Nail in the Coffin: The Mandatory Arbitration Epidemic on Employee Sexual Harassment Claims

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I. INTRODUCTION

A young college graduate gets her first job at a high-profile accounting firm after applying to dozens of accounting jobs across the country. She is excited because this job means stability. This job ensures that she will have a steady income, health insurance, and the ability to start paying off an overwhelming amount of student loans. Before the graduate can start working, she is asked to meet with the head of the accounting firm to fill out many forms, one of which is an employment contract. While briefly looking over the forms, the graduate sees an arbitration agreement but does not ask about it. Even if she were well versed in the meaning of arbitration, the graduate knows there is no way to remove anything from the contract. The firm knows this as well. She realizes that new employees have no bargaining power at this high-profile firm.

After the graduate gets settled at her new job, her boss starts making sexual comments to her in passing. The boss then starts asking her out on dates. She ignores these advances until her boss begins following her home after work. Feeling like she has no other option, she chooses to file a claim for sexual harassment with the firm's human resources office. Three weeks later, she receives an email stating that her employment contract has been terminated.

Humiliated and confused, the graduate hires a lawyer and sues the firm for sexual harassment. The case is dismissed because of the mandatory arbitration clause in her employment contract. Forced to arbitrate, the graduate consults her attorney. The attorney tells her that he has considered dropping her case because her chances of recovery are unlikely. The attorney looks at the arbitration agreement in the graduate's contract and finds that she will have to pay for the arbitrator, discovery, witnesses, travel expenses to the company's chosen

location, and attorney's fees. The attorney tells the graduate this information and suggests that it is not in her best interest to arbitrate the claim, that she is not likely to win the claim, and that even if she does win, it will not be a profitable endeavor. She chooses not to arbitrate. Now the graduate is out of a job, uninsured, indebted to the attorney, and fearful of a return to a corporate workplace.

If the graduate were able to bring her claim in court, she would have months to collect evidence, compel her boss to share certain documents, and could include as many depositions and witnesses as she would like. She would be required to prove to a jury, by a preponderance of the evidence, that her boss violated the law.[1] She would need to show that sexual harassment was "severe or pervasive" enough to create a hostile work environment and that complaining about the harassment was a motivating factor in why she was fired.[2] Instead, she will appear in a conference room with an arbitrator chosen by her employer, where she will not know what standard of proof she has to meet to win her case, and the proceeding will not be subject to judicial review.[3]

In recent years, workplace sexual harassment has risen in the public consciousness. The #MeToo movement has made it clear that nearly every woman in America, and many men, have experienced sexual harassment.[4] More than 12,000 claims of sex-based harassment are filed each year with the Equal Employment Opportunity Commission.[5] Yet, it is estimated the seventy-one percent of

1. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

2. *See id.* at 786.

3. Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, ECON. POL'Y INST. 3–4 (Dec. 7, 2015), https://www.epi.org/files/2015/arbitration-epidemic.pdf.

4. Sophie Gilbert, *The Movement of #MeToo*, THE ATLANTIC (Oct. 16, 2017), https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979/. One in five women and one in seventy-one men will experience sexual assault at some point in their lives. *Get Statistics: Sexual Assault in the United States*, NAT'L SEXUAL VIOLENCE RESOURCE CTR., https://www.nsvrc.org/node/4737 (last visited Sept. 28, 2019) (citing Michele C. Black et al., *National Intimate Partner Violence and Sexual Violence Survey: 2010 Summary Report*, CTRS. FOR DISEASE CONTROL & PREVENTION 1 (Nov. 2011), https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf).

5. *Enforcement & Litigation Statistics: Charges Alleging Sex-Based Harassment (Charges Filed with EEOC) FY 2010–FY 2018*, U.S. EQUAL EMP.

individuals who experience sexual harassment at work do not report it to a manager or supervisor.[6] Employees are reluctant to report sexual harassment for a variety of reasons. Some fear they will not be believed or that they will be blamed.[7] Others are afraid that nothing will be done or that they will suffer retaliation for speaking up.[8]

Employees who have gathered the courage to try to expose a workplace predator should not have their voices suppressed through mandatory private, confidential arbitration proceedings.[9] Conversely, open court proceedings allow for public scrutiny, which keeps employees safe and insulated from retaliation. Arbitration lacks transparency, which means that even when victims come forward, their colleagues are still vulnerable to being abused in the same way.[10] By requiring employees to arbitrate behind closed doors, cases of sexual harassment remain hidden and employers escape accountability.

The negative effects of mandatory arbitrations on employees are not limited to sexual harassment claims. In fact, the expanse of arbitration's reach impacts many employees. Around sixty million American workers are now subject to mandatory arbitration agreements.[11] However, only "5,758 mandatory employment

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OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm (last visited Sept. 28, 2019).

6. *See* Stefanie K. Johnson, Jessica F. Kirk & Ksenia Keplinger, *Why We Fail to Report Sexual Harassment*, HARV. BUS. REV. (Oct. 4, 2016), https://hbr.org/2016/10/why-we-fail-to-report-sexual-harassment (citing Alanna Vagianos, *1 in 3 Women Has Been Sexually Harassed at Work, According to Survey*, HUFFPOST (Feb. 19, 2015), https://www.huffpost.com/entry/1-in-3-women-sexually-harassed-work-cosmopolitan_n_6713814 (discussing *Cosmopolitan*'s 2015 survey of 2,235 full-time and part-time female employees)).

7. Courtney E. Ahrens, *Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape*, 38 AM. J. COMMUNITY PSYCHOL. 263, 263–64, 269–70 (2006).

8. *Id.*

9. Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631, 1671–72 (2005).

10. *Id.* at 1672.

11. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. 5 (Apr. 6, 2018), https://www.epi.org/files/pdf/144131.pdf. Colvin's study found that since the early 2000s, the share of workers subject to mandatory arbitration has more than doubled and now impacts over fifty-five percent of the working population. *Id.* at 1. Colvin's research demonstrates that the trend toward

arbitration cases are filed per year nationally."[12] These numbers indicate that only "1 in 10,400 employees" that encounter mandatory arbitration clauses actually file a claim each year.[13] Along with the diminishing number of workplace claims brought against employers, there are emotional and behavioral consequences that result when employees are subject to mandatory arbitration.

Arbitration has a long history in America, one that has been greatly debated, cherished, and criticized.[14] However, there has yet to be an analysis on how arbitration psychologically impacts the behavior and emotions of those that are often forced to arbitrate sexual harassment claims. In the legal context, emotional and behavioral consequences of legal decisions, rules, and procedures are fleshed out through application of a legal approach called therapeutic jurisprudence.[15] This Note will utilize a therapeutic jurisprudence framework to examine the current state of mandatory arbitration in the law and the emotional and behavioral consequences that mandatory arbitration agreements have on employees subjected to sexual harassment. By combining empirical and non-empirical research to analyze the therapeutic implications of mandatory arbitration clauses, this Note will expose "psycholegal soft spots"[16] embedded throughout the arbitration process and suggest alternatives to arbitration for sexual harassment claims that are more therapeutic. In light of the notion that legal decisions should be made in the most therapeutic way possible, this Note will call for a more therapeutic approach to the enforcement of mandatory arbitration clauses in employment contracts by

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mandatory arbitration has weakened the position of employees whose rights have been violated by barring access to the courts for all types of legal claims, including claims of sexual harassment. *Id.*

12. *Id.* at 11.

13. *Id.*

14. *See generally* Alexander J.S. Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 INDUS. & LAB. REL. REV. 1019 (2015); Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344 (1997); Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399 (2000).

15. *See* David Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125, 125–26 (2000).

16. David B. Wexler, *Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, 67 REV. JUR. U.P.R. 317, 320 (1998).

acknowledging the psychological and legal impact that mandatory arbitration has on victims of workplace sexual harassment.

This Note includes five parts that outline the evolution of arbitration in the workplace. When taken together, these parts acknowledge how mandatory arbitration clauses perpetuate a cycle of sexual violence in the workplace and have detrimental psychological impacts on employees, and they introduce legislative alternatives for how mandatory arbitration clauses could be implemented in the employment context. Part II outlines the history of arbitration in America and how the arbitration process evolved to its current use. Part III identifies the therapeutic jurisprudence framework that will be used to analyze the psychological impact of mandatory arbitration on employees subjected to sexual harassment. Part IV examines empirical and non-empirical research that highlights the effect that arbitration has on the claims brought by employees and how it impacts employees in the workplace before and after the arbitration process. Finally, Part V includes a case study that analyzes the psychological impacts of mandatory arbitration on an employee that was forced to arbitrate her sexual harassment claim. This Note concludes with observations on the impact mandatory arbitration has on the emotional and psychological wellbeing of employees subjected to sexual harassment and provides suggestions on how to make the process more therapeutic for victims of workplace sexual harassment.

II. THE NAIL: THE ORIGIN OF ARBITRATION

In 2016, former Fox News anchor Gretchen Carlson brought a claim against Chairman and CEO of Fox News, Roger Ailes, alleging that Ailes retaliated against her because she refused his sexual advances and complained about severe and pervasive sexual harassment at Fox News.[17] Before the suit was filed, Carlson met with Ailes to discuss the discriminatory treatment at Fox News, and Ailes responded by telling Carlson that if she would engage in a sexual relationship with him that her problems could easily be resolved.[18] Carlson refused

17. Complaint & Jury Demand at 1–2, Carlson v. Ailes, No. 2:16-cv-04138 (N.J. Super. Ct. Law Div. July 6, 2016), 2016 WL 4722340.

Carlson v. Ailes, No. 2:16-cv-04138-JLL-JAD, 2016 Jury Verdicts LEXIS 6653 (D.N.J. Sept. 6, 2016).

18. *Id.* at 2.

Ailes's sexual demands, and nine months later, Ailes ended Carlson's career at Fox News.[19] Carlson then brought a lawsuit against Ailes alleging sexual harassment and retaliation.[20] In response, Ailes successfully argued that the case should be compelled to private arbitration because Carlson agreed to mandatory arbitration in her employment contract.[21] This decision forced Carlson into a private, confidential setting that protected Ailes and the history of sexual harassment at Fox News from public scrutiny. Countless employees face the same situation as Carlson.[22] Employees who fight back against sexual harassment risk retaliation, which might include vicious personal attacks, termination of employment, or black-balling from their employment industry.[23] The arbitral system was never intended to create these results.

