critique of reliance on commercial norms in understanding parties' agreements).

80. The CAS, established by the International Olympic Committee (IOC) to resolve private sports-specific disputes, has been described as "a unifying institution that can help deliver sport back to its origins," and "can be the unifying body that ensures fairness and integrity in sport through sound legal control and the administration of diverse laws and philosophies." Richard H. McLaren, *The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes*, 35 VAL. U. L. REV. 379, 380–81 (2000). The CAS arbitral scheme applies through association requirements and contractual incorporation, and is based on widely accepted principles that may some day be recognized as the "*lex sportiva*." *Id.* The CAS serves communal goals in a manner similar to that of traditional merchant arbitration systems. *See supra* notes 69–72 and accompanying text (discussing growth of arbitration among merchant and trade groups).

81. *Advanced Micro Devices, Inc. v. Intel Corp.*, 885 P.2d 994, 1005 (Cal. 1994) (holding that

rules expressly encourage arbitrators to exercise their discretionary power to provide relief with an eye toward correcting injustice, even where strict application of the law would prevent just results.⁸²

Arbitration's privacy also may foster more democratic dispute resolution than parties experience through litigation by allowing disputants to build consensus in crafting rules and procedures for their given contexts.⁸³ Parties are generally free to tailor arbitration procedures in accordance with shared norms and notions of equity.⁸⁴ Increased transparency may hinder this flexibility, however, by causing arbitrators to observe more rigid court-like conventions to satisfy public expectations and ensure enforceability of awards.⁸⁵ Nonetheless, lack of transparency in arbitration may hinder democratic public participation in dispute resolution.⁸⁶

Accordingly, privacy may benefit consumers and employees with equitably strong, but legally weak, cases.⁸⁷ Arbitrators may reach past legal confines to order remedies that a court may deny.⁸⁸ Although evidence is mixed, some studies suggest that this flexibility has allowed

arbitrators may order remedies not available in court). "Were courts to reevaluate independently the merits of a particular remedy, the parties' contractual expectation of a decision according to the arbitrators' best judgment would be defeated." *Id.* at 1001.

82. *But see* McLaren, *supra* note 80, at 403–05 (recognizing that the CAS is limited by "the appropriate legal machinery"). *See also* Lindland v. U.S. Wrestling Ass'n, 230 F.3d 1036, 1037–39 (7th Cir. 2000) (ordering U.S. Wrestling to certify Lindland as its nominee for the Olympic Games in accordance with the re-wrestle ordered by an arbitrator).

83. *See* Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347, 359 (2005) (explaining how private dispute resolution processes may be "closer to direct democracy models (town meetings) than representative models").

84. *See* Mentschikoff, *supra* note 22, at 852–54 (emphasizing application of trade rules and standards in trade group arbitrations).

85. *See* Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT'L L. 53, 66–68 (2005) (explaining loss of fairness focus that results from judicialization of arbitration). While substantive review may force arbitrators to more meticulously analyze cases and apply legal rules, it also may cause arbitrators to shirk attention to cases because they view their determinations as merely advisory. In addition, non-lawyers may refuse to arbitrate reviewable arbitrations, diminishing disputants' access to valuable expert arbitrators.

86. *See* Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 LAW & CONTEMP. PROB. 279, 298–304 (2004) (discussing reasons why arbitration can be considered undemocratic).

87. *See* Harris v. Parker Coll. of Chiropractic, 286 F.3d 790, 793–94 (5th Cir. 2002) (enforcing an expanded review provision in an employment contract, but narrowly construing the clause against the employer who drafted the clause to encompass only pure questions of law and thus preserve the arbitrator's factual, equitable determination); Hughes Training Inc. v. Cook, 254 F.3d 588, 595 (5th Cir. 2001) (vacating \$200,000 arbitration award for an employee on an emotional distress claim pursuant to a clause in the arbitration agreement calling for substantive judicial review of the award).

88. *Advanced Micro Devices, Inc. v. Intel Corp.*, 885 P.2d 994, 1005 (Cal. 1994) (explaining arbitrator discretion and benefits of arbitration as a means to obtain equitable and creative relief not otherwise available in court).

employees to enjoy higher win rates in arbitration than litigation.⁸⁹ Furthermore, reports have indicated that investors may obtain more favorable results in NASD arbitrations than in court, possibly because arbitrators focus more on providing equitable outcomes than applying strict legal rules that make fraud claims particularly difficult to assert.⁹⁰ Indeed, privacy fueled courts' envy, distrust, and refusal to enforce arbitration agreements,⁹¹ and this refusal led Congress to enact the Federal Arbitration Act (FAA).⁹²

2. Promotion of Efficiency in Arbitration

Privacy also may benefit the parties by fostering faster and cheaper dispute resolution than parties experience in litigation. Everyone may save time and money when they resolve their disputes without the prolonged financial and personal strife caused by trial and judicial appeals.⁹³ In addition, arbitrators may deliver awards more quickly and

89. Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J. at 44, 45 (Nov. 2003–Jan. 2004) (finding arbitrated outcomes did not materially differ from trial outcomes in cases between employers and highly paid employees); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563–65 (2001) (compiling timing and win rate information in employment arbitration and concluding that evidence suggests that claimants win more cases in arbitration than they do in litigation); Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 808, 810 (2003) (finding data regarding arbitrated outcomes in study of employment arbitrations under AAA's fairly pro-employee rules did not reveal bias against employees); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 46–49 (1998) (finding that employees win 63% of their claims in arbitration and only 15% of their claims in litigation).

90. Gretchen Morgenson, *Why Investors May Find Arbitrators on Their Side*, N.Y. TIMES, Aug. 19, 2001, at C1. To the surprise of brokers who believed that arbitration would curb investor claims, it has been reported that arbitrators' flexibility and focus on equity has benefited some investors. *Id.* For example, an investor must prove intent on the broker's part to establish a fraud claim in federal court, while in arbitration, panels have ruled against firms for recommending poor investments to clients or for failing to supervise brokers, without requiring proof of intent to defraud. *Id.* In addition, in federal court, only investors that have bought or sold based on a broker's recommendation may sue for fraud, whereas arbitrators have allowed claims by investors that held on to stock due to an analyst's call. *Id.* Morgenson concludes that in arbitration, many claimants receive at least some portion of their demands in cases that probably would have failed in court. *Id.*

91. See ENCYCLOPEDIA OF GENERAL BUSINESS AND LEGAL FORMS 205 (Clarence F. Birdseye ed., 1924) (emphasizing common law courts' jealousy and opposition to arbitration, despite their enforcement of other contracts); Charles Newton Hulvey, *Arbitration of Commercial Disputes*, 15 VA. L. REV. 238, 238–39 (1929) (stating reasons courts did not enforce arbitration agreements).

92. 9 U.S.C. §§ 1–16 (2000); *IDS Life Ins. Co. v. SunAmerica, Inc.*, 103 F.3d 524, 528 (7th Cir. 1996) (emphasizing that the FAA represents "Congress's emphatically expressed support for facilitating arbitration in order to effectuate private ordering and lighten the caseload of the federal courts").

93. See Harry J. Dworkin, *Arbitration: An Obvious Solution to a Crowded Docket*, 29 CLEV. B. ASS'N J. 167, 167–68 (1958) (advocating binding arbitration as a means to resolve disputes in much less time than the two to three years it took from litigation commencement to trial in state and

generate lower fees and costs when they need not write reasoned opinions.⁹⁴ This is one of the efficiency benefits the Supreme Court has noted in promoting strict enforcement of arbitration agreements.⁹⁵

Increased transparency may hinder these efficiency benefits, however, by fostering "judicialized" arbitration proceedings. This occurs when arbitrators seek to protect the enforceability of their proceedings under increased scrutiny by infusing proceedings with court-like formalities, rules, and procedures.⁹⁶ Some nonetheless argue for greater review of arbitration proceedings to ensure minimal fairness of arbitration imposed on "little guys"⁹⁷ such as employees and consumers.⁹⁸ More review, however, may harm these little guys by adding to costs of arbitration, which companies may pass on to

federal courts).

94. See Christopher B. Kaczmarek, *Public Law Deserves Public Justice: Why Public Law Arbitrators Should Be Required to Issue Written, Publishable Opinions*, 4 EMP. RTS. & EMP. POL'Y J. 285, 297-99 (2000) (opinion writing adds time and costs to the arbitration process, thus commercial arbitrators generally do not write opinions).

95. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (basing pro-arbitration policy on the assumption arbitration is "usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices") (quoting H.R. REP. NO. 97-542, at 13 (1982)); *Smoothline Ltd. v. N. Am. Foreign Trading*, 249 F.3d 147, 148 (2d Cir. 2001) (emphasizing arbitration as "a speedy and relatively inexpensive trial before specialists"); *Ariz. Elec. Power Coop. v. Berkeley*, 59 F.3d 988, 992 (9th Cir. 1995) (touting efficiency and simplicity as arbitration's key benefits); *Sverdrup Corp. v. WHC Constructors, Inc.*, 989 F.2d 148, 152 (4th Cir. 1993) (same).

96. The "judicialization" of arbitration has been widely debated. Compare, e.g., Bruce M. Selya, *Arbitration Unbound?: The Legacy of McMahon*, 62 BROOK. L. REV. 1433, 1454-57 (1996) (questioning over-judicialization of securities arbitration through increased discovery, written opinions, and other added procedures) with Edward Brunet, *Toward Changing Models of Securities Arbitration*, 62 BROOK. L. REV. 1459, 1485-93 (arguing that perceived judicialization of securities arbitration would improve the process; but nonetheless indicating discomfort with directing a court to substantively review arbitration awards).

97. See Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 637 (1996) (discussing companies' inclusion of arbitration clauses in their contracts with consumers, employees, franchisees, and other "little guys").

98. See *id.* at 686-93 (suppliers generally are free to impose arbitration clauses that take advantage of consumers because consumers are unlikely to be informed about the existence or meaning of arbitration provisions); see generally Sarah Rudolph Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759 (2001) (proposing that employees likely do not expend limited resources reading, understanding, or negotiating arbitration clauses); Geraldine Szott Moohr, *Opting in or Opting Out: The New Legal Process or Arbitration*, 77 WASH. U. L.Q. 1087 (1999) (discussing unfairness of arbitration in traditionally non-merchant contexts). Concerns regarding one-sided arbitration agreements are not new, and in fact arose at common law. See IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 68-71 (1992) ("one-sided" and "mandatory" arbitration agreements raise important concerns regarding arbitration's consensuality). Again, it seems this debate would benefit from a clarified understanding of arbitration's finality under the current FAA/UAA scheme.

consumers through decreased wages/benefits or increased prices/rates.⁹⁹ Furthermore, parties with little financial resources may be unable to fund the expenses of judicialized arbitration procedures, let alone launch substantive post-award appeals.¹⁰⁰ Little guys also may be harmed when their sensitive information becomes public due to increased judicial review of arbitration proceedings. In addition, it is unclear that increased review would even lead to “better” awards.¹⁰¹ Increased scrutiny of arbitration also would impose additional costs on notoriously scant resources of courts and other public agencies.¹⁰²

B. Drawbacks of Privacy

1. Abuse of Arbitration’s “Cozy” Atmosphere

The privacy of arbitration also creates the risk that those with power will take advantage of arbitration’s “cozy” process. They may use it to intimidate opponents who are emotionally sensitive or vulnerable to the stresses of participating in a dispute resolution process. This is especially true when a party does not have legal representation or is unfamiliar with the arbitration process.

Consider, for example, the understandable emotion of a sexual harassment claimant who must assert sensitive claims in a fairly small

99. See Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 93 (2001) (attempts to make arbitration more “fair” to consumers through judicialization of proceedings often results in increased business costs that are passed on to the populace through higher prices); Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 211–13 (1998) (discussing cost savings of efficient arbitration in consumer transactions, and how savings may be passed on to consumers through lower prices and better product quality).

100. See Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813, 843 (2000) (“Non-individuals—especially corporate parties—enjoy [generally] greater access than individuals to the economic resources necessary” to “litigate with more vigor and for a longer period of time.”). A 1992 U.S. Dept. of Justice, Bureau of Justice Statistics survey of state courts indicated that involvement of non-individual defendants in litigation generally resulted in longer trials. *Id.* at 842–43. See also Theodore O. Rogers, Jr., *The Procedural Differences Between Litigation in Court and Arbitration: Who Benefits?*, 16 OHIO ST. J. ON DISP. RESOL. 633, 640 (2001) (comparing costs and benefits of arbitration and litigation in employment cases, and concluding that “[t]here are real advantages for employees in the arbitration process” but that employers may nonetheless opt for arbitration because it offers more certainty).

101. See Moohr, *supra* note 98, at 1093 (noting that substantive judicial review of arbitration may be too burdensome for non-commercial disputants); Ware, *supra* note 19, at 711–12 (discussing lack of evidence that “plaintiffs ‘do worse’ in arbitration than they would have done in court”).

102. See *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Belco Petroleum Corp.*, 88 F.3d 129, 133 (2d Cir. 1996) (emphasizing that one of arbitration’s key advantages is that it “helps to relieve crowded court dockets”); *Mobil Oil Indon. Inc. v. Asamera Oil (Indon.) Ltd.*, 372 N.E.2d 21, 23 (N.Y. 1977) (stressing that judicial intrusion in arbitration must be limited in order to conserve the time and resources of both the courts and the parties).

conference room. The claimant may have to assert and explain claims while sitting across a narrow table from the asserted harasser, who also may be the claimant's boss. In addition, traditionally flexible arbitration procedures do not provide the decorum, or "buffer," of judicial rules. Furthermore, arbitration rules generally do not require arbitrators to intercede voluntarily to protect claimants from intimidation, leaving claimants vulnerable to targeted attacks on a claimant's sensitivities. Moreover, effects of such intimidation may go unchecked by the limited judicial review the FAA allows.

A courtroom trial, in contrast, generally is open to public scrutiny and takes place in a less intimate setting. That said, courtrooms are often very intimidating, and perhaps more frightening than arbitration rooms. Judicial procedures, however, provide a "buffer" between claimants and defendants.¹⁰³ Those with sensitive claims, therefore, may prefer courts' open but protective procedures to arbitration's private process.

2. Private Opinion's Prevention of Public Access to Information

Some criticize arbitration's absence of published opinions because it impinges development of public law and the public's access to information that may affect civic interests.¹⁰⁴ Arbitrators may save time and costs by not writing reasoned opinions to explain their awards, but this also allows for privatization of the law. Naked awards also fail to provide the parties with direction regarding future behavior. Enforcement of these naked awards is generally proper, however, because arbitrators usually seek to reach just results and the parties should be bound by their contracts to forego trial for arbitration.

The lack of published opinions is nonetheless troubling with respect to discrimination, consumer protection, and other claims affecting public health or safety.¹⁰⁵ This is because published opinions benefit the public

103. For example, courts may limit the scope of discovery and medical examinations, as well as the admissibility of evidence of sexual behavior or predisposition. *See, e.g.,* *Vinson v. Superior Court*, 740 P.2d 404, 411–14 (Cal. 1987) (finding that sexual harassment claimant did not waive her right to sexual privacy by filing suit, and ordering trial court to limit scope of claimant's mental examination); Paul Nicholas Monnin, *Proving Welcomeness: The Admissibility of Evidence of Sexual History in Sexual Harassment Claims Under the 1994 Amendments to Federal Rule of Evidence 412*, 48 VAND. L. REV. 1155, 1160 (1995) (explaining how judicial rules may allow courts to limit evidence of sexual behavior or predisposition in civil and criminal proceedings).

104. *See* Moohr, *supra* note 98, at 1093–97 (claiming that judicial adjudication, in contrast to arbitration, can stimulate legal development and create public values largely because courts communicate with each other and the public through recorded opinions).

105. *See* Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 318 (1995) (arguing that arbitration denies consumers statutory protections due to limited discovery, lack of class action procedures, and absence of written opinions or other means "for transmitting data to

by aiding development of law, and providing information regarding products' safety, companies' legal violations, and other public policies. Courts' opinions become public record, and may spark further investigations and policy initiatives.¹⁰⁶ Without such exposure, manufacturers may exert influence over government agencies charged with protecting product safety and control media reporting regarding their products.¹⁰⁷ Commentators have responded that the civil justice system "is eminently equipped to expose manufacturers who manipulate and hide behind the law."¹⁰⁸

For example, the courts played an important role in exposing the inadequacy of fabric flammability standards.¹⁰⁹ The textile industry essentially controlled the development and application of weak safety regulations under the 1953 Flammable Fabrics Act.¹¹⁰ These weak regulations, in turn, allowed Riegel Textile Corporation to market its flannelette, which complied with regulations but was in fact flammable.¹¹¹ It was not until consumers prosecuted court claims regarding flammable children's clothing in the 1980s that the public became aware of the flammability regulations' inadequacies and companies' manipulations of these regulations.¹¹² Moreover, the court's published rulings for consumers on these claims publicly reprimanded the industry. The court declared that it was ordering punitive damages "to expose this type of gross misconduct, punish those manufacturers guilty of such flagrant misbehavior, and deter all manufacturers from acting with similar disregard for the public welfare."¹¹³

regulatory and enforcement agencies"); Moohr, *supra* note 98, at 1093–97 (attributing statutory prohibitions on sexual discrimination, in part, to the open processes of judicial adjudication). Some institutional rules, however, do require publication of some awards. See, e.g., Meredith W. Nissen, *Class Action Arbitrations*, DISP. RESOL. MAG., Summer 2005, at 19, 21 (explaining AAA class arbitration rules requiring that reasoned awards be made publicly available); Notice of Filing of Proposed Rule Change to Provide Written Explanations in Arbitration Awards, Exchange Act Release No. 34-52009, 70 Fed. Reg. 41,065 (July 11, 2005) (building on current NASD award publication, and proposing amendments allowing parties to require that these awards include reasoned opinions).

106. See Christopher Placitella & Justin Klein, *The Civil Justice System Bridges the Great Divide in Consumer Protection*, 43 DUQ. L. REV. 219, 223–35 (2005) (emphasizing uneven power structure in pharmaceutical cases and the need for civil litigation to protect consumer interests).

107. See *id.* at 220 (quoting Dr. David Graham, the associate Director of Science and Medicine in the FDA's Office of Drug Safety, that "[w]e are virtually defenseless" in guarding ourselves from unsafe pharmaceuticals in light of the industry's influence over the FDA and the media).

108. *Id.* at 231.

109. *Id.* at 231–33.

110. *Id.* at 232.

111. *Id.* at 232–33.

112. *Id.*

113. *Id.* at 233 (quoting *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 732 (Minn. 1980)).

If this case had been arbitrated, the dangers of flannelette may have escaped public scrutiny, especially because the product passed industry sponsored government regulations. The published opinion established manufacturers' liability, and the open trial process alerted the public of significant safety issues. This, in turn, mobilized public demand for regulatory changes and accountability. If the plaintiffs had agreed to arbitrate all claims related to the flannelette, however, there would have been no public trial with media access, and the process would have ended with no published opinion. Furthermore, arbitration rules or agreement provisions may have precluded the arbitrators and parties from disclosing information about the arbitration.