A. English Common Law Arbitration

The arbitration system was initially created by merchants doing business within English common law jurisdictions.[24] Recognizing that the court system could not provide a forum for quick resolution of business disputes, and with the knowledge that successful business relationships depended on fast and predictable resolutions, merchants developed their own system of dispute resolution—arbitration.[25] In this way, arbitration developed as a means for self-regulation of business interests without the intrusion of a legal system perceived as too expensive and slow to resolve commercial disputes effectively.[26]

The merchant's system of arbitration was not well accepted in English courts. Arbitration was viewed as an attempt to circumvent the scope of judicial authority and was therefore deemed legally invalid.[27]

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19. *Id.*

20. *Id.* at 1–2.

21. *Id.*

22. *See* Johnson et al.*, supra* note 6.

23. *Id.*

24. Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 454, 459–61 (1996).

25. *Id.* at 460.

26. *Id.*

27. *Id.* at 461–63.

As a result, the common law system considered pre-dispute agreements, such as arbitration agreements, nonbinding because either party could refuse to arbitrate at any time before the arbitrator's decision was made.[28] This is vastly different from the arbitration system in America today.

B. Arbitration in America

The United States followed the English common law system of arbitration until 1925.[29] American judges preferred this common law system because, like the English view, irrevocable arbitration agreements were regarded as "ousting" the courts of jurisdiction.[30] Legislatures passed laws that limited the use of arbitration for any purpose and refused to adopt new arbitration statutes until it was clear that authorizing commercial arbitration would benefit the American economy by simplifying business relations.[31] American businesses grew to favor arbitration because it offered autonomy from government regulation and provided a more reliable means of dispute resolution.[32] However, American courts continued to follow the rule of nonbinding arbitration agreements until 1925, when Congress enacted the Federal Arbitration Act (FAA).[33]

The charge toward the enactment of the FAA was dominated by the theory "that arbitration promised to insulate private rule-making from governmental control and, at the same time, give 'to people who want[ed] to keep out of the courts, an opportunity for settling their differences.'"[34] The Act's purpose was to make arbitration agreements as viable as any other contract agreement and reverse the approach of

28. *See id.* at 462.

29. *See id.* at 466.

30. *Id.* at 464.

31. *Id.* at 464–65.

32. *Id.* at 465.

33. *See* United States Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–16 (2018)) (now referred to as the Federal Arbitration Act); *see also* Cole, *supra* note 24, at 465–66.

34. Cole, *supra* note 24, at 465–66 (citing Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 YALE L.J. 147 (1921)).

making arbitration agreements non-binding.[35] Yet, the legislative history of the FAA shows that arbitration agreements were only to apply to commercial disputes between merchants.[36] It was not intended for noncommercial purposes such as employment contracts.[37] Disputes concerning federal statutory claims were not to be resolved through arbitration.[38] Likewise, Congress did not intend for the FAA to apply to boilerplate employment contracts.[39]

American businesses did not require employees, or weaker parties in general, to resolve disputes through private arbitration until recently.[40] Beginning in the 1950s, the United States Supreme Court began to reinterpret the FAA to compel statutory claims to binding arbitration.[41] Supreme Court interpretation did not stray too far from legislative intent, however, until the 1990s in *Gilmer v. Interstate/Johnson Lane Corp*.[42] In *Gilmer*, the Court dealt with the issue of age discrimination in employment practices.[43] The Court compelled arbitration of Gilmer's discrimination claim because the plaintiff had signed the New York Stock Exchange's registration application that included a mandatory arbitration provision.[44] The

35. The House Report and the Senate Report for the United States Arbitration Act explain that the legislature enacted arbitration legislation as a result of judicial hostility surrounding the enforcement for arbitration agreement. H.R. REP. NO. 68-96, at 1–2 (1924); S. REP. NO. 68-536, at 2–3 (1924).

36. H.R. REP. NO. 68-96, at 1 (1924). Arbitration agreements were also not intended for allegations about human decency, such as sexual harassment allegations. *Id.*

37. *Id. (*"The purpose of this bill is to make valid and enforceable agreements for arbitration contained in contract involving interstate commerce.").

38. *See* Christopher R. Leslie, *Conspiracy to Arbitrate*, 96 N.C. L. REV. 381, 388 (2018).

39. *Id.*

40. Sternlight, *supra* note 9, at 1636.

41. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chysler-Plymouth, Inc., 473 U.S. 614, 636–40 (1985) (ruling that claims under Sherman Antitrust Acts are subject to arbitration).

42. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23, 26–27 (1991).

43. *Id.* at 23.

44. *See id.* In order to obtain employment, Gilmer had to become a member of the New York Stock Exchange. *Id.* The Stock Exchange application required that he arbitrate any controversy between a registered representative and any member of

Court held that requiring arbitration of a statutory claim did not undermine the important social policies that federal statutes were designed to protect.[45] The *Gilmer* court also explained that the existence of unequal bargaining power between employers and employees was not a sufficient reason to avoid the enforcement of arbitration agreements.[46] In practice, *Gilmer* abrogated previous Supreme Court precedent that protected employees from 1925 until 1985.[47] Once the Supreme Court began to issue decisions stating that

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the organization arising out of employment. *Id.* Gilmer argued that requiring arbitration of employment discrimination claims would be inconsistent with public policy and undermine the role of the Equal Employment Opportunity Commission. *Id.* at 27–33. The Court rejected both of these arguments. *Id.* at 35.

45. *See id.* at 27–28, 35.

46. *Id.* at 32–33.

47. In Wilko v. Swan, the Supreme Court decided that statutory claims could *not* be arbitrated. *See* 346 U.S. 427, 438 (1953). The state of the law regarding the arbitration of statutory claims involving violations of Title VII of the Civil Rights Act and the Americans with Disabilities Act were not arbitral before 1990. The legal climate following *Wilko* and leading to *Gilmer* involves a series of cases that analyze federal statutes for substantive laws that allow statutory claims to be arbitrated. In 1957, the Supreme Court compelled arbitration under the Labor Management Relation Act ("LMRA"). *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 451 (1957). The *Lincoln Mills* Court found that the LMRA fashioned a substantive federal policy that allowed for arbitration of claims under the LMRA. *See id.* at 456–57.

In 1983, the Court adopted a presumption in favor of arbitration to use when deciding cases involving the FAA in Moses H. Cone Memorial Hospital v. Mercury Construction Corp. 460 U.S. 1, 25 (1983). The Court found that when deciding whether a particular dispute comes within an arbitration clause, courts should resolve all doubts in favor of arbitration. *Id.* at 24–25. The Court stated that such a presumption furthered the "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Id.* at 24. This decision began the powerful trend that led courts to begin consistently upholding the legality of arbitration agreements for nearly all purposes.

Whereas previously the FAA has been found to apply only to contractual disputes, in 1985 in Mitsubishi Motors Co. v. Soler Chrysler-Plymouth, Inc., the Supreme Court held that the FAA also compelled arbitration of statutory disputes. *See* 473 U.S. 614, 640 (1985). Two years later in Shearson/American Express, Inc. v. McMahon, the Supreme Court expanded on its holding in *Mitsubishi* to conclude that a dispute involving alleged violations of the anti-racketeering RICO statute and federal securities laws was also subject to an ordinary boilerplate arbitration clause. 482 U.S. 220, 240–42 (1987). Then Court's decision in Rodriguez de Quijas v. Shearson/American Express Inc., found that *Wilko* was incorrectly decided because it was difficult to reconcile *Wilko's* mistrust of arbitration of statutory disputes and

commercial arbitration was favored and that arbitration of employment claims was permitted, businesses jumped at the opportunity to compel arbitration in contexts where arbitration clauses were previously unenforceable.[48]

In 2001, the case of *Circuit City Stores, Inc. v. Adams* added workplace sexual harassment to the long list of claims that can be compelled to arbitration.[49] Saint Clair Adams, a sales counselor in a California Circuit City Store, signed an employment contract that required employees to resolve disputes with the company through private arbitration.[50] Adams filed a state-law employment discrimination lawsuit against Circuit City claiming he was sexually harassed by co-workers because of his sexual orientation.[51] Circuit City responded by initiating an action against Adams in federal court to compel arbitration pursuant to Adam's arbitration agreement and the FAA.[52] The federal district court entered the requested order,[53] but the Court of Appeals for the Ninth Circuit reversed, interpreting the FAA to exempt all employment contracts from the FAA's reach.[54] The Supreme Court granted certiorari regarding the scope of the FAA's coverage.[55]

At issue in *Circuit City* was Section One of the FAA.[56] Section One excludes from the Act's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[57] The Supreme Court held that

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explained that the string of decisions following *Wilko* illustrated an environment that favored arbitration of statutory disputes. 490 U.S. 477, 477–88 (1989). With the burial of *Wilko*, the legal climate going into the 1990s created the perfect foundation for the *Gilmer* Court to give arbitration agreements more power than they were ever intended to have.

48. Sternlight, *supra* note 9, at 1638.

49. 532 U.S. 105 (2001).

50. *Id.* at 109–10.

51. Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 892 (9th Cir. 2002); *see also Circuit City*, 532 U.S. at 110.

52. *Circuit City*, 532 U.S. at 109–10.

53. *Id.*

54. *Id.* at 109–11.

55. *Id.*

56. *Id.* at 109.

57. 9 U.S.C. § 1 (2018); *see also Circuit City*, 532 U.S. at 109.

Section One should be read narrowly to exempt only employment contracts of transportation workers.[58] In essence, the *Circuit City* decision expanded the coverage of the FAA to cover all disputes arising out of nearly all areas of employment. Moreover, the *Circuit City* decision created an environment that lead to the silencing of workplace sexual harassment claims and paved the way for employers that utilize mandatory arbitration agreements to control the fate of sexual harassment victims.

C. The Birth of Mandatory Arbitration

Mandatory arbitration, within the field of employment law, is a provision in an employer-created agreement in the non-union workplace that requires an employee to arbitrate future employment related disputes.[59] These agreements, drafted by the would-be defendant employer, impose arbitration on employees as a condition of employment before any dispute occurs.[60] "Under the FAA, such arbitration is *mandatory* in that courts will rigorously enforce the arbitration clause and compel the parties to arbitrate, even if one of the parties would prefer to litigate once a dispute actually arises."[61] The FAA provides that the arbitration decision is final and binding, having the same effect as a court judgment with exceedingly limited grounds for judicial review.[62] The courts' approach of rigorously enforcing such arbitration agreements means that corporate defendants can opt out of the court system by the simple act of writing mandatory arbitration agreements into their standard form employment

58. *Circuit City*, 532 U.S. at 119–21.

59. *See, e.g.*, David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1253 (2009).

60. *Id.* (citing Sternlight, *supra* note 9, at 1631–33, 1632 n.1).