An area where arbitration's privacy has shielded access to safety information is in manufactured home ("MH") cases.¹¹⁴ MH manufacturers and lenders routinely include binding arbitration provisions in their "take-it-or-leave-it" form sales and financing contracts.¹¹⁵ Furthermore, courts' general enforcement of these arbitration provisions under the FAA¹¹⁶ has allowed MH insiders essentially to effectuate pro-industry private law.¹¹⁷ It also allows consumer claims to escape public attention, and hinders development of warranty, lending, and other consumer protection law.¹¹⁸ This is especially true because the MH industry's interest group, the Manufactured Home Institute (MHI), has controlled the Department of Housing and Urban Development's creation of MH safety standards, and MH insiders routinely include warranty limitations in their form contracts.¹¹⁹ This may allow MH insiders to impose housing rules that

114. See Amy J. Schmitz, *Mobile-Home Mania? Protecting Procedurally Fair Arbitration in a Consumer Microcosm*, 20 OHIO ST. J. ON DISP. RESOL. 291, 371 (2005) (discussing privacy in MH warranty arbitration).

115. See *id.* at 314–16 (describing prevalence of arbitration clauses and one-sided bargaining in MH transactions).

116. Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16 (2000).

117. See *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89–90 (2000) (finding MH consumer failed to meet burden of proving prohibitive arbitration costs, and therefore enforcing arbitration provision in financing contract); Schmitz, *supra* note 114, at 313–14 (explaining private lawmaking in MH contexts).

118. See, e.g., *Cunningham v. Fleetwood Homes of Ga., Inc.*, 253 F.3d 611, 613 n.1 (11th Cir. 2001) (involving broad arbitration clause in MH sales contract, covering all claims "arising out of or in any way relating" to sale of MH and negotiations leading to sale, including contract, warranty, and tort, and expressly inuring to the benefit of third parties).

119. See David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371, 410–11 (2003). See also Celeste M. Hammond, *The (Pre) (As)sumed "Consent" of Commercial Binding Arbitration Contracts: An Empirical Study of Attitudes and Expectations of Transactional Lawyers*, 36 J. MARSHALL L. REV. 589, 604–09 (2003) (discussing the "myth" of voluntariness" of pre-dispute arbitration agreements in employment and consumer contracts).

harm MH consumers and public policy promoting safe and affordable housing.¹²⁰

3. Privacy's Augmentation of Repeat Player Advantages

This lack of transparency also may augment repeat player advantages of arbitration. Powerful parties enjoy advantages in selecting arbitrators and presenting their cases.¹²¹ Corporate employers, for example, generally have legal teams that gather information about arbitrators, whereas employees often lack access to such information.¹²² Furthermore, repeat players may then augment arbitration's privacy with pro-drafter confidentiality provisions effectually to ensure that the public will not learn about claims against them. This may include violations affecting public interests, such as employment discrimination and manufacturing laws. Arbitral privacy thus saves these defendants from unfavorable public relations of trial and hinders individuals' abilities to gather evidence of habitual offenses or patterns of illegal conduct.

Moreover, federal pro-arbitration jurisprudence preempts state attempts to curb these advantages by treating arbitration differently than other contracts or otherwise hindering enforcement of arbitration.¹²³ For example, a state could not require separate notice and consent for arbitration clauses in form contracts.¹²⁴ Federal law thus permits companies to use form arbitration clauses to remove disputes against them from the public judicial system without clear consent of the other participants, let alone the public that may be affected by the disputes.¹²⁵ In this way, these companies may effectively impose their own brands of privatized justice.¹²⁶

120. Contracting communities have used arbitration as an effective tool in cultivating private law that efficiently regulates their intra-relations. See Bernstein, *supra* note 77, at 1724, 1744–45, 1785 (discussing cotton merchant community's creation of a private legal system (PLS) through which the community has succeeded in minimizing transaction, legal system, and collection costs); Snyder *supra* note 119, at 402–03 (discussing Professor Bernstein's findings regarding the diamond industry's self-regulation through arbitration). For example, cotton merchants have relied on tribunals' application of private rules and norms to promote cooperation and commercial stability and efficiency. Bernstein, *supra* note 77, at 1756.

121. See Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 218–20 (noting disproportionate benefits repeat players derive from confidentiality in arbitration).

122. *Id.*

123. Margaret L. Moses, *Privatized "Justice"*, 36 LOY. U. CHI. L.J. 535, 535–40, 546–48 (2005).

124. See *id.* at 545–47 (providing example).

125. *Id.* at 547.

126. *Id.*

Some courts have recognized these repeat player advantages in holding arbitration provisions unconscionable under general contract law.¹²⁷ In *Acorn v. Household International, Inc.*, for example, the court emphasized the repeat player advantages of arbitration in finding that AAA arbitration rules incorporated in the arbitration clauses in the claimants' loan contracts were unconscionable in part because they allowed arbitrators to hold closed hearings and required that awards be kept confidential.¹²⁸ The court concluded that such secrecy unduly favored defendants because it allowed them to prevent "the scrutiny critical to mitigating [repeat player] advantages."¹²⁹

Similarly, a court assessing another lender's arbitration form found a provision preventing disclosure of the award was not necessarily objectionable, but contributed to the overall unconscionability of the arbitration provision.¹³⁰ The court recognized that "repeat arbitration participants enjoy advantages over one-time participants" that magnify the disproportionate effects of the provision, shielding any award from public disclosure.¹³¹

The same was true with respect to the confidentiality provision the court assessed in *Ting v. AT&T*.¹³² In that case, the court found that the

127. See Randall, *supra* note 121, at 218–20 (concluding that the majority of courts find confidentiality provisions in one-sided arbitration agreements unconscionable). These courts that object to arbitration's secrecy generally do not focus solely on unconscionability of confidentiality provisions in arbitration, but note disproportionate burdens of these provisions in the context of agreements with many one-sided provisions. See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1476–77 (D.C. Cir. 1997) (noting how lack of disclosure would prevent potential claimants from gathering information about the company's patterns of statutory violations, in the course of critiquing cost, arbitrator selection, and other provisions in the arbitration agreement that favored the company over employees). Furthermore, courts split regarding *Cole's* application, and the acceptability of confidentiality and privacy in arbitration. Compare, *Parilla v. IAP Worldwide Servs. VI*, 368 F.3d 269, 271–72, 279–81 (3d Cir. 2004) (finding confidentiality provisions in employment agreement not unconscionable, and interpreting *Cole* to support its conclusion) with *Lloyd v. Hovensa L.L.C.*, 243 F. Supp. 2d 346, 350–52 (D.V.I. 2003) (citing *Cole* in holding confidentiality provision restricting publication of parties' identities unconscionable in employment context), *rev'd*, 369 F.3d 263 (3d Cir. 2004) (reversing this finding based on the *Parilla* court's finding that the AAA confidentiality and privacy rules were not unconscionable).

128. *Acorn v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1172 (N.D. Cal. 2002).

129. *Id.* Nonetheless, the court should have at least considered whether confidentiality of awards would have benefited the claimants as well by shielding any personal financial information contained in the awards. See also *Lloyd*, 243 F. Supp. 2d at 352–53 (finding restriction on publication of parties' identities unconscionable because it disproportionately favored repeat players by preventing potential plaintiffs from building cases of intentional misconduct or patterns of discrimination), *rev'd*, 369 F.3d 263, 275 (3d Cir. 2004) (reversing this finding based on *Parilla*, 368 F.3d at 279–80).

130. *Luna v. Household Fin. Corp. III*, 236 F. Supp. 2d 1166, 1180–81 (W.D. Wash. 2002).

131. *Id.* at 1181.

132. 319 F.3d 1126, 1133, 1149–52 (9th Cir. 2003). The secrecy provision stated, "[a]ny arbitration shall remain confidential. Neither you nor AT&T may disclose the existence, content or results of any arbitration or award, except as may be required by law or to confirm and enforce an award." *Id.* at 1152 n.16.

confidentiality provision in AT&T's form arbitration clause in the Consumer Services Agreement ("CSA") contributed to the clause's unconscionability because AT&T's routine use of this clause allowed it to potentially prevent seven million Californians from obtaining information regarding prior claims. This included evidence consumers would need to prove intentional misconduct or unlawful discrimination.¹³³ It also would have permitted AT&T to continue to "accumulate[] a wealth of knowledge on how to negotiate the terms of its own unilaterally crafted contract."¹³⁴

Nonetheless, many courts deny or ignore the repeat player advantages of arbitration's privacy. The United States Court of Appeals for the Third Circuit, for example, concluded that the confidentiality provisions incorporated in an employment agreement were not unconscionable.¹³⁵ Instead, the court opined that the provisions did not favor the employer or in any way impede the employee's ability to obtain relief on her Title VII claims, let alone future claimants' ability to prove such statutory claims.¹³⁶ This court thus exemplified the federal pro-arbitration and pro-privacy trend, which seems to be growing as courts happily cull their dockets.¹³⁷

IV. DISPROPORTIONATE EFFECTS OF CONFIDENTIALITY CONFUSION

Secrecy may benefit all parties in arbitration, especially in corporate disputes involving intellectual property and other business secrets. Nonetheless, misconceptions and confusion about confidentiality in arbitration may lead individuals without arbitration experience to become subject to arbitration clauses without understanding how privacy and pro-drafter confidentiality provisions may work to their disadvantage.¹³⁸ Repeat players generally draft confidentiality agreements to protect the secrecy of unfavorable claims and awards, while individuals without arbitration resources, experience, or understanding may leave their personal information vulnerable to disclosure.¹³⁹ These individuals

133. *Id.* at 1152.