61. *Id.* (emphasis added) (internal quotation marks omitted). The agreements become forced, mandatory arbitration agreements when agreeing to arbitration is a condition of employment. *See id.*

62. Bowen v. Amoco Pipeline Co., 254 F.3d 925, 931 (10th Cir. 2001) (finding that expansive judicial review after an arbitration award would go against FAA policy). In order to achieve the objective of the FAA, the court must enforce agreements to arbitrate as well as the resulting awards. *Id.* at 935.

contracts.[63] Because most of those contracts are nonnegotiable, the corporate defendant generally only does business on the basis of an arbitration agreement.[64]

Most recently, mandatory arbitration expanded from requiring an individual employee to arbitrate to preventing classes of employees from litigating employment disputes.[65] This trend overwhelmingly affects employees subject to sexual harassment in the workplace.[66] When multiple employees have been subjected to sexual harassment, whether by one repeat offender or as a result of a company failing to

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63. *See* Sternlight, *supra* note 9, at 1633 (quoting David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33–34).

64. *See id.*

65. *See generally* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018). Before the *Epic Systems* decision, there were still two outlets that employees could utilize to collectively defend their rights against the reach of the FAA. The first outlet was the unconscionability doctrine. The doctrine invalidated contracts that had terms so unjust or one-sided in favor of the party who had the superior bargaining power. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 338 (2011). In 2011, the Supreme Court considered a consumer class action in which the plaintiff attempted to aggregate many small injuries. *Id.* at 348. The Court reaffirmed the federal policy that favors arbitration of employment disputes. *Id.* at 346. In dicta, the Court noted the disadvantages of collective proceedings and how collective proceedings interfere with the FAA's pro arbitration scheme. *Id.* The *Concepcion* decision provided a scapegoat to employers wishing to eliminate class actions by putting an otherwise unenforceable class-action waiver into an arbitration clause. This decision placed class action waivers beyond the reach of the unconscionability doctrine.

The second outlet was the effective vindication doctrine. When an arbitration clause covered federal statutory rights, the effective vindication doctrine invalidated arbitration agreements that prevented a party from effectively vindicating their statutory cause of action within the arbitration forum. *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 236 (2013). The Court in *American Express Co. v. Italian Colors Restaurant* explained that the effective vindication doctrine originated in dicta and had never been applied to invalidate an arbitration agreement. *Id.* The Court held that "the fact that [mandatory arbitration] is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy." *Id.* (emphasis omitted) (citing *In re* Am. Express Merchs.' Litig., 681 F.3d , 147 (2nd Cir. 2012) (Jacobs, J., dissenting)). A class-action waiver requires employees to individually bring claims against their employers even if it is financially impossible for the injured party to bring the claim or the contracting terms are unfair or one-sided.

66. *See* Johnson et al., *supra* note 6.

address a toxic corporate culture, requiring workers' claims to be decided in individual arbitration strips employees of the protection that comes with banding together in a collective action. Mandatory arbitration agreements have the potential to negatively impact the behaviors and emotions of employees who are victims of workplace sexual harassment. Moreover, the isolating culture of mandatory arbitration threatens the ability to victims to psychologically heal from a sexual harassment experience. This threat of undervaluing and further disempowering sexual harassment victims through forced arbitration procedures warrants a therapeutic jurisprudence analysis.

III. THE SKELETON: THERAPEUTIC JURISPRUDENCE

Therapeutic jurisprudence ("TJ") is an area of legal study that regards the law as a social force that influences behaviors and has the ability to produce therapeutic and anti-therapeutic consequences.[67] TJ proposes that law makers and enforcers be aware of those consequences, rather than ignore them, and ask whether the law's anti-therapeutic consequences can be reduced and its therapeutic consequences enhanced.[68] Recognizing the role of the law as a therapeutic agent that impacts human psychology, TJ focuses on how laws affect the psychological wellbeing of individuals.[69] TJ analysis exposes therapeutic and anti-therapeutic consequences of laws and legal procedures, and it anticipates whether such procedures and rules can be reshaped to enhance therapeutic results.[70] Further, TJ itself does not purport to resolve the anti-therapeutic impacts of a given law or procedure; instead, it sets the stage for exposure of therapeutic values by adding a new prism to review the law.[71]

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67. In essence, TJ does not merely examine the law on the books but examines the law in action—how the law manifests itself in law offices, client behavior, and behavioral impacts in courtrooms around the world. Wexler, *supra* note 15, at 125. Examples of anti-therapeutic consequences include the inability to psychologically heal from trauma experienced as a result of legal processes. *See id.* at 126–28.

68. *Id.* at 126.

69. *Id.* at 125–26.

70. *Id.* Enhancing therapeutic potential involves making the psychological impact of laws and legal procedures more emotionally friendly for all involved. *Id.*

71. An example of anti-therapeutic consequences can be identified by looking at the repealed "Don't Ask, Don't Tell" rule. *See* Kay Kavanagh, *Don't Ask, Don't*

TJ is used to analyze how mental health principles, psychology, and psychotherapy can be integrated into the legal system.[72] This Note implements a relational psychology foundation when analyzing therapeutic aspects of mandatory arbitration in the sexual harassment context. Relational therapy is "based on the idea that mutually satisfying relationships with others are necessary for one's emotional

Tell: Deception Required, Disclosure Denied, 1 PSYCHOL. PUB. POL'Y. & L. 142, 142–43 (1995); *see also* Wexler, *supra* note 15, at 126. This legal rule prevented the government from asking about a military service member's sexuality. Kavanaugh, *supra*, at 145. Likewise, a military recruit was also prohibited from talking about his or her sexuality. *Id.* at 146. Study of the "Don't Ask, Don't Tell" rule has suggested that if someone was gay in the military and could not talk about his or her sexuality, then that person may also have been afraid to talk about many other aspects of his or her life because those things could possibly raise the question of a legally prohibited topic. Wexler, *supra* note 15, at 126–27; *see also* Kavanaugh, *supra*, at 152–54. As a result, the "Don't Ask, Don't Tell" rule caused "great isolation, marginality, and superficiality in social relations" for gay persons in the military. Wexler, *supra* note 15, at 127; *see also* Kavanaugh, *supra*, at 151. These results are anti-therapeutic in nature.

72. David B. Wexler, *Justice, Mental Health, and Therapeutic Jurisprudence*, 40 CLEV. ST. L. REV. 517, 519–20 (1992). In practice, TJ has been applied to plea bargaining. *Id.* For example, sexual offenders have been found to psychologically "harbor 'cognitive distortions'" about their offending behavior. *Id.* at 519 (quoting David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence and Criminal Justice Mental Health Issues*, 16 MENTAL & PHYS. DISAB. L. REP. 225, 229–30 (1992)). As a result, offenders reject their involvement with criminal activity. *Id.* As a first step in therapy, psychologists perform a task of cognitive restructuring on the offender. *Id.* at 519–20. "'[C]ognitive restructuring' [is] an attempt to break through [the individual's] denial by having the offender admit to the underlying conduct and its details" associated with the crime. *Id.* at 519. In a TJ analysis concerning a sex offender's plea bargain, "[TJ] might ask whether the law operates antitherapeutically, by promoting cognitive distortion, or whether it operates therapeutically, by setting the stage for cognitive restructuring." *Id.* at 519–20. The TJ analysis is then directed at a trial judge's behavior as the judge "goes through the process of establishing a factual basis for a plea." *Id.* at 519. If the judge involves the defendant only minimally by looking to the record, prosecutor, and defense counsel to establish a factual basis, "a defendant harboring cognitive distortion might not have those distortions confronted head-on by the plea process and dialog with the judge." *Id.* However, "if the judge . . . involve[s] the defendant personally and heavily in the process of determining a factual basis for the plea," the court will perform a "therapeutically valuable cognitive restructuring function." *Id.* at 520. Mandatory arbitration prevents this cognitive restructuring from even being a possibility for those who are guilty of sex crimes that occur in the workplace.

well-being," and it is "a type of psychotherapy that takes into account social factors, such as race, class, culture, and gender, and examines the power struggles and other issues that study develop as a result of these factors, including how they relate to the relationships in a person's life."[73]

"Psychotherapeutic interventions for victims of sex crimes are designed to reduce psychological distress, symptoms of post-traumatic stress disorder (PTSD), and rape trauma through" recounting an individual's experience.[74] A relational therapist attempts "to help victims make sense of their memories and reduce or eliminate PTSD symptoms, including thoughts, flashbacks, guilt, and fears associated with the victim's response to the assault."[75] One of the most common therapeutic models used to help victims recover from trauma is the supportive psychotherapy model.[76] Supportive psychotherapy occurs in either an individual setting or group setting, and this therapy model "allows an individual to share his or her traumatic experience and the symptoms" caused by that experience.[77] Supportive psychotherapy, as well as other supportive approaches such as counseling, "aim to normalize experience, instill hope, increase interpersonal learning, and decrease an individual's sense of isolation."[78] Recognizing that mandatory arbitration promotes secrecy and isolation, the potential cognitive impacts of mandatory arbitration on sexual harassment claims provide an ideal landscape for a relational psychology-based TJ analysis.[79]

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73. *Relational Therapy*, PSYCHOL. TODAY, https://www.psychologytoday.com/us/therapy-types/relational-therapy (last visited Sept. 7, 2019).

74. Nat'l Inst. of Justice, *Psychotherapies for Victims of Sexual Assault*, CRIMSOLUTIONS.GOV, https://www.crimesolutions.gov/PracticeDetails.aspx?ID=18 (last visited Sept. 21, 2019).

75. *Id.*

76. *See id.*

77. *Id.*

78. *Id.*

79. Cognitive behavioral therapy is focused "on the idea that in any given situation or interaction, an individual's thoughts, attitudes, and beliefs determine the individuals emotional experience and behavior." Aviva Moster, Dorota W. Wnuk & Elizabeth L. Jeglic, *Cognitive Behavioral Therapy Interventions with Sex Offenders*, 14 J. CORRECTIONAL HEALTH CARE 109, 111 (2008). "[I]f someone wants to change the way he or she behaves or experiences and expresses emotion, cognitive behavioral

The therapeutic implications surrounding the psychological and behavioral impact of mandatory arbitration on employers and employees have yet to be explored through a therapeutic lens. Specific evidence that will be used in the therapeutic evaluation of mandatory arbitration agreements includes the following: the number of employees that agree to contracts containing mandatory arbitration clauses, the number of claims that make it to arbitration, the outcomes of arbitration, and how employees psychologically react to the arbitration environment and throughout the arbitration process. Additionally, this analysis will consider why employers choose to write mandatory individual arbitration clauses into employment contracts and how arbitration therapeutically impacts employers. Because nearly all mandatory arbitration agreements are compelled to arbitration,[80] the act of agreeing to a mandatory arbitration agreement, the initial decision by a judge to compel arbitration, and the arbitration process present the opportunity to examine therapeutic consequences in the workplace sexual harassment context.

A. Therapeutic Jurisprudence Framework

In building a TJ framework to analyze mandatory arbitration agreements, it is important to first define what "therapeutic" means. In the TJ context, "therapeutic" is defined as beneficial in the sense of improving the psychological or physical well-being of a person.[81] Under this definition, a TJ analysis involves the use of social science and psychology to study the extent to which the arbitration process promotes the psychological and physical well-being of the people it affects.[82]

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therapy dictates that the person must study and change his or her thoughts and beliefs." *Id.* This occurs through open flows of communication and recognition of the wrong that has occurred. *See id.* at 112. Reduction of cognitive distortion occurs when the offender speaks about the offense in a group setting. *See id.* "When offenders verbalize their distortion, they are challenged, their negative consequences are emphasized, and prosocial views are offered." *Id.*

80. *See* Schwartz, *supra* note 59, at 1253.

81. *See* Wexler, *supra* note 15, at 125.

82. *See id.*

Outcomes will be analyzed by the identification of "psycholegal soft spots."[83] The determination of psycholegal soft spots includes the identification of social relationships or emotional issues within an area of law that ought to be considered to avoid conflict or stress.[84] Psycholegal soft spots have been described as "ways in which certain legal procedures (e.g.[,] litigation or its alternatives) . . . may expectedly produce or reduce anxiety, anger, hurt feelings, and other dimensions of law-related psychological well-being."[85] In the context of mandatory arbitration, the identification of psycholegal soft spots includes assessing the likely psychological effect of various legal maneuvers or decisions on the employee, on those close to the employee (such as coworkers within the same workplace or situation), or on the employee's relationship with others (the employee's relationship with employers, those involved in the arbitration process, and future employers and coworkers).

Many TJ scholars utilize a question-generated exercise to identify psycholegal soft spots.[86] TJ questions seek to analyze the underlying therapeutic impacts of a legal issue, and the answers are then balanced against the interests that are negatively affected.[87] This question/answer framework will be used in the mandatory arbitration context by using a set of framing questions that apply to the

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83. Wexler, *supra* note 16, at 320. The "psycholegal soft spot" grows out of the preventive law concept of the "legal soft spot." Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 42 (1997). "Whereas the concept of legal soft spots refers to factors in a client's affairs that may give rise to future legal trouble, the concept of psycholegal soft spots might include the identification of social relationships or emotional issues that ought to be considered in order to avoid conflict or stress when contemplating the use of a particular legal instrument." *Id.* at 42–43.

84. Wexler, *supra* note 16, at 320–21. A primary way to identify psycholegal soft spots is to describe and discuss them. *Id.* at 321.

85. *Id.*; *see also* Marc W. Patry et al., *Better Legal Counseling Through Empirical Research: Identifying Psycholegal Soft Spots and Strategies*, 34 CAL. W. L. REV. 439, 441 (1998) (explaining that psycholegal soft spots are "areas where legal intervention or procedures may not lead to a lawsuit or to legal vulnerability, but may lead to anxiety, distress, depression, hard and hurt feelings, etc.").

86. E.g., Amy T. Campbell, *Using Therapeutic Jurisprudence to Frame the Role of Emotion in Health and Policymaking*, 5 PHX. L. REV. 675, 692–93, 693 tbl. 1 (2012).

87. *See id.*

psychological impact of mandatory arbitration on the employer and the victim of workplace sexual harassment. The framing questions include the following: what is the problem within the arbitration context?; is the problem influenced by knowledge of mandatory arbitration upon agreement or is the problem informed by the reaction of those who have signed mandatory arbitration agreements?; can a re-evaluation of arbitration agreement enforcement address the problem in psychologically health-promoting ways?; what are the therapeutic consequences of how the law currently views mandatory arbitration agreements?; what are the potential anti-therapeutic consequences of mandatory arbitration in the sexual harassment context?; and is it possible to address anti-therapeutic consequences? [88] The results of these questions indicate whether the FAA is in need of complete reform, whether tweaks to the enforcement of mandatory arbitration on certain claims are necessary, or whether mandatory arbitration is in need of no reform at all.

B. Relational Psychology Foundation

To aid in answering the questions above, relational psychology practices will be used to inform the therapeutic impact that mandatory arbitration agreements have on victims of workplace sexual harassment. Sex-based crimes affect how victims view themselves and the people around them.[89] Likewise, workplace sexual harassment cognitively affects how victims relate to others in their workplace.[90] As a result, therapeutic effects of mandatory individual arbitration of sexual harassment claims will be grounded in a relational psychology foundation. "Relational psychology holds that relationships, not the individual as an isolated self, constitute the primary basis of

88. *See id.* This framework is based off of Amy T. Campbell's TJ framework. *See id.* The question and answer framework provides a platform from which to ask and raise question that otherwise go unaddressed in the legal field. The answers to TJ focused questions give rise to positive and negative consequences of legal rules and practices. A TJ framework expands the range of questions to ask, with an eye toward psychologically positive consequences. Results may help inform new approaches to the way legal rules and practices are created and enforced. The questions have been altered to fit the mandatory arbitration context.

89. *See* Ahrens, *supra* note 7, at 270–73.

90. *Id.*

psychological development."[91] Psychiatrist Jean Baker Miller developed relational psychology applications in the mid-1980s.[92] Her leading premise of relational psychology is that "each person becomes a more developed and more active individual only as she/he is more fully related to others."[93] One of the main assumptions of relational theory is that human beings are inherently social in nature.[94] Relational theory proposes that "our relational nature drives us to 'grow through and toward connection.'"[95] Most importantly, the theory "acknowledges the reality of diversity and the inevitability of power differentials, while describing a path not only toward healthy coexistence, but mutual empowerment."[96]

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91. David C. Yamada, *Employment Law as if People Mattered: Bringing Therapeutic Jurisprudence into the Workplace*, 11 FLA. COASTAL L. REV. 257, 264 (2010) (citing CHRISTINA ROBB, THIS CHANGES EVERYTHING: THE REVOLUTION IN PSYCHOLOGY (2007)).

92. *See generally* Jean Baker Miller & Irene P. Stiver, *A Relational Reframing of Therapy* 2 (Wellesley Ctrs. for Women, Working Paper No. 52, 1991), http://www.wcwonline.org/Publications-by-title/a-relational-reframing-of-therapy. One of the core tenets of relational psychology is to name oppressive systems and give voice to marginalized populations, including both men and women employees. *See id.* at 5. Miller was driven by a desire to call attention to the influence of systemic power differentials on the disruption of connection at both the individual and society level. *See id.* The scope of relational theory, in this way, extends beyond personal, intimate relationships, to consider the overarching structures that shape wider relational patterns. *See id.* An underlying goal of relational psychology lies in exploring how societal structures can better contribute to peaceful coexistence. *See* David C. Yamada, *Human Dignity and American Employment Law*, 43 U. RICH. L. REV. 523, 548–50 (2009).

93. Yamada, supra note 92, at 548 (quoting Jean Baker Miller, *What Do We Mean by Relationships?*, 1986 STONE CTR. DEV. SERVS. & STUD. 2).

94. Melissa McCauley, *Relational-Cultural Theory: Fostering Healthy Coexistence Through a Relational Len*s, BEYOND INTRACTABILITY (Mar. 2013) (citing Jennifer J. Llewellyn & Jocelyn Downie, *Introduction*, in BEING RELATIONAL: REFLECTIONS ON RELATIONAL THEORY AND HEALTH LAW 1, 4 (Jennifer J. Llewellyn & Jocelyn Downie eds., 2011)), https://www.beyondintractability.org/essay/relational-cultural-theory.

95. *Id.* (quoting Judith V. Jordan, *Introduction*, in THE POWER OF CONNECTION: RECENT DEVELOPMENTS IN RELATIONAL-CULTURAL THEORY 1, 2 (Judith V. Jordan ed., 2010)).

96. *Id.*; *see also* Miller, *supra note* 93, at 2.

Miller's research explains that five "good things" happen to people in positive growth relationships and environments.[97] The five factors as applied to mandatory individual arbitration agreements in the workplace are as follows[98]: (1) each employee feels a greater sense of vitality and energy after entering into a mandatory arbitration agreement; (2) each employee feels empowered to act and does act when taking legal action concerning workplace disputes; (3) each employee has a more accurate picture of her/himself and the other person(s) in the employment relationship after entering into the employment contract; (4) each employee feels a greater sense of worth and empowerment after encountering a mandatory arbitration agreement and thereafter; and (5) each employee feels more connected to other persons in the workplace.[99] If mandatory arbitration produces these five "good things," then it has a positive impact on employees.

Neuroscientific data demonstrates that the brain grows through connection, that we come into the world ready to connect, and that disconnection creates real pain.[100] For instance, the Pain Overlap Theory proposes that the experience of social pain—the pain that can be experienced through workplace disputes—and physical pain have similar results on an individual's biological and psychological well-being.[101] This theory brings to light the real consequences of pain and social separation in the workplace and thereafter. It also supports the relational psychology theory that what occurs in the workplace and through the vindication of an employee's legal rights has real psychological impacts on employees.

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97. McCauley, supra note 94; Miller et al., *supra* note 92, at 2.

98. Miller et al., *supra* note 92, at 2.

99. *See id.* The inverse of these five factors that signals that the employment environment is non-relational, or anti-therapeutic, are employees experiencing the following: (1) diminished vitality and energy in the workplace; (2) feeling disempowered or stifled in their ability to take action; (3) less clarity and more confusion; (4) diminished sense of worth; and (5) a desire to withdraw from or defend against relationships in the workplace setting. *See id.*

100. *See* Naomi I. Eisenberger & Matthew D. Lieberman, *Why It Hurts to Be Left Out: The Neurocognitive Overlap Between Physical and Social Pain*, *in* THE SOCIAL OUTCAST: OSTRACISM, SOCIAL EXCLUSION, REJECTION, AND BULLYING 109, 110 (Kipling D. Williams et al. eds., 2015).

101. *See id.*

Relational psychology is fitting for the mandatory arbitration context because adults spend over a quarter of their lives in a working environment.[102] Employees obtain a sense of self-worth by the type of job that they hold, how they are treated in that job, and the environment in which they work.[103] Moreover, the workplace is the core of social involvement for a large number of adults.[104] With these considerations in mind, and the assumptions accompanied by relational psychology theory, it is fitting for TJ and relational psychology to blend together in the assessment of how mandatory individual arbitration affects employees.