134. *Id.* The court's holding may have been the impetus for AT&T re-writing its confidentiality provision. *Id.* at 1152 n.16. The court does not provide the revised confidentiality provision.

135. *Parilla v. IAP Worldwide Servs.* VI, 368 F.3d 269, 279–80 (3d Cir. 2004).

136. *Id.* at 280–82.

137. *See Moses, supra* note 123, at 546–48 (critiquing privatized justice). *See also Iberia Credit Bureau, Inc. v. Cingular Wireless L.L.C.*, 379 F.3d 159, 175–76 (5th Cir. 2004) (upholding validity of confidentiality provision requiring secrecy of existence and results of arbitration, especially in light of federal policy favoring arbitration as a trade-off of the procedures of the courtroom).

138. Randall, *supra* note 121, at 218–19.

139. *See id.* at 218–20 (discussing pro-drafter confidentiality provisions in arbitration contracts).

generally do not realize the need or have the resources to take the necessary steps to protect the confidentiality of their personal information.¹⁴⁰ In addition, these individuals generally cannot compete with corporate power to control the disclosure of information after arbitration, and may be left wishing they had contractually protected themselves.

A. *Inadequate Confidentiality Protection*

Parties may agree to confidentiality provisions in their arbitration contracts that preclude them from disclosing information about any arbitration proceedings to third parties. The scope of these confidentiality provisions varies with respect to the information and people they cover. In addition, confidentiality provisions usually extend to only those who accept them. This means witnesses and others who are not parties to an arbitration contract containing confidentiality provisions may disclose information about an arbitration proceeding unless they separately agree to keep this information secret.

Such confidentiality contracts are nonetheless rare. In one study, researchers found confidentiality provisions in only 13.5% of the arbitration clauses studied.¹⁴¹ In addition, contracting oversights and realities of uneven bargaining power often result in non-existent or inadequate confidentiality protections for individuals.¹⁴² Instead, confidentiality provisions generally benefit companies who routinely arbitrate their disputes, even when the provisions appear neutral.¹⁴³ Such repeat players draft form provisions to protect their interests, but leave individuals' sensitive information subject to disclosure.¹⁴⁴ For example, the AAA's confidentiality clause which some companies adopt neutrally prohibits disclosure of "the existence, content, or results" of

140. See Gibbons, *supra* note 65, at 772–73 (explaining that arbitral awards may develop "common law" in areas saturated by form arbitration clauses, and that repeat players may control this law if they can "selectively choose" what information to disclose about their arbitrations).

141. Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience, 67 LAW & CONTEMP. PROBS. 55, 69 (2004). The study also found that most arbitration clauses contain fairly even-handed terms, but may operate to the undue advantage of repeat players. *Id.* at 72–73.

142. See, e.g., Randall, *supra* note 121, at 218–20 (discussing one-sided nature of disclosure provisions).

143. *Id.* See also Demaine & Hensler, *supra* note 141, at 71–73 (finding that even if consumer arbitration contracts appear to contain fair terms, this is often deceptive because limited discovery, claim carve-outs, cost-splitting, and other facially neutral provisions generally disadvantage consumers who enter the arbitration process without legal experience or resources).

144. See Gibbons, *supra* note 65, at 780–83 (emphasizing the growing use of arbitration clauses in form contracts involving disparate power relationships in online contracting).

arbitration,¹⁴⁵ but neglects to clearly protect confidentiality of individuals' personal information revealed during the proceedings. Moreover, the clause would not prevent attendees at the arbitration from reporting their experiences.

Similarly, one large lender's form arbitration clause required the parties to keep any award confidential, but did not ensure that a borrower's financial information revealed in arbitration would remain secret.¹⁴⁶ The clause also augmented the lender's repeat player advantages by barring class actions or consolidation, preserving the lender's rights to seek judicial foreclosure, and creating the risk that a borrower's arbitration costs would be at least ten times those of a court proceeding.¹⁴⁷

One-time participants are unlikely to have the experience or resources to effectively negotiate for terms protecting their confidentiality interests in arbitration.¹⁴⁸ Consumers, for example, generally do not realize what rights they have waived through an arbitration clause until after a dispute arises.¹⁴⁹ They also may assume their personal information is automatically confidential, and are unlikely to understand how pro-drafter confidentiality terms may impact issues affecting the public's interests. For example, individuals' personal financial information may be revealed in an arbitration involving securities or debt, and thus become subject to unwanted disclosure. The same may be true for an employee who must reveal sensitive information during arbitration of a sexual harassment claim.

Furthermore, these claimants should not assume that arbitrators will use their evidentiary or procedural powers to preclude admissibility or protect confidentiality of such information. Instead, arbitrators generally have wide discretion in deciding admissibility of evidence, and failure to apply a claimed privilege will rarely provide grounds for vacating an arbitration award.¹⁵⁰ In addition, standard arbitration contracts often

145. DRAHOZAL, *supra* note 14, at 425.

146. Luna v. Household Fin. Corp. III, 236 F. Supp. 2d 1166, 1171-72, 1178-82 (W.D. Wash. 2002).

147. *Id.* at 1172, 1178-82.

148. See Gibbons, *supra* note 65, at 780-81 (noting reasons why consumers generally do not realize the significance of arbitration clauses, especially when the clauses incorporate institutional rules by reference); Demaine & Hensler, *supra* note 141, at 73-74 (concluding from a study of arbitration clauses that consumers generally become bound by arbitration agreements without truly "agreeing" to them).

149. Demaine & Hensler, *supra* note 141, at 73-74 (emphasizing that consumers lack information and experience to appreciate the rights they have waived in pre-dispute contracts).

150. See Rhoades v. United States, 953 F. Supp. 203, 205 (S.D. Ohio 1996) (noting how the arbitrator overruled Rhoades's claim that her medical records were protected by doctor-patient privilege); Chiarella v. Viscount Indus., No. 92 Civ. 9310 (RPP), 1993 WL 497967, at *2, *4

affirm arbitrators' power to conduct hearings and admit evidence as they deem appropriate, and do not require compliance with evidentiary and privilege rules applicable in court.¹⁵¹ Accordingly, individuals should not passively assume that their personal information is safe from disclosure.

B. Disproportionate Publicity Regarding Arbitration

The public usually learns very little about arbitrated cases because any arbitration awards that may become public during judicial confirmation proceedings generally state nothing more than claim denials or dollar amounts due.¹⁵² Some companies have therefore used arbitration's privacy to prevent disclosure regarding consumer protection violations, smarmy financial dealings, or other unsavory conduct.¹⁵³ *Focus Europe* reporters found in their survey of international contract and treaty arbitrations that a peek inside arbitrations revealed corruption, bribery, and other bad acts. One reporter concluded, "[t]o open a window on arbitration is to shed light on the good, the bad, and the ugly in international business."¹⁵⁴

Nonetheless, when information about arbitrated cases becomes public, it tends to favor more powerful parties. This is because companies with well-staffed public relations departments may selectively issue press releases emphasizing their arbitration victories, and otherwise casting arbitration outcomes to favor their positions.¹⁵⁵ This may encourage arbitrators to follow these pro-company awards in future proceedings, and dissuade injured parties from pursuing claims against these powerful companies. There is usually little to counter pro-

(S.D.N.Y. Dec. 1, 1993) (rejecting Chiarella's challenge of an arbitration award on the basis that the arbitrators improperly rejected ordering in camera review of allegedly privileged documents, finding that this was "arguably within the arbitrators' powers"), *modified on other grounds*, 1994 WL 116010 (S.D.N.Y. Mar. 28, 1994). *But see* Richard M. Mosk & Tom Ginsburg, *Evidentiary Privileges in International Arbitration*, 50 INT'L & COMP. L.Q. 345, 345-46, 381-83 (2001) (acknowledging that evidentiary rules generally do not apply in arbitration, but arguing that international arbitrators usually should accede to good faith claims of privilege valid under the law of the locale with the closest connection to the case).

151. See LAWRENCE R. AHERN III & NANCY F. MACLEAN, WEST'S LEGAL FORMS §13.13 (2d ed. 1994) (providing arbitration form suggesting such affirmation of broad arbitrator power, but no confidentiality protection for individuals' personal information).

152. Budnitz, *supra* note 105, at 313 (explaining how "the most that a successful consumer can report to the press is an award of X dollars," which lacks the effects of a reasoned opinion).

153. See Gibbons, *supra* note 65, at 783 (noting courts' limited understanding of the extent of repeat player advantages).

154. *Sneak Peek*, *supra* note 16, at 25 (reporting bad cases of bribery with respect to contracts involving projects in developing nations).

155. *Id.* (emphasizing that consumers usually lack the sophistication and resources needed to spark press publication of stories about their arbitrated cases).

company press, however, due to individuals' lack of organizational, financial or political clout to publicize their views of arbitrated cases.¹⁵⁶

For example, *PR Newswire* published Knight Trading Group, Inc.'s press release announcing a NASD arbitration panel's dismissal of an employee's improper termination and "whistleblower" claims against his employer, Knight Securities, L.P. (KSLP).¹⁵⁷ The former employee alleged that KSLP had deceitfully traded stock and fired him for asserting these allegations. Notably, *PR Newswire's* published report stated that KSLP expected that it would be "vindicated," and touted the corporation's "client-focused strategies" and "comprehensive trade execution services in equities and derivatives."¹⁵⁸ The report emphasized the NASD's arbitral award as a final and effectually non-reviewable victory for KSLP, only mentioning as an aside that the award required KSLP to pay the former employee \$19,101.00 it owed him for 2000.¹⁵⁹

C. Policy Effects of Faulty Assumptions About Arbitration's Secrecy

Arbitration supporters and critics often advance shortsighted policies based on rushed conclusions about arbitral secrecy. Many arbitration supporters assume that restrictions on arbitration's privacy would impede the use of arbitration, and its promise for providing more efficient dispute resolution than trials provide.¹⁶⁰ They also defend arbitral secrecy as being no different than secrecy in mediation and settlement negotiations.¹⁶¹

Meanwhile, many critics of arbitration target arbitral secrecy as merely means for repeat players to hide their legal problems from the

156. For example, *PR Newswire* published Nymox Pharmaceutical Corporation's favorable statement regarding its settlement of securities claims being arbitrated and litigated, but there was no claimant response or less favorable account of the settlement. See *Nymox Announces Positive Settlements of Outstanding Litigation*, BUS. WIRE, Aug. 12, 2004, LEXIS, Nexis Library, BWIRE File (publishing Nymox Pharmaceutical Corp.'s press release announcing its settlement of judicial and arbitral claims asserted against the company and its plan to pursue its "many promising product development programs"). A search for "nymox w/30 arbitra! AND date (geq (8/1/04) and leq (8/31/04))" in the Lexis database, "News, Most Recent Two Years (English, Full Text)" revealed no other reports. See search conducted on July 14, 2005, by David Blower, research assistant to Amy Schmitz, on file with author.

157. See *Knight Announces Successful Conclusions of Dispute Resolution Arbitration With Former Employee*, PR NEWSWIRE, Sept. 23, 2004, LEXIS, Nexis Library, PRNEWS File [hereinafter *Knight Press Release*] (publishing press release verbatim). See also Ann Davis, *Knight Trading Wins Dismissal of Case Involving Whistle-Blower*, WALL ST. J., Sept. 24, 2004, at C3 (providing KSLP's remarks, but including some comment by the employee).

158. *Id.*

159. *Id.*

160. See Rabinovich-Einy, *supra* note 11, at ¶¶ 70–75 (discussing alleged justifications for arbitration's privacy).

161. Randall, *supra* note 121, at 220–21.

public and future claimants. Some courts also subscribe to this view, and seem to overlook how confidentiality may benefit individuals. In the *Ting* case discussed above,¹⁶² for example, some consumer claimants may have benefited from the confidentiality provision to the extent its protection of “content” of arbitration may have prevented anyone involved from using or otherwise disclosing consumers’ financial or other personal information.¹⁶³ Furthermore, some sexual harassment claimants, and others with sensitive claims, would not assert those claims without ensured arbitral secrecy.¹⁶⁴

In reality, secrecy does not necessarily exist in arbitration and not all secrecy is “good” or “bad” for anyone. Instead, parties must draft contracts and policymakers must develop arbitration reforms that take into account how secrecy can help and harm all parties, as well as the public. Individuals should be concerned with confidentiality of their personal information. With expansion of technology, growth of corporate use of personal information, and epidemic identity theft, individuals must be careful to ensure the secrecy of their personal information revealed in presenting arbitration claims and proving damages. The debate regarding secrecy in arbitration, therefore, must include consideration of how confidentiality may protect these vulnerable parties.

In addition, policymakers should consider the different roles confidentiality plays in arbitration versus mediation, negotiation, and other non-binding dispute resolution processes. There are good reasons why these non-binding processes are generally more confidential than arbitration. These processes only end disputes if the parties reach settlements, whereas binding arbitration necessarily ends the parties’ disputes and thus *replaces* trials.¹⁶⁵ Laws and administrative rules generally protect confidentiality of non-binding processes because it promotes candor, and therefore efficacy, of these processes. Without this protection, parties to non-binding processes may hold back information out of concern that the information will be disclosed or used in trial. Arbitrating parties, in contrast, have incentive to present all relevant

162. See *supra* text accompanying notes 132–34.

163. Perhaps the secrecy provision would not have had that effect, but the court should have at least considered the consumers’ interests in confidentiality and the possibility of balancing the provision.

164. See Rabinovich-Einy, *supra* note 11, at ¶ 71 (noting pros of arbitration’s privacy).

165. Randall, *supra* note 121, at 220–21. See also, e.g., *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1304–05 (9th Cir. 1994) (finding sexual harassment claimant did not have to arbitrate her claims under an arbitration clause in her employment contract because remedies and procedural protections, including privacy rights of sexual harassment victims under California judicial rules, would not necessarily apply in arbitration).

information to the arbitrators because they know it is their only shot in presenting their cases.

Complete secrecy is therefore not as essential in arbitration as it is in non-binding processes. Instead, arbitral secrecy may go too far in precluding the public from access to information affecting health, safety, and other important policies. The same may be true for private settlement agreements.¹⁶⁶ However, secrecy of awards may be more problematic because arbitrating parties generally waive public law and procedures pursuant to *pre-dispute* contracts, at a time when they likely lack experience or information to realize the effects of arbitration.¹⁶⁷ In contrast, parties to settlement agreements enjoy more consent and control in resolution processes leading to their *post-dispute* settlements.

Accordingly, it may be appropriate to require publication of arbitration awards affecting areas of public concern, even if the same may not be true for settlements. At the least, the public should have access to a limited amount of information about arbitration proceedings affecting health or safety.¹⁶⁸ For example, public disclosure and published opinions may be warranted in the flammable fabrics and MH warranties cases discussed above.¹⁶⁹

That does not mean arbitration should be fully transparent. Again, arbitrating parties often desire and benefit from privacy of arbitration proceedings, and may be wise to decrease arbitral transparency through confidentiality agreements.¹⁷⁰ The problem is that current confusion regarding arbitration's secrecy has hindered parties' and policymakers' appreciation of the tensions raised by the privacy paradox.

V. TWO-PRONGED POLICY TO ADDRESS TENSIONS OF THE PRIVACY PARADOX

This Article calls for awareness of the privacy paradox and the complex tensions it raises for policymakers considering the proper role of transparency in arbitration. The Article also seeks to spark textured debate for transparency reforms by offering a two-prong reform for both increased and decreased arbitral transparency: (1) increase transparency

166. Arbitration awards may be more transparent than settlements when awards become public during judicial confirmation or challenges, although settlement contracts may also become public during litigation regarding their enforcement.

167. See *supra* notes 121–37, and accompanying text (discussing repeat player advantages).

168. See *supra* notes 26–33 and accompanying text (discussing privatization of law).

169. See *supra* notes 109–13 and accompanying text (discussing the role of litigation in airing dangers of flannelette and the inadequacies of fabric flammability regulations).

170. See *supra* notes 67–101 and accompanying text (discussing the benefits of privacy and confidentiality agreements in arbitration).

by requiring published awards and reports in cases affecting public rights and interests; but (2) decrease transparency by requiring confidentiality of individuals' personal information revealed during arbitration. The Article, therefore, cautions contracting parties and policymakers to consider not only the public's interest in accessing arbitration information, but also individuals' interests in protecting the confidentiality of sensitive information revealed in arbitration. This recognizes, however, that more empirical research is necessary regarding parties' needs and experiences regarding arbitral confidentiality.¹⁷¹ Current surveys of arbitration satisfaction provide only surface replies with respect to confidentiality.¹⁷²

A. Means for Facilitating Two-Pronged Policy

An initial inquiry in crafting transparency policy is to determine *how* such policy should evolve: through contract drafting, revision of institutional arbitral rules, or development of legislative mandates? Arbitration is a matter of contract, and therefore it would be ideal if parties protected their own and the public's interests in their individual bargains. Bargaining realities, however, often prevent individuals from negotiating confidentiality provisions in arbitration contracts. Moreover, the public generally has no say in parties' private agreements. Legislative or administrative rules may therefore be warranted to increase access to information affecting important public interests without jeopardizing arbitrating parties' legitimate secrecy needs.

1. Contractual Creation

a. Directly in Parties' Contracts

Parties to a pre-dispute contract containing an arbitration clause often do not invest time or resources in negotiating privacy and confidentiality

171. Researchers have reported limited surveys of parties' satisfaction with arbitration. *See, e.g.*, HARRIS INTERACTIVE, ARBITRATION: SIMPLER, CHEAPER, AND FASTER THAN LITIGATION (2005), available at <http://www.instituteforlegalreform.com/resources/ArbitrationStudyFinal.pdf> (reporting U.S. Chamber Institute for Legal Reform commissioned survey of participants' views of arbitration). These surveys generally focus on overall satisfaction with speed, cost, and fairness of the process and researchers broadly ask "were you very, moderately, or not satisfied with . . ." questions. *Id.* at 22–29.

172. For example, in a recent survey of 609 arbitration participants, seventy-nine percent of the respondents checked "very satisfied" or "moderately satisfied" when asked "[h]ow [they] would rate . . . the confidentiality of the process" in an online survey. *Id.* at 27. This reveals very little, however, because most of the respondents agreed to arbitrate *after* disputes arose, the claims were not in sensitive areas, and the question did not define confidentiality. *Id.* at 9, 12, 27.

rules for possible proceedings. This generally is efficient because there is no reason for these parties to waste resources wrangling over details of future arbitration proceedings they never expect to pursue.¹⁷³ When arbitration contracts include such rules, however, they tend to favor corporate parties who draft rules to protect the privacy of their business secrets and arbitration results. In contrast, consumers and employees who become subject to form arbitration provisions usually lack the arbitration experience or resources to comprehend the significance of an arbitration clause, let alone their need to contractually protect confidentiality of their personal information.