IV. THE BARE BONES CONTRACT: EMPIRICAL AND NON-EMPIRICAL IMPACTS OF MANDATORY ARBITRATION AGREEMENTS

Annette Phillips began working as a bartender at a Hooters restaurant in South Carolina in 1989.[105] Five years later, Hooters initiated an alternative dispute resolution program among its employees.[106] "As part of that program, the company conditioned eligibility for raises, transfers, and promotions upon an employee signing an 'Agreement to arbitrate employment-related disputes,'" including sexual harassment claims.[107] The agreement provided for binding arbitration in accordance with a standard set of rules that were created and administered by Hooters.[108] And in both 1994 and again in 1995, Phillips signed the agreement which provided that disputes would be resolved pursuant to rules and procedures that the company would promulgate "from time to time" and provide to employees upon written request.[109] In 1996, Phillips alleged that a company official "sexually harassed her by grabbing and slapping her buttocks."[110]

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102. Gina Belli, *Here's How Many Years You'll Spend at Work in Your Lifetime*, PAYSCALE (Oct. 1, 2018), https://www.payscale.com/career-news/2018/10/heres-how-many-years-youll-spend-work-in-your-lifetime.

103. *See infra* note 218.

104. *See infra* note 218.

105. Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 935 (4th Cir. 1999).

106. *Id.*

107. *Id.* at 935–36.

108. *Id.* at 936.

109. *Id.*

110. *Id.* at 935.

Management ignored her complaint telling her to "let it go."[111] She then quit her job and threatened Hooters with a Title VII suit.[112] Hooters then filed suit seeking to compel Phillips to arbitrate her claim.[113] The Fourth Circuit determined that Hooter's arbitration agreement was illusory and therefore non-binding.[114] However, the court further affirmed that clearly written mandatory arbitration agreements will compel sexual harassment victims to arbitration.[115]

A. The Formation Process: What Happens Before the Employee Sees the Agreement? What Result?

The first step of the TJ analysis questions whether mandatory arbitration is actually a problem for employees subjected to sexual harassment. Research shows that mandatory arbitration is a problem, and the problem begins at the outset of the mandatory arbitration creation process.[116] Before the contract for employment gets into the hands of employees, the arbitration logistics are determined by

111. *Id.*

112. *Id.* Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, sex, religion, and national origin. 42 U.S.C. § 2000e-2(a)(1) (2018).

113. *Hooters,* at 936.

114. *Id.* at 935.

115. *Id.* at 940.

116. *See infra* notes 119–28.

employers and their lawyers,[117] including the selection of arbitrators.[118] Enabling employers to choose their arbitrator creates an underlying psycholegal soft spot for employees by creating a power imbalance at the outset of the employment relationship. This imbalance is the "repeat player effect,"[119] or the tendency of arbitrators to favor the employer over the employee as a means of ensuring a consistent flow of business.[120]

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117. For an example of a boiler plate mandatory arbitration clause, see the following:

> Any dispute or controversy arising out of or relating to any interpretation, construction, performance, termination or breach of this Agreement, will be settled by final and binding arbitration by a single arbitrator to be held in Boston, Massachusetts, in accordance with the American Arbitration Association national rules for resolution of employment disputes then in effect, except as provided herein. The arbitrator selected shall have the authority to grant any party all remedies otherwise available by law, including injunctions, but shall not have the power to grant any remedy that would not be available in a state or federal court. The arbitrator shall have the authority to hear and rule on dispositive motions (such as motions for summary adjudication or summary judgment). The arbitrator shall have the powers granted by Massachusetts law and the rules of the American Arbitration Association which conducts the arbitration, except as modified or limited herein. In aid of arbitration, either party may seek temporary and/or preliminary injunctive relief in the Business Litigation Session of the Suffolk County Massachusetts Superior Court (or in a regular session of that court if the case is not accepted into the Business Litigation Session) at any time before an arbitration demand has been filed and served, or before an arbitrator has been selected.

Mandatory Arbitration Sample Clauses, LAW INSIDER, https://www.lawinsider.com/clause/mandatory-arbitration (last visited Sept. 3, 2019).

118. *Hooters*, at 938–39 ("[T]he employee's arbitrator . . . must be selected from a list of arbitrators created exclusively by Hooters. This gives Hooters control over the entire panel and places no limits whatsoever on whom Hooters can put on the list.").

119. Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 190–91 (1997). An employer will likely arbitrate many disputes, while a typical employee will arbitrate, at most, one. *Id.* Because employers are more familiar with the arbitration process and their selected arbitrator, the employer is more likely to win as a result of repeat arbitration experience. *Id.*

120. *Id.* at 193. In 2015, the *New York Times* reported that an arbitrator went to a basketball game with the company's lawyer the night before the arbitration

The *Hooters* court's affirmation of mandatory arbitration in the sexual harassment context demonstrates that the current state of the law does not acknowledge the anti-therapeutic impacts surrounding mandatory arbitration proceedings. The law allows companies to use arbitration agreements that are a condition of employment to shift the costs of arbitration onto employees and thereby discourage them from bringing claims against their employers.[121] High costs are imposed by selecting an arbitrator or arbitration provider "with high fees, locating the arbitration in a distant forum, and limiting available discovery and thereby requiring employees to try to gather evidence through more expensive means."[122] Arbitration might work well for both parties if the parties are on an "equal playing field," but the relationship between an employee and a large business is deliberately crafted to be far from equal.[123] Annette Phillips, a party in *Hooters*, confirmed as much, stating "that she was blindsided by the 'wholly one-sided' arbitration process, in which [Hooters] had almost total control over the members of the arbitration panel."[124]

Psycholegal soft spots indicate anti-therapeutic consequences in the arbitration agreement creation process. High costs of arbitration

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proceedings began. Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System,'* N.Y. TIMES (Nov. 1, 2015), https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-.a-privatization-of-the-justice-system.html. The company won the arbitration dispute. *Id.* The *Times* reporters also discovered that, out of the cases they examined, forty-one arbitrators each handled ten or more cases for one company between 2010 and 2014. *Id.* Additionally, one arbitrator in an employment case simultaneously had twenty-eight other cases involving the same defendant company. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html. The weight of these numbers is illuminated by the arbitrator's explanation, that "beneath every decision, was the threat of losing business." Silver-Greenberg & Corkery, *supra*.

121. *See* Sternlight, *supra* note 9, at 1651.

122. *Id.* (footnotes omitted).

123. Sejal Singh, *Your Contract at Work Might Prevent You from Suing Over Sexual Harassment*, VICE (May 17, 2018, 12:59 PM), https://broadly.vice.com/en_us/article/vbqekm/mandatory-arbitration-clauses-sexual-harassment.

124. *Id.*; *see also* Hooters of Am., Inc., v. Phillips, 173 F.3d 933, 940 (4th Cir. 1999).

have more than just a financial impact on employees, arbitration also impacts the parties' ability to cognitively heal from the sexual harassment experience. When an employer can manipulate the terms of an arbitration agreement, there is no motivation for positive behavioral change for both the employer and employee. The power to choose the person overseeing and deciding an arbitration claim provides an immense advantage to employers.[125] By requiring an employee to give up an integral legal right, employers enter the employment relationship with an overwhelming power imbalance in their favor.[126] Conversely, employees enter the employment relationship disadvantaged, creating an environment of diminished self-worth and vulnerability from the start.[127] Further, the environment of mandatory arbitration encourages employees to either not pursue claims when there is a valid cause of action or stay silent about workplace injustices.[128]

Laws and procedures end up being anti-therapeutic in nature when there is no positive motivation for behavioral change as the result of a law or legal practice.[129] When employers know that they can control the results of claims brought against them, they lack incentive to improve the work environment.[130] By choosing the arbitration setting, employers are shielded from public scrutiny.[131] This further

125. Stone & Colvin, *supra* note 3, at 23.

126. *Id.*

127. Robert C. Bird, *Employment as a Relational Contract*, 8 U. PA. J. LAB. & EMP. L. 149, 168–69 (2005) (explaining that employment contracts are centered around trust, that when an employer uses contracting tactics that take away an employee's autonomy the employee loses trust, and that loss of trust leads to vulnerability and a loss of confidence within the employment relationship).

128. Stone & Colvin, *supra* note 3 ("The legal developments [in mandatory arbitration] have de facto stripped employees of many of the legal rights and protections that they have fought long and hard to obtain."); *see also* Patry et al., *supra* note 85, at 413 (explaining that managers should not dismiss claims of sexual harassment because the ambivalence to sexual violence encourages victims to stay silent and decreases productivity in the workplace).

129. Wexler, *supra* note 15, at ___.

130. Kimberly Kalmanson & Randi M. Cohen, *The Real Cost of Mandatory Arbitration*, LAW.COM (Nov. 23, 2018), https://www.law.com/newyorklawjournal/2018/11/23/the-real-cost-of-mandatory-arbitration/.

131. *Id.*

prevents any incentive to change workplace practices.[132] Moreover, there is no incentive for employees to stand up to their employer because there is little hope of receiving a positive result.[133]

On balance, because the agreement creation process is solely dictated by employers, a psycholegal soft spot arises that demonstrates the anti-therapeutic impacts of mandatory arbitration agreements on employees from the outset of the employment relationship. Therapeutic alternatives are achievable, however, even though anti-therapeutic results arise from the start of an arbitration agreement's creation. If the terms of arbitration agreements were discussed between the employer and the employee before an employee agrees to the terms of the employment contract, then an employee would enter the relationship knowing her options when choosing to bring a cause of action. Further, if employers and employees decided the terms of the arbitration together, the employee would have a greater sense of confidence and self-worth over what procedure would best suit the individual if workplace disputes arise.

B. The Contract: What Is the Non-Empirical Impact That Mandatory Arbitration Agreements Have on Employees?

The second TJ question asks whether the problem is influenced by knowledge of mandatory arbitration upon agreement or if the problem is informed by the reactions of employees that have signed mandatory arbitration agreements. After the agreements are written, they are presented to future employees who must agree to arbitrate as a condition of employment. When employees encounter mandatory arbitration agreements in their employment contracts, they generally either do not know that agreeing to the condition in the contract will prevent them from bringing a claim in court or wrongfully believe that they can still sue their employer.[134] Only a small percentage of employees read arbitration clauses, and an even smaller number of employees understand and comprehend the gravity of giving up the

132. *Id.*

133. *Id.*

134. CONSUMER FIN. PROTECTION BUREAUS, ARBITRATION STUDY, REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT §1028(a), at § 1.4.2 (Mar. 2015).

right to a jury trial.[135] "[P]sychologists have shown that predictable irrationality biases" prevent employees from appropriately evaluating the costs and benefits of agreeing to mandatory arbitration clauses.[136] "[B]ecause people tend to be overly optimistic and eager at new employment opportunities," employees will often underpredict the need that they might have to bring a claim against an employer.[137] As a result, employees undervalue what they are losing by giving up a right to formally bring a claim in court.[138]

Psychologists have also shown that people are "risk-seeking" in regard to potential losses, such as the loss of company earnings as a result of litigation or the loss of a job due to an unhealthy work environment.[139] The motivation to maximize profits drives companies to tailor their employment contracts to include overly manipulative mandatory agreements.[140] Because these, at times, manipulative arbitration agreements are a condition of employment, risk-seeking employees will agree to arbitration for fear of losing the opportunity of a stable job.[141] As a result, companies are more inclined to implement manipulative agreements into their contracts because they are aware of the vulnerable situation of newly hired employees and their desire for job security.[142] Again, this arbitration ideology that is fueled by profit maximization exposes a psycholegal soft spot that perpetuates an implicit power imbalance that devalues the employees' rights, maximizes an employer's earning potential by placing a high cost on arbitration proceedings, and creates a workplace environment of distrust and confusion.