Accordingly, it is unlikely that transparency reforms will occur solely through parties' contract negotiations. Companies generally lack incentive to draft their form contracts to require publication of awards revealing their statutory violations or other misconduct.¹⁷⁴ Individuals usually lack resources or experience to successfully negotiating for contract provisions protecting the confidentiality of their sensitive information.

b. Incorporated Through Institutional Arbitration Rules

Institutional or administrative arbitration rules apply when parties incorporate them in their contracts. In other words, these rules may become contract terms by reference. Accordingly, arbitral institutions could reform their rules to expressly cover confidentiality and transparency. This would save contracting parties from having to invest their resources to draft these provisions. It also may foster rules with balanced concern for the interests of all involved in arbitration because bargaining and resource imbalances may play less of a role in development of institutional rules than in parties' contractual negotiations.

Some arbitral institutions have already promulgated transparency rules to foster goodwill. For example, the NASD sought to boost its image by requiring that written awards be provided to the parties and public in its arbitrations.¹⁷⁵ In addition, the NASD recently has proposed

173. See Tarek F. Abdalla, *Litigation vs. Arbitration: Which Is Better for the Commercial Dispute?*, PRAC. LITIGATOR, Sept. 2005, at 47, 51, 52 (seeming to assume arbitration is both confidential and private, and failing to suggest that parties expressly protect confidentiality of arbitration information in their agreements).

174. This may be unfair. Furthermore, securities law may require companies to reveal information regarding their legal scuffles in certain public filings.

175. NASD CODE OF ARBITRATION PROCEDURE 10330 (Nat'l Ass'n of Sec. Dealers 2005), available at <http://nasd.complinet.com/nasd/display/display.html>.

rules to allow customers and associated persons in industry controversies to require arbitrators to issue these awards with reasoned opinions.¹⁷⁶

NASD arbitration, however, is more transparent than purely private arbitration because the Securities and Exchange Commission (SEC) enjoys regulatory authority over its proceedings. Most institutions that administer arbitrations under parties' private agreements take no position on whether parties should agree to keep information regarding their cases confidential.¹⁷⁷ They also may be reluctant to embrace the time-consuming and possibly contentious tasks of developing transparency rules and publishing awards in a systematic manner. Moreover, some administering institutions would be hesitant to risk losing repeat clientele by requiring disclosure of awards. Such rules may cause repeat players to avoid these institutions or reform their arbitration contracts to require ad hoc administration.

2. Legislative Regulations

Again, it may be difficult for parties to draft and mutually accept transparency provisions that appropriately protect all parties, as well as the public's interests in access to information. Employers and manufacturers usually do not voluntarily publish arbitration awards that indicate statutory violations, and all disputants do not enjoy equal access and power in the press. Furthermore, arbitral institutions are unlikely to act in unison to develop and implement uniform transparency reforms. Accordingly, legislative regulations may be necessary to foster reforms that minimize perils of the privacy paradox.

Legislative creation of transparency reforms would not be a simple task. Legislators who draft such reforms would have to consider tensions between contract freedom and fair access to information in light of the textured interests of contracting parties as well as the public. Nonetheless, legislators hopefully would pursue that task with balanced concerns and understandings.¹⁷⁸ Furthermore, consumer groups

176. NASD Notice of Filing of Proposed Rule Change, Release No. 34-52009 70 Fed. Reg. 41,065 (July 15, 2005).

177. See American Arbitration Ass'n, *Statement of Ethical Principles for the American Arbitration Association, an ADR Provider Organization*, <http://www.adr.org/sp.asp?id=22036> (last visited Jan. 31, 2006) (stating that although "AAA staff and neutrals have an ethical obligation to keep information confidential, the AAA takes no position on whether parties should or should not agree to keep the proceeding and award confidential between themselves"). Note also that NASD may be different because it is a self-regulatory agency that must act pursuant to the Securities and Exchange Act of 1934 and federal directives of the SEC geared to protect customers from securities fraud.

178. This is admittedly an optimistic view.

generally have more access and opportunity to impact statutory drafting than corporate crafting. Corporations do not hold open hearings to gather input regarding their form contracts. Instead, they are free to fashion forms to serve their business interests.¹⁷⁹

Legislative rules also allow for greater scope by extending to not only parties to an arbitration agreement, but also arbitrators and other third parties who participate in arbitration proceedings. Confidentiality provisions in an arbitration agreement do not bind non-parties to the agreement. Furthermore, these non-parties generally have no incentive to sign provisions protecting confidentiality of arbitrating parties' personal information.¹⁸⁰

State legislatures may be best suited to promulgate such transparency and confidentiality rules due to their likely understanding of local contract law. The FAA may preempt such state rules, however, in light of the Supreme Court's insistence that the FAA preempts any state laws that single out arbitration agreements for special treatment or otherwise hinder enforcement of arbitration. Accordingly, the FAA may preempt state rules requiring publication of awards or confidentiality protections that differ from parties' agreements or seem to conflict with FAA pro-arbitration policy. Nonetheless, such rules may pass preemption analysis if they are promulgated as default standards parties could vary by contract. Furthermore, it seems such rules would actually promote arbitration by boosting its legitimacy, and therefore its use and acceptance.¹⁸¹

B. Promotion of Transparency and Protection of Secrecy

This is not the first Article to suggest publication of arbitration awards.¹⁸² It is unique, however, in its recognition of the confusion regarding the differing aspects of confidentiality and privacy in arbitration, and the underappreciated effects of this confusion. To untangle this confusion and its impact, this Article proposes *both* limited publication of arbitration awards affecting important public interests *and* default rules that protect the confidentiality of individuals' sensitive personal information revealed in arbitration. In some cases, this may

179. See Drahozal, *supra* note 7, at 741, 764 (explaining how companies may share cost savings of their arbitration programs with individuals).

180. See *supra* notes 138–41 and accompanying text (discussing confusion and assumptions regarding arbitration's confidentiality and lopsided protections).

181. There are other arguments for how state legislatures may avoid preemption problems. Broader discussion of preemption, however, is beyond the scope of this Article.

182. See, e.g., Gibbons, *supra* note 65, at 784–93 (proposing publication of e-arbitration awards in cyberspace where the public has an interest in interpretation and enforcement of the contract).

warrant publication of an arbitration report with careful extraction of individuals' personal information the public has no right or need to know. Furthermore, it may justify injunctive relief or sanctions to enforce rules precluding nonconsensual disclosure or use of one's personal information.

1. Publication of Arbitration Reports in Cases Affecting Important Public Interests

Arbitration proceedings and awards should generally remain private. Hearings should remain closed to uninvited third parties, and all awards need not become public.¹⁸³ This privacy is a benefit of arbitration, and may foster arbitration's efficiency, flexibility, and equity.¹⁸⁴ It also may promote candor and non-adversarial relational mending.¹⁸⁵ Contractual liberty also warns against transparency rules that unduly intrude on parties' contract choices. Accordingly, any rules requiring publication of awards should be limited with respect to types of cases covered, substantive writing requirements, and means for publishing these awards.

Such publication rules should therefore cover only cases affecting important public interests, such as those involving health or safety.¹⁸⁶ These are usually the cases in which public interests in transparency prevail over private secrecy interests. They also are generally statutory claim cases in which establishing precedent and informing the public are most important. In addition, although tort, contract, and other non-statutory claims may impact public issues, they often are accompanied by statutory claims. Moreover, it would likely create litigation and confusion to require courts or arbitrators to determine on a case-by-case basis when arbitrations impact "public interests."

Accordingly, a good option would be to require publication of arbitration reports in cases involving a stated list of statutory claims that most impact health and safety. A legislative or administrative task force could clarify this list to include discrimination, consumer protection, corruption, and fraud statutes.¹⁸⁷ The list also could include cases

183. See also Sternlight, *supra* note 6, at 1673–74 (concluding that "[p]rivate 'justice' is truly problematic" because it impedes enforcement of societal norms and equal treatment, but noting how all societies do not feature public trials or precedent and all disputes need not be decided publicly).

184. See *supra* notes 164–65 and accompanying text (discussing pros of privacy in arbitration).

185. See *supra* notes 43–44 and accompanying text (discussing relational benefits of ADR privacy).

186. Similarly, the public import of class arbitrations led the AAA to require that awards in these arbitrations be made publicly available. See, e.g., Nissen, *supra* note 105, at 21 (explaining AAA class arbitration rules requiring that reasoned awards be made publicly available).

187. Of course, this is no easy task, and it could be difficult to determine the authority or make-

involving disputes arising from contracts created over the Internet.¹⁸⁸ This likely would capture most cases of public import, and would be less costly than requiring publication in all statutory claim cases. It also would minimize confusion and inefficiencies of requiring case-by-case determinations of when publication is required.

Publication rules also could minimize inefficiencies by limiting the substance of reports. Published reports could be limited to the identity of the parties and arbitrators, arbitrator and administrative fees, hearings and disposition dates, a brief description of the claims, and a statement of results. For example, California requires arbitral institutions to publish such basic arbitration reports in consumer cases.¹⁸⁹ Similarly, the NASD requires publication of such basic awards in its arbitrations.¹⁹⁰ The NASD also has proposed rules allowing a party to require that arbitrators briefly state fact-based reasons for their conclusions.¹⁹¹ This requirement would be limited, however, in that arbitrators would not have to provide legal authorities or specific damage calculations, and a party would have to alert arbitrators of a request for reasons at least twenty days in advance of hearings to provide arbitrators with proper warning and an opportunity to decline appointment if they feel unable to comply with a request.¹⁹²

Such limited reports may not further the development of the law to the extent of reasoned and publicly reported judicial opinions, but they would provide more public information and signaling benefits than purely private awards or settlement agreements. Indeed, only two percent of cases make it through trial, and very few cases become

up of this committee. However, a legislative task force could include representatives from all affected groups to build acceptance and limit inefficiencies of on-going battles regarding what claims require published reports.