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135. Sternlight, *supra* note 9, at 1648–49 ("Some companies may even deliberately design their arbitration clauses in a manner geared to decrease the likelihood that the [employee] will focus on the arbitration clause.").

136. *Id.* at 1649.

137. *Id.* (citing Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 13 BEHAV. L. & ECON. 39 (Cass Sunstein ed., 2000)).

138. *Id.* (citing Jolls et al., supra note 137).

139. *Id.* (citing Daniel Kahneman & Amos Tversky, JUDGEMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3 (Daniel Kahneman et al. eds., 1982)).

140. *See id.* (citing Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 747 (1999)).

141. *See id.*

142. *See id.*

Acknowledging that employees are risk-seeking and not well versed in the legalese of arbitration illuminates another psycholegal soft spot. This anti-therapeutic consequence is fixable, however. Instead of explaining the arbitration agreement to employees or allowing them to be a part of the arbitration selection process, the current system keeps employees from being fully informed of the right that is being given up by agreeing to mandatory arbitration.[143] For sexual harassment victims, the current system continues to disempower employees that already feel they have no power as a result of their sexual harassment experience.[144] The culmination of these psycholegal soft spots indicate that the mandatory arbitration problem is influenced by both lack of employee knowledge upon agreement and reactions to the agreement when the employee is unable to bring their claim in open court.

C. Impact On Claims Brought: What Is the Empirical Effect on Claims Pursued Through Arbitration?

The problem with mandatory arbitration is further recognized when evaluating the empirical impact that mandatory arbitration has on claims brought against employers. Around sixty million American workers are subject to mandatory arbitration agreements, yet "5,758 employment arbitration cases are filed per year nationally."[145] The

143. Sternlight*, supra* note 9, at 1648–49 ("Some companies . . . deliberately design their arbitration clauses in a manner geared to decrease the likelihood that the [employee] will focus on the arbitration clause.").

144. Aditi Bagchi, *The Myth of Equality in the Employment Relation*, 2009 MICH. ST. L. REV. 579, 580 (explaining that employers and employees are not on an equal playing field when entering the employment relationship. "The inequality between them is multi-dimensional. Employers have more wealth. Employers have more bargaining power. Owners and managers are usually of higher social status." (footnotes omitted)); *Sexual Harassment: A Severe and Pervasive Problem*, NEW AM., https://www.newamerica.org/better-life-lab/reports/sexual-harassment-severe-and-pervasive-problem/conclusion (last visited Sept. 29, 2019) (explaining that sexual harassment occurs as a result of "unequal power dynamics, racism, misogyny, and gendered cultural expectations" and causes the victim to feel insulted, threatened, and degraded). When both of these power imbalances are encountered by a victim it is intuitive that feelings of disempowerment are amplified for a victim of sexual harassment.

145. Colvin, *supra* note 11, at 11.

effect of these numbers is that only "1 in 10,400 employees" that encounter mandatory arbitration procedures actually file a claim each year.[146] "In 2016, approximately 31,000 federal lawsuits were filed in five categories of employment cases," which include the following: Title VII under the Civil Rights Acts, Americans with Disabilities Act, Fair Labor Standards Act, Employee Retirement Income Security Acts, and the Family and Medical Leave Act.[147] Yet, only 5,126 arbitration claims were filed of those 31,000 known potential claims.[148] When observing employment-related claim filing rates in federal and state courts, it is estimated that "if employees covered by mandatory arbitration were filing claims at the same rate as in court, there would be between 206,000 and 468,000 claims filed annually."[149] This is thirty-five to eighty times the rate currently observed.[150] These results reveal that employers implementing mandatory arbitration clauses into their boilerplate employment contracts have been successful in exponentially reducing the likelihood of being subject to any liability.[151]

Given that roughly twenty percent of the non-unionized workforce is covered by arbitration clauses, if imposing mandatory arbitration enhances employees' access to justice, it would be expected, if not intuitive, that many employees would bring claims in arbitration.[152] This result, however, is not the case.[153] On average, employees are less likely to win in arbitration than in court, and even when they do, the typical worker gets a mere twenty-one percent of the damages they would receive in federal court.[154] For a worker who is fired after reporting sexual harassment, that could be the difference

146. *Id.*

147. Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 691 (2018) (citing *U.S. District Courts–Civil Cases Commenced, by Nature of Suit, During the 12-Month Periods Ending September 20, 2012 Through 2016*, U.S. COURTS, http://www.uscourts.gov/sites/default/files/data_tables/jb_c2a_0930.2016.pdf).

148. *Id.*

149. Colvin, *supra* note 11, at 11.

150. *Id.*

151. Stone & Colvin, *supra* note 3, at ___.

152. *Id.*, at 15.

153. *Id.*, at ___.

154. *Id.*, at 19.

between keeping her home and being unable to make rent. This data shows that there is an underlying therapeutic explanation for why employees have chosen to forgo the arbitration process once claims have been filed.[155] These results are not just insignificant data points or the result of nonexistent workplace related issues. These numbers speak to psychologically-damaged employees and the result of harmful and manipulative power imbalances related to mandatory arbitration procedures.[156]

By looking at employers, employees, and the arbitration agreement formation process, it can be seen that each of these individual parts work together to have anti-therapeutic impacts on employees, even before the actual arbitration begins. The inclusion of arbitration agreements from the outset of employment generates an unconquerable power imbalance because employees are subject to unequal bargaining power and the data shows that employees are unlikely to receive any financial benefit from pursuing a claim once one arises.[157] Moreover, because arbitration occurs privately, employers are unmotivated to change workplace practices. And employees are not motivated to take part in the arbitration process because of the financial burden that employers can place on an employee if the employee chooses to arbitrate. In essence, psycholegal

155. *See* Elyse Shaw, Ariane Hegewisch, M. Phil & Cynthia Hess, *Sexual Harassment and Assault at Work: Understanding the Costs*, INST. FOR WOMEN'S POL'Y RES. (Oct. 2018), https://iwpr.org/wp-content/uploads/2018/10/IWPR-sexual-harassment-brief_FINAL.pdf. (explaining that victims of sexual harassment experience physical and mental health problems, career interruptions, and lower earnings. Moreover, the study emphasizes that the risk of termination and the costs associated with bringing claims against employers negatively impacts victims because they rely on their income to "meet basic needs and achieve economic security.").

156. *See* Yamada, supra note 91, at 273 (explaining that individuals that have just been fired are in a "terrible emotional state"); *see also* Louise F. Fitzgerald, Kimberly T. Schneider & Suzanne Swan, *Job-Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence from Two Organizations*, 82 J. APPLIED PSYCH. 401, 403–04 (1997) (explaining that the most common responses to sexual harassment are for the victim to avoid the harasser or appease the harasser without direct confrontation, and explaining that victims are more likely to tolerate the harassment, deny that the harassment every happened, reinterpret the harassment as benign, forget about the harassment, or blame themselves for the harassment instead of pursing claims against their employer).

157. Stone & Colvin, *supra* note 3, at 18–21.

soft spots have been exposed where there is a devaluing of an individual, unfair power balances, and a lack of positive motivation to change current behaviors that indicate current mandatory arbitration practices are anti-therapeutic in nature.

V. BURIAL OF A SENSE OF SELF: MANDATORY ARBITRATION CASE STUDIES THROUGH A THERAPEUTIC JURISPRUDENCE LENS

Trauma that results from rape and sexual harassment are experienced at individual and collective levels. This section will apply the TJ/relational psychology framework step by step to Gretchen Carlson's mandatory arbitration experience. First, trauma is defined as "experiences that cause intense physical and psychological stress," which could be "a [single] event, multiple events, or a set of circumstances experienced by an individual as physically and emotionally harmful or [] threatening."[158] Trauma in the workplace can take many forms and can affect whether an employee chooses to speak out against his or her employer or chooses to bring a legal claim for issues arising in the workplace.[159] Trauma in the workplace may be experienced through acute trauma, or "a traumatic event that often occurs without warning and over which the employee has no control."[160] Trauma destroys the identities of employees in ways that "threaten an employee's sense of self and security."[161]

Specific instances of workplace collective trauma occur when there is evidence of sexual harassment and discrimination.[162] Rape and

158. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVICES, TREATMENT IMPROVEMENT PROTOCOL (TIP) SERIES, NO. 57, A TREATMENT IMPROVEMENT PROTOCOL: TRAUMA-INFORMED CARE IN BEHAVIORAL HEALTH SERVICES xix (2014); *see Trauma and Violence*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., https://www.samhsa.gov/trauma-violence (lasted updated Aug. 2, 2019).

159. *Id.*

160. *Id.* Examples of acute trauma include: workplace accidents (witnessing a coworker getting injured or killed while on the job), stress due to downsizing, lay-offs, company closing or forces outside of work, or random acts of violence in the workplace. *Id.*

161. Michal Alberstein, *ADR and Collective Trauma: Constructing the Forum for the Traumatic Fuss*, 10 CARDOZO J. CONFLICT RESOL. 11, 15 (2008).

162. These are claims that fall under Title VII of the Civil Rights Act and the National Labor Relations Act.

sexual harassment are experienced collectively because sex-related crimes are part of a culture in which the rape of women as a whole is normalized and regulated.[163] Because sex-based crimes have collective impacts, victims should be empowered not only as individuals, but also as a member of a collective group sharing a common experience in order to psychologically overcome a workplace sexual harassment experience.[164] When sexual harassment occurs in the workplace, employees should be able to join together and gain strength through one another's shared experience if cognitive healing is to occur.[165] Moreover, when victims of collective trauma are unable to join together and share a common experience because of mandatory individual arbitration agreements,[166] employees are further disempowered by being separated from a group through which victims gain strength.[167] By binding victims to mandatory individual arbitration, employees subjected to sexual harassment are unable to cognitively heal because their ability to choose how to face their abuser is dictated by their employer. These impacts on a victim's healing ability demonstrate another anti-therapeutic aspect of mandatory arbitration in the sexual harassment context.