188. See, e.g., Gibbons, *supra* note 65, at 771–72, 784–93 (examining the role of privacy in online arbitration and proposing publication rules aimed to increase transparency of “the process, the award, and the reasoning behind the award” to establish the legitimacy and fairness of such arbitration); Lucille M. Ponte, *Broadening Traditional ADR Notions of Disclosure: Special Considerations for Posting Conflict Resolution Policies and Programs on E-Business Web Sites*, 17 OHIO ST. J. ON DISP. RESOL. 321, 321–24, 338–39 (2002) (discussing growth and popularity of on-line dispute resolution programs and proposing that e-businesses be required to disclose existence, costs, and other information regarding these programs to properly inform consumers and increase credibility of these programs).

189. CAL. CIV. PROC. CODE § 1281.96 (Deering 2005) (requiring at least quarterly publication of consumer arbitration reports that include the name of the nonconsumer party, type of dispute, prevailing party, how many times the nonconsumer has been party to such arbitration, whether the consumer was represented by an attorney, dates of arbitral events, disposition, amount of claim and award, names of arbitrators, fees, and percentage of fees allocated to each party).

190. Notice of Filing of Proposed Rule Change, *supra* note 105.

191. *Id.*

192. *Id.* In addition, the NASD rules do not allow parties to require statements of reasons in abbreviated arbitrations decided on the pleadings or conducted under default procedures. *Id.*

subjects of judicial opinions.¹⁹³ Furthermore, the growing competition among arbitrators may give arbitrators incentives to publish quality opinions to signal their knowledge and expertise in an area.¹⁹⁴ Nonetheless, publication rules should balance need for legal development and public access with maintenance of arbitral efficiencies, and should not lead quality arbitrators, especially non-attorneys, to leave the arbitrator market.¹⁹⁵

In addition, rules could allow for minimal supplemental compensation for arbitrators in cases requiring reasoned awards. For example, NASD's recent proposal allows arbitrators required to write reasoned opinions to earn an extra \$200, which the NASD and arbitrating parties would split.¹⁹⁶ This works well where NASD arbitrators earn flat fees per hearing, but parties may have to pay additional costs measured by arbitrators' time spent writing reports where parties must pay arbitrators on an hourly basis. Nonetheless, some arbitral institutions may agree to bear all or most additional costs of publication to foster goodwill and improve public perception of their processes.¹⁹⁷ They also may roll report and publication costs into administrative fees, and may allocate the fees to parties based on ability to pay.¹⁹⁸ In ad hoc arbitrations, the parties most likely would have to split report and publication costs, unless they agree otherwise in their arbitration agreements.

Policymakers also should consider efficiencies and burden allocations in determining responsibility and means for gathering and publishing these awards. Publication requires human and economic resources, and the government may not be best situated for the job. Instead, arbitrators or arbitration administering institutions likely would

193. See Boyd N. Boland, *Most Cases Settle: The "Vanishing Trial" from the Perspective of a Settlement Judge*, TRIAL TALK June/July, 2005 at 15 (noting that nationally, the likelihood that a case will go through trial is less than two percent). Settlement impedes development of the law to a much greater extent than arbitration, which has led some judges to lament the lack of trials. See *id.* at 17 (Judge Higginbotham noting that trials are necessary to clarify normative legal standards).

194. Drahozal, *supra* note 5, at 550.

195. Restrictions on requiring legal authorities or intricate calculations should ease these concerns.

196. Notice of Filing of Proposed Rule Change, *supra* note 105, at 5.

197. See *infra* note 202 and accompanying text (access to some AAA redacted awards available for a relatively low fee).

198. It is nonetheless unclear how the AAA allocates costs of arbitrators' time writing reports in employment disputes, and whether the AAA folds publication costs into employment administrative fees. National Rules for the Resolution of Employment Disputes, 34 & 40 (AAA 2005) (failing to state arbitrators' compensation or how report costs are allocated). Additionally, the employer pays filing and hearing fees over the \$125 paid by the employee, and these fees range from \$750 to \$10,000 depending on the amount of the claim, plus \$300–\$500 per day for hearings. National Rules for the Resolution of Employment Disputes, Administrative Fee Schedule (AAA 2005).

be responsible for making these reports public in a systematic manner. This seems appropriate because they likely would have the means and resources to accomplish this task efficiently through use of the Internet.

For example, California requires arbitration administrators to make their consumer arbitration reports available to the public for free over the Internet, but allows them to charge a fee for paper copies of these reports.¹⁹⁹ In addition, NASD publishes reports from its arbitrations on the Internet.²⁰⁰ Similarly, the AAA makes redacted versions of its employment awards electronically available to the public for a fairly low fee of \$100 for a one-year subscription.²⁰¹ The aim should be to make arbitration reports as accessible to common individuals as they are to repeat players and other sophisticated parties, without overly adding to formalities and costs of arbitration to the award database.²⁰²

There are many questions and options that must be explored and debated.²⁰³ Determining what, when, and how to publish arbitration awards merely scrapes the tip of the issue iceberg. Furthermore, publication is not without costs, both in terms of resources and impacts on private dispute resolution values. Public law, legitimacy, and fairness values, however, justify these costs in statutory areas of particular public concern.

2. Preservation of Confidentiality to Protect Personal and Proprietary Information

While increased transparency may be warranted with respect to arbitration awards affecting public issues, decreased transparency may be necessary to protect individuals from unwanted disclosure or use of their personal information revealed in arbitration. It also may be beneficial to

199. CAL. CIV. PROC. CODE § 1281.96 (Deering 2005).

200. See Press Release, Nat'l Ass'n of Sec. Dealers, NASD Dispute Resolution to Provide Arbitration Awards Online (May 10, 2001), available at <http://www.nasd.com/> (type: "NASD Dispute Resolution to Provide Arbitration Awards Online" into the 'search' box, then click on the first available article) (stating how NASD worked with the Securities Arbitration Commentator to make awards readily accessible online and maintain the library of awards).

201. AAA Employment Awards Database, <http://www.adr.org/AAA Awards> (last visited Feb. 3, 2006) (providing access to redacted awards from AAA employment arbitrations filed after January 1, 1999 for a yearly fee of \$100, but allowing access to a sample award for free at, <http://www.adr.org/AAA Awards/Docs/exampleaward.pdf> (last visited Feb. 3, 2006)).

202. See, e.g., *Fernandez v. Citigroup Global Mkts.*, No. 03-05011, 2005 WL 782876 (N.A.S.D. Mar. 22, 2005) (Sasnett-Stauffer, Arb.), available at <http://scan.cch.com/aad/200503/03-05011.pdf> (exemplifying an electronically published opinion, including basic but informative party, case, issue, outcome, and remedy information).

203. See Sternlight, *supra* note 6, at 1658–61 (emphasizing that some disputes regarding arbitration “cry out for empirical studies,” but such research is difficult because arbitration is private).

protect business secrets. This does not mean courts should disregard confidentiality provisions in parties' arbitration agreements.²⁰⁴ Instead, the aim should be to develop default confidentiality protections parties likely would approve in a hypothetical bargain.

As discussed above, parties without resources or arbitration experience generally do not protect their confidentiality interests. For example, consumers usually accept pre-dispute arbitration clauses in their contracts without considering that they may need to protect confidentiality of their financial, medical, and other personal information revealed during any future arbitration. Additionally, although some companies contractually protect their business secrets, others neglect to do so in their arbitration agreements. In such cases, default rules requiring confidentiality of personal information and business secrets likely would mimic what the parties would have negotiated had they had the necessary experience and opportunity to do so.

Such confidentiality protection is not unprecedented. Policymakers have recognized businesses' and individuals' legitimate confidentiality interests in crafting evidentiary rules and privileges geared to protect sensitive information from unwanted disclosure in litigation.²⁰⁵ For example, evidentiary rules applicable in court preclude admissibility of evidence of sexual behavior and settlement negotiations unless the need for the evidence substantially outweighs the risk that disclosure will harm a claimant or unfairly prejudice a party.²⁰⁶ Privilege rules also may preclude disclosure or admissibility of communications arising in fiduciary or other protected relational contexts. For example, a

204. See Gibbons, *supra* note 65, at 790–91 (courts should honor parties' confidentiality agreements unless the court finds competing public interests in disclosure). Courts should be vigilant in analyzing the enforceability of these agreements under contract law and should resist the urge to quickly dismiss disfavored defenses such as duress and unconscionability.

205. Although arbitrators may apply similar restrictions on information in exercising their discretion regarding evidentiary matter, such protections are not guaranteed in arbitration. See, e.g., *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1304–05 (9th Cir. 1994) (finding that remedial and procedural protections available in court would not apply in arbitration of sexual harassment claims in finding the arbitration agreement unconscionable, especially because California evidentiary rules would have protected the privacy rights of sexual harassment victims in court). But see *Beauchamp v. Great W. Life Assurance Co.*, 918 F. Supp. 1091, 1096–98 (E.D. Mich. 1996) (disagreeing with *Prudential* in part because the court in that case believed the California rule precluding admission of claimant's sexual history did not apply in arbitration).

206. See, e.g., FED. R. EVID. 412 (restricting admissibility of evidence in civil and criminal cases regarding past sexual behavior or predisposition); FED. R. EVID. 408 (limiting admissibility of evidence regarding compromise negotiations); Monnin, *supra* note 103, at 1155, 1190 (discussing scope and justifications for evidentiary rules limiting evidence of sexual behavior or predisposition in civil and criminal proceedings). Courts apply a balancing test to determine whether admission of the evidence is warranted. FED. R. EVID. 412(b)(2). In applying this balancing test, however, arbitrators must vigilantly recognize the degrading and harmful nature of such information. Monnin, *supra* note 103, at 1189–91.

physician-patient privilege may protect sensitive medical information from discovery. Similarly an accountant-client privilege may limit or preclude disclosure of financial information.²⁰⁷

In addition, some courts use insular disclosure orders to limit use of financial information in litigation to prevent its nonconsensual use or disclosure. California courts, for example, use this device to allow a requesting party's counsel to examine relevant financial information for purposes of proving punitive damages, but prevent counsel from sharing that information with clients or other third parties.²⁰⁸ Courts also may balance need for relevant information with confidentiality concerns by ordering *in camera* inspection of financial and other personal information. In a child support case, for example, the court found that the parties' personal financial records were relevant, but examined the records *in camera* to minimize unwanted disclosure of such information.²⁰⁹

Similar rules may be warranted in arbitration in the absence of contrary agreement.²¹⁰ For example, the Consumer Due Process Protocols, promulgated by the National Consumer Disputes Advisory Committee, suggest that arbitrators should "make reasonable efforts to maintain the privacy of the hearing" and "carefully consider claims of privilege and confidentiality when addressing evidentiary issues."²¹¹ In

207. See FED. R. EVID. 501 (stating evidentiary privileges are governed by state law); CAL. EVID. CODE § 994 (Deering 2005) (declaring privilege precluding testimony of physicians regarding communications with patients); COLO. REV. STAT. ANN. § 13-90-107(1)(f)(I) (West 2005) (declaring a privilege preventing accountants from testifying regarding communications with a client pertaining to financial information relevant to the professional employment); *Colo. State Bd. of Accountancy v. Raisch*, 931 P.2d 498, 500 (Colo. Ct. App. 1996) (finding "accountant-client privilege . . . appli[es] without exception to all communications between the client and the certified public accountant and the accountant's employees specified in the statute").

208. See *Coll. Hosp., Inc. v. Superior Court*, 882 P.2d 894, 898 (Cal. 1994) (explaining that pretrial discovery limits on financial information are necessary to prevent parties from being coerced into settlements to avoid unwanted disclosure of financial information); *Richards v. Superior Court*, 150 Cal. Rptr. 77, 80-81 (Cal. Ct. App. 1978) (explaining that a party compelled to reveal financial information relevant to a claim for punitive damages is "presumptively entitled to a protective order that the information need be revealed only to counsel for the discovering party" and that the information may only be used for that lawsuit); Penelope Potter Palumbo, *Balancing Competing Discovery Interests in the Context of the Attorney-Client Relationship: A Trilemma*, 56 S. CAL. L. REV. 1115, 1115-17 (1983) (explaining use of insular protective orders for financial information in punitive damages cases).

209. See *Wollerson v. Wollerson*, 687 So. 2d 663, 666 (La. Ct. App. 1997) (finding that tax returns and other financial information were relevant to a request for increased child support, but ordering that the court inspect such information *in camera* to strictly limit disclosure to only the most relevant information).

210. See *supra* notes 2-9 and accompanying text (discussing this paradox and confusion regarding secrecy of arbitration).

211. AAA, CONSUMER DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF CONSUMER DISPUTES (1998), available at http://www.adr.org/sp.asp?id+22019#PRINCIPLE_12_ARBITRATION_HEARINGS. The protocol fails to address the need to protect individuals'

addition, more particularized default rules could go further to clarify that arbitrators must apply a stated list of protections for personal, sensitive and proprietary information. It would then be up to the parties to alter or waive such default confidentiality rules.

Parties' agreements, however, would be subject to general contract defenses and any mandatory report publication rules.²¹² Furthermore, parties could waive confidentiality by placing confidential information at issue in later public proceedings.²¹³ For example, parties currently make otherwise confidential information subject to disclosure by using it to challenge the enforceability of an arbitration award in court.²¹⁴

Policymakers would have to balance these confidentiality protections with any report publication rules.²¹⁵ In some cases, arbitrators would have to publish arbitration reports with personal information redacted from the reports. This may allow for limited information to appear in a claim description, but require that the claimant's identity remain confidential unless the claimant waives or otherwise alters confidentiality rules.²¹⁶ The AAA International Arbitration Rules, for example, allow the administrator to publish selected awards, decisions, and rulings without the parties' consent after they have been "edited to conceal the names of the parties and other identifying details."²¹⁷

Similarly, a published award in a sexual harassment case may contain basic facts regarding the claim, results, and reasons for the results, but should not contain sensitive information about the claimant's relationships or bouts with depression. It also may be appropriate to redact the identities of the particular individuals involved to preserve reputations and save them from public embarrassment. This generally

information, perhaps due to the committee's stated concern with preventing repeat players from abusing their disproportionate access to information. *Id.* (Reporter's Comments).

212. See Christopher R. Drahozal, *Default Rule Theory and International Arbitration Law (with Comments on Expanded Review and Ex Parte Interim Relief)*, INT'L ARB. NEWS, Winter 2004/2005, at 3-4, available at http://www.abanet.org/intlaw/committees/disputes/commercial_disputes/winter0405.pdf (explaining that mandatory rules may be proper to protect third party interests).

213. These waivers and modifications would then be subject to scrutiny under contract and other enforcement principles.

214. A consumer may challenge an award, for example, on grounds that the arbitration award exceeded the arbitrator's power because the arbitration agreement was unconscionable. In that context, the consumer may use personal financial and social information to support that claim. If the consumer does not obtain any protective order and chooses to publicly reveal this information, it seems the information should no longer be deemed confidential.

215. For example, information about a sexual harassment claimant's bouts with depression may be revealed during arbitration of his or her claims, but this information should not become subject to public disclosure unless the claimant waives confidentiality protections.

216. These are merely ideas, and full exploration of their propriety and implications is beyond the scope of this Article.

217. INT'L ARB. R. art. 27 (also making this subject to parties' other agreement).

should not, however, prevent publication of a corporate employer's identity, especially where future claimants and others have an important interest in accessing information regarding a corporation's discriminatory practices.

Confidentiality protection rules also should prescribe reasonable enforcement mechanisms. "Protections" protect nothing if parties can easily ignore and evade them. Furthermore, enforcement mechanisms may be particularly important with respect to arbitral confidentiality to prevent parties from leaking information to the press or otherwise revealing sensitive information to manipulate or coerce the other party into settlement. Such mechanisms also should be fairly clear and easy to apply to prevent innocent disclosures and minimize difficulties and inefficiencies of requiring parties to prove actual damages for breach of confidentiality rules. Confidentiality rules should not punish innocent human inclinations to talk, or become empty vessels that leave parties with no remedy.

Accordingly, such rules could allow for injunctive relief to preclude parties from "letting the cat out of the bag" by disclosing information in the first place. Once information has been revealed, however, it may be appropriate to order monetary sanctions for intentional disclosure of protected information. Although such remedies come with their own complications, they would be more efficient and satisfying than requiring courts to assess proof and propriety of actual damages on a case-by-case basis.²¹⁸

Again, there is great need for empirical research on all these questions and issues.²¹⁹ Confidentiality protections should balance concern for all parties involved in disputes, while not overly intruding on contractual liberty. Regulation should not go beyond proper protection to paternalism. This is especially true because overly protective measures could backfire by providing repeat players with auxiliary means for hiding information.²²⁰

218. It also may be appropriate to give arbitrators discretion to determine proper sanctions, under their already broad remedial powers per institutional rules or legislative regulations authorizing such arbitral power. This power could be used not only to order monetary sanctions, but also to direct evidentiary sanctions. For example, an arbitrator may deem improperly disclosed information inadmissible in the arbitration.

219. See DRAHOZAL, *supra* note 14, at 552 (emphasizing great need for such research regarding arbitration practice).

220. Perhaps confidentiality rules should cover only "personal" information, such as individuals' financial, sexual, social, or familial information, in order to prevent such improper use of the rules.

VI. CONCLUSION

Common understandings of privacy in arbitration often lull individuals into assuming personal information revealed in arbitration may not become public. They assume privacy and confidentiality are synonymous, as though arbitration is like a trip to Las Vegas: “What happens in arbitration stays in arbitration.” The reality, however, is that arbitration is private but not necessarily confidential. This is the privacy paradox: it defies common conceptions of arbitration’s secrecy, but is nonetheless true. This paradox is problematic because it leads to shortsighted contracting and simplistic assumptions about arbitral justice. Moreover, it may foster injustice when repeat players unduly benefit from unpublished awards as well as pro-drafter confidentiality provisions.

This Article thus calls contracting parties to more carefully draft their arbitration contracts, and invites policymakers to craft transparency reforms that consider tensions created by the privacy paradox. It seeks to spark discussion of multi-perspective transparency reforms by proposing a two-prong approach toward transparency: (1) Require publication of arbitration awards in arbitrations involving statutory discrimination, consumer protection, corruption, and fraud; and (2) Establish default rules protecting personal and proprietary information from use or disclosure outside of arbitration hearings. The key is to balance all parties’ interests in confidentiality and privacy with the public’s legitimate interests in accessing information that may affect health, safety or wellbeing. Indeed, tempered and properly guided secrecy standards could enhance arbitration’s value for disputing parties, as well as the public.