In the TJ context of sexual harassment claims, victims experience specific therapeutic consequences, and there are significant reasons why facing an employer in a private, mandatory arbitration setting are anti-therapeutic to victims. Victims of workplace sex-related trauma experience the following: shame, denial, fear of consequences (such as job loss, inability to receive a promotion, loss of credibility, fear of being branded a troublemaker, fear of being blackballed in the employee's industry, and fear of physical safety),

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163. Michal Alberstein, *ADR and Collective Trauma: Constructing the Forum for the Traumatic Fuss*, 10 CARDOZO J. CONFLICT RESOL. 11, 15 (2008) (citing Catherine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. WOMEN CULTURE & SOC'Y 648 (1983)).

164. *See* MacKinnon, *supra* note 163, at 644–55.

165. *See id.*

166. *See* Sternlight, *supra* note 9, at 1651 ("Companies are increasingly using arbitration clauses to prevent class action from being brought against them . . . ."). Mandatory individual arbitration clauses, also known as class action waivers, force employees to arbitrate alone, rather than joining with a group of similarly injured employees. *See id.*

167. *See id.*

low self-esteem, and hopelessness.[168] Employees may decide arbitration is the proper way to handle their personal claims. Yet, when forced into a forum after experiencing the above emotions, there is an increase in the anti-therapeutic consequences for the victim—that of feeling an even greater loss of control and helplessness when forced into a forum not chosen by the victim.[169] When faced with mandatory individual arbitration agreements, victims feel an even greater sense of isolation and vulnerability by being denied the ability to gain strength through communication with others who have shared similar experiences in the same workplace.[170]

A. Case Study: What Is the Impact of Mandatory Arbitration on Victims of Workplace Sexual Harassment?

When looking back to Gretchen Carlson's case against Roger Ailes, the true impact of mandatory individual arbitration on sexual harassment victims can be seen when applying Miller's relational psychology theory.[171] The first prong of the relational psychology analysis asks whether it is likely that an employee felt a greater sense of vitality and energy after entering into a mandatory arbitration agreement.[172] Carlson did not experience a greater sense of vitality and energy after entering into the mandatory arbitration agreement because she was unable to vindicate her rights in her forum of choice.[173] In an interview with Vox, Carlson stated that "[m]ost people start jobs never expecting to get into any kind of a dispute. I know I didn't. But then

168. *Why Don't Victims of Sexual Harassment Come Forward Sooner?*, PSYCHOL. TODAY (Nov. 16, 2017), https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201711/why-dont-victims-sexual-harassment-come-forward-sooner.

169. *See id.*

170. *See id.*

171. Carlson explained in an interview with Vox that, shortly after she brought a claim against Ailes, she realized that mandatory arbitration was not just a problem but is an epidemic for employees subjected to workplace sexual harassment. Hope Reese, *Gretchen Carlson on How Forced Arbitration Allows Companies to Protect Harassers*, VOX (May 21, 2018), https://www.vox.com/conversations/2018/4/30/17292482/gretchen-carlson-me-too-sexual-harassment-supreme-court.

172. Miller et al., *supra* note 92, at 2; *supra* Section II.B

173. *See* Reese, *supra* note 171.

when you find out you have [a mandatory arbitration agreement], it means that settling that case is going to be secret."[174] Not only was Carlson unable to achieve justice by speaking with her employer,[175] but the court turned her away as well.[176] In this instance, the *Gilmer* precedent of always holding in favor of the arbitration agreement pushes victims into even more uncomfortable, traumatic experiences following the sexual harassment that has already occurred.[177] The courts' approach of enforcing mandatory arbitration clauses in sexual harassment claims provides judges with the opportunity to remedy the anti-therapeutic consequences experienced by Carlson and other victims. This remedy can occur if judges take a more understanding approach when compelling sexual harassment victims to arbitration.

A psycholegal soft spot arises when an employee willing to speak out against sex-based trauma is forced into a system where the odds are stacked in favor of employers. The second prong of the TJ/relational psychology analysis asks the following question: does each employee feel empowered to act and does the employee actually act when taking legal action concerning workplace disputes?[178] Again, in an interview with Vox, Carlson stated that when a victim complains to her employer's human resource office, the company goes, "'Phew, nobody will ever know about this,' because of [mandatory arbitration] clauses. Then you get thrown into forced arbitration where, oftentimes, the company picks your arbitrator for you. You don't get the same number of witnesses and depositions . . . [and] [r]arely does the employee win."[179]

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174. *Id.*

175. Carlson v. Ailes, No. 2:16-cv-04138-JLL-JAD, 2016 Jury Verdicts LEXIS 6653 (D.N.J. Sept. 6, 2016). Scholars claim that a sense of "justice" occurs when an individual's interests, such as autonomy and self-determination, are considered in the design of a system of justice that serves public interests. *See* Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems*?*: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 39 (1999).

176. *Carlson*, 2016 Jury Verdicts LEXIS 6653.

177. Ahrens, *supra* note 7, at 263–64, 266–73 (describing the impact of insensitive reactions to victims of sex crimes and how insensitive reactions from the legal system prevent victims from ever speaking out about their harassment experience).

178. Miller et al., *supra* note 92, at 2.

179. Reese, *supra* note 171.

Lack of empowerment is further increased at the individual arbitration level because the individual mandatory arbitration process prevents victims from being a part of a group that enables cognitive healing, thereby creating a psycholegal soft spot and anti-therapeutic results.[180] On the individual level, nearly thirty percent of mandatory arbitration agreements include class action waivers, meaning that over forty-one percent of employees covered by mandatory arbitration procedures are also subject to class action waivers.[181] When employees are subject to malicious or deceptive behavior in the workplace and are unable to receive justice, employees' sense of safety and security is exponentially weakened.[182] This lack of empowerment and the inability to feel safe and secure at work when attempting to vindicate workplace injustice carries over into future jobs.[183]

Third, does each person have a more accurate picture of her/himself and the other person(s) in the employment relationship?[184] Carlson did not have an accurate picture of herself, her employers, or her coworkers upon entering the employment contract due to the secrecy surrounding arbitration disputes.[185] By applying the *Gilmer* and *Circuit City* precedent to sex-related workplace crimes, victims are forced to remain powerless against employers when they are not an

180. *See* Ahrens, *supra* note 7, at 270–73. In Carlson's Vox interview, she stated that collective actions "give[] voice to more than just one person. The [individual] arbitration process means that nobody else in the company knows this behavior might be going on. When things are technically more out in the open, more people don't feel alone. So you find strength in numbers." Reese, *supra* note 171.

181. Colvin, *supra* note 11, at 2.

182. *See* Yamada, *supra* note 91, at 267.

183. *See id.* at 267–68. Lawyers can help with the anti-therapeutic impacts that mandatory arbitration results have on an employee's transition from one job to another by negotiating a severance program or obtaining counseling under the victim's existing health insurance plan. *Id.* at 274.

184. Miller et al., *supra* note 92, at 2.

185. *See* Reese, *supra* note 171. In her interview, Carlson indicates that mandatory arbitration proceedings prevent employees and employers from truly understanding the implications of an allegedly toxic workplace environment. *Id.* Carlson claimed that an employee could be fired for bringing a harassment or discrimination claim. *Id.* As a result, victims are out of a job and cannot tell coworkers or future employers why they had to leave. *Id.* Carlson also explained that the perpetrator will often get to stay on the job, because no one knows that the person was accused of sexual harassment. *Id.*

active participant in the group creating the terms of mandatory arbitration agreements.[186]

Fourth, does each person feel a greater sense of worth and empowerment after encountering a mandatory arbitration agreement and thereafter?[187] Carlson did not have a greater sense of worth after entering the employment contract that forced her into a forum that heavily favored her abuser.[188] Rejection from a justice system that is purported to protect victims does not promote positive feelings of self-worth.[189] When workplace issues arise, arbitration agreements effectively work to discourage employees from bringing a claim against their employer.[190] Arbitration clauses limit the legal remedies employees can pursue.[191] They place an individual employee against his or her employer in a private setting that is not open to public scrutiny.[192] Further, because arbitration occurs in private, employers are not faced with sexual harassment allegations head-on, therefore preventing employers from realizing the harmful effects of a toxic workplace.[193] Because of the private nature in which arbitration ensues, employees rarely have the opportunity to feel vindicated.[194] This lack of vindication and validation sheds light on another psycholegal soft spot.

Fifth, does each employee feel more connected to other persons in the workplace?[195] Carlson did not feel more connected to persons in

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186. *See* Ahrens, *supra* note 7, at 270–73.

187. Miller et al., *supra* note 92, at 2.

188. *See* Reese, *supra* note 171. Carlson explained that it is a "dark day" when an employee discovers that he or she has an arbitration clause in his or her employment contract. *Id.* This is partially because an employee is faced with the realization that he or she "no longer [has] the right to an open jury process." *Id.*

189. *See* Ahrens, *supra* note 7, at 269–73.

190. Sternlight, *supra* note 9, at 1651.

191. *Id.* at 1652–53.

192. *Id.* at 1647.

193. *See id.* at 1672. As a matter of public justice, private proceedings and private arbitration awards do not serve an educational function for the public or the parties involved. *Id.* Such proceedings and awards "offer no opportunity for nondisputants to learn from what happened, nor is there an incentive for arbitrators to follow precedent or develop a body of decisions consistent with the rule of law." *Id.*

194. *See id.*

195. Miller et al., *supra* note 92, at 2.

her workplace.[196] Given the specific type of trauma associated with sex-related violence, victims commonly feel isolated.[197] By privatizing a victim's abuse and forcing the employee to arbitrate a claim in a private setting, the already isolated employee becomes even more secluded.[198]

Even before an arbitration claim is brought, the confidentiality clauses embedded in arbitration agreements prevent employees from speaking to one another, greatly harming workplace socialization.[199] The workplace is one of the main environments in which adults form social relationships.[200] This is because the majority of a working adult's day is spent interacting with coworkers.[201] "[M]ost discussions of current events, movies, sports, popular culture, and personal relationships outside the family are with coworkers."[202] Through repeated interactions, coworkers often "develop feelings of affection, mutual understanding, empathy, and loyalty."[203] Moreover, relationships that form in the workplace usually make up much of every adult's social circle.[204]

Forcing employees to handle their claims individually, when they desire to collectively litigate, discourages employees from connecting with each other. Further, forced individual arbitration prevents employees from learning about similar concerns shared by others in similar situations in the workplace because of the isolation and confidentiality inherent in mandatory individual arbitration

196. *See* Reese, *supra* note 171. Carlson felt disconnected from everyone in her workplace. *See id.* This disconnect stemmed from the initial sexual harassment and was then furthered by the inability to discuss harassment openly. *See id.*

197. *See id.*

198. ABA Comm'n on Women in the Prof., Report to the House of Delegates (2018).

199. *See* Sternlight, *supra* note 9, at 1672.

200. Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 9 (2000).

201. *Id.*

202. *Id.* (citing Robert Huckfeldt et al., *Political Environments, Cohesive Social Groups, and the Communication of Public Opinion*, 39 AM. J. POL. SCI. 1025, 1031–32 (1995)).

203. *Id.*

204. *Id.*

clauses.[205] This prevents harmful workplace environments from improving.[206] Denying groups of employees their right to have an individual or collective voice in the face of workplace trauma is a psycholegal soft spot that yields anti-therapeutic results inside and outside of the workplace. When looking at the workplace socialization of employees subjected to sexual harassment, the results of arbitration include seclusion, lack of trust, rejection, and decreased self-worth.[207] Each of these results negatively impacts the behavior of individuals.[208] Feelings associated with arbitration, especially feelings associated with arbitrating over sex-related violence, inevitably contribute to lower number of cases that reach the arbitration stage and create anti-therapeutic results for employees wishing to achieve justice.

B. Obtainable Solutions: What Steps Can Be Taken to Mitigate the Harmful Psychological Effects of Mandatory Arbitration Agreements in Employment Contracts?

Beginning in 2009, bills addressing the mandatory arbitration of sexual harassment claims indicate that there are tangible solutions to the anti-therapeutic consequences caused by mandatory arbitration.[209] In March 2017, the Mandatory Arbitration Transparency Act was introduced in the Senate.[210] The Act attempted to prohibit businesses from including a confidentiality clause in their arbitration agreements related to discrimination claims.[211] The bill ultimately failed; however,

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205. *Advancing Opportunity: A Review of the Systemic Program of the U.S. Equal Employment Opportunity Commission*, EEOC (July 7, 2016), https://www.eeoc.gov/advancing-opportunitya-review-systemic-program-us-equal-employment-opportunity-commission.

206. *See* Sternlight, *supra* note 9, at 1672 (explaining that mandatory arbitration does not serve public justice because it does not provide an outlet for shaping conduct).

207. Fitzgerald et al., *supra* note 156, at 413 (explaining that psychological harm is increased when victims of sexual harassment are forced to interact with their abuser).

208. *Id.* at 412 ("[S]exual harassment . . . exerts a significant negative impact on women's psychological well-being and, particularly, job attitudes and behaviors.").

209. *See generally* Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009).

210. Mandatory Arbitration Transparency Act of 2017, 115 H.R. 4130, 115th Cong. (2017).

211. *Id.*

the reforms presented in the Mandatory Arbitration Transparency Act are a perfect fix to the anti-therapeutic results of mandatory arbitration. The Act is specifically tailored to allow employees to choose whether their sexual harassment or discrimination claim is arbitrated.[212]

Another effort to address mandatory arbitration at the federal level is through the continuously proposed Arbitration Fairness Act (AFA).[213] The AFA seeks to amend the FAA to specify that "no predispute arbitration agreement of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute" is enforceable.[214] If enacted, the AFA would effectively eliminate all mandatory arbitrations in the employment context.[215] In its statement of congressional findings, the AFA specifically refers to the problems of employees having little choice when entering mandatory arbitration agreements, the deleterious effect that mandatory arbitration has on the development of public law, and how mandatory arbitration impedes the law of judicial review.[216] Congress has repeatedly introduced this statute, with versions proposed in 2009, 2011, 2013, and 2015.[217]

Most recently, on February 12, 2018, all fifty-six state attorneys general weighed in on the issue of mandatory arbitration in the sexual harassment context.[218] The attorneys general acknowledged that while there may be benefits to arbitration provisions in certain contexts, arbitration agreements are not suitable for sexual harassment claims.[219] They claimed victims of such "serious misconduct should not be constrained to pursue relief from decision makers who are not trained as judges, are not qualified to act as courts of law, and are not positioned to ensure that such victims are accorded both procedural and substantive due process."[220] Public actions such as these demonstrate

212. *Id.*

213. Arbitration Fairness Act of 2015, 144 S. 1133, 114th Cong. (2015).

214. *Id.*

215. *Id.*

216. *Id.* at § 2.

217. *Id.*

218. Letter from National Association of Attorneys General to Congressional Leadership (Fed. 12, 2018), http://myfloridalegal.com/webfiles.nsf/WF/HFIS-AVWMYN/%24file/NAAG+letter+to+Congress+Sexual+Harassment+Mandatory+Arbitration.pdf (regarding mandatory arbitration of sexual harassment disputes).

219. *Id.*

220. *Id.*

that there are ways to fix the current state of the law without reforming the FAA completely.

VI. CONCLUSIONS FOR THE FUTURE OF MANDATORY ARBITRATION AGREEMENTS IN THE EMPLOYMENT CONTEXT

In theory, arbitration should be therapeutically beneficial to employees, and pioneers of arbitration believe it to be in the employee's best interest to arbitrate.[221] However, employees are emotional beings that search for connections in the workplace.[222] These connections stem from other employees and their employers.[223] If an employee feels devalued or unable to have control over her rights, the employee is adversely affected by a system that is allegedly designed to cater to employees.[224] This has proven to be empirically and psychologically true when viewed through a TJ/relational psychology framework.

Mandatory arbitration creates anti-therapeutic results for victims of workplace sexual harassment, but there are ways to structure the arbitration system to promote therapeutic consequences. The TJ analysis hinges on the presence of psycholegal soft spots that reveal anti-therapeutic results in the mandatory arbitration context.[225] Once the psycholegal soft spots are identified, suggestions can be made to improve the legal process at issue.[226] Throughout the analysis of mandatory arbitration agreements, many psycholegal soft spots came to the surface.

When employees sign mandatory arbitration agreements, they are shut out of the court system and forced into a setting they did not anticipate.[227] For victims of sexual harassment, this rejection is detrimental and will likely discourage the victims from continuing to speak out against their employers.[228] Although arbitration agreements

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221. *See* Estlund, *supra* note 147, at 688–89.

222. *See* Estlund, *supra* note 200, at 9; *see also* Huckfeldt et al., *supra* note 202, at 1031–32.

223. *See* Estlund, *supra* note 200, at 9.

224. *Id.*

225. *See* Wexler, *supra* note 16, at 317–21.

226. *Id.* at 319–21.

227. *See* Sternlight, *supra* note 9, at 1671–72.

228. *See* Ahrens, *supra* note 7, at 269–73.

are written into many employment contracts, the majority of employees do not know what mandatory arbitration agreements are in practice.[229] Addressing this before the employee signs a contract is a therapeutic remedy to this psycholegal soft spot. If employers were to explain to employees the legal effects of agreeing to mandatory arbitration before the employees signed employment contracts, then employees would knowingly and voluntarily enter into arbitration agreements. Then, a future victim of sexual harassment would likely pursue a claim in the correct forum when attempting to seek legal recourse against her harasser instead of facing rejection in a court, thereby making arbitration a positive healing experience.

Next, arbitration agreements disempower employees from the outset of the employment relationship because the agreements force employees into a forum where the odds are slanted against them, creating another psycholegal soft spot. This psycholegal soft spot arises due to the lack of transparency surrounding arbitration.[230] Mandatory arbitration clauses keep employees from communicating with one another because employees sign confidentiality clauses in their employment contracts.[231] To make the transparency problem worse, arbitration results are kept from public scrutiny.[232] Arbitration disadvantages employees subjected to sexual harassment because it privatizes the trauma, discrimination, or other workplace injustices by silencing employees.[233] Unlike a court of law, private arbitration occurs in the absence of legal safeguards and other guarantees that ensure a fair process.[234] A report issued by the Equal Employment Opportunity Commission noted that forced arbitration "can prevent

229. *See* Sternlight, *supra* note 9, at 1648–49.

230. *See* Estlund, *supra* note 147, at 682–84. Given that most employees who bring sexual harassment claims are terminated as a result, the payoff that results in arbitration is often not worth the risk of job loss. If arbitration proceedings and results were not private, then employees would be able to have access to more information concerning arbitration proceedings and recovery. This access to information would enable employees to make a more conscious decision when encountering arbitration agreements in employment contracts and resolve the feeling of disempowerment and lack of control when the arbitration agreement is enforced.

231. Sternlight, *supra* note 9, at 1649.

232. *Id.* at 1635.

233. EEOC, *supra* note 205.

234. *Id.*

employees from learning about similar concerns shared by others in the workplace."[235] Mandatory arbitration prevents the development of law enforcing standards and norms that should help eliminate harassing behavior by removing sexual harassment claims from the court system where decisions are publicly reported.[236] Moreover, an important stage in healing collective trauma is providing public recognition of the wrong.[237] A therapeutic solution to the transparency problem would occur if the mandatory arbitration process was made public, then employees would receive the public recognition that promotes psychological healing.[238] Further, if the mandatory arbitration process was altered to prevent employers from stopping employees from bringing class actions and if employees were made aware of the claims being arbitrated within their workplace, then workplace culture would improve, and victims of sexual harassment would be able to heal by talking about their stories with those that share the same experience.

After acknowledging the problems, psycholegal soft spots, and anti-therapeutic consequences embedded in mandatory arbitration, the next step in the TJ analysis looks to whether it is actually possible to address the anti-therapeutic consequences in mandatory arbitration.[239] It is only a matter of time before legislation is passed that will limit the enforceability of these contracts in the employment context. As seen

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235. *Id.*

236. Lisa B. Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference*, *in* ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF THE NEW YORK UNIVERSITY 50TH CONFERENCE OF LABOR 303, 303–29 (Samuel Estreicher & David Sherwyn eds., 2004).

237. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN.'S TRAUMA AND JUSTICE STRATEGIC INITIATIVE, U.S. DEP'T OF HEALTH & HUMAN SERVICES, SAMHSA'S CONCEPT OF TRAUMA AND GUIDANCE FOR A TRAUMA-INFORMED APPROACH 8 (JULY 2014), http://www.traumainformedcareproject.org/resources/SAMHSA%20TIC.pdf.

238. Carlson asserted in her Vox interview that her fight toward ending mandatory arbitration of sexual harassment claims is all about making sexual harassment a public discussion within the workplace. Reese, *supra* note 171. She claimed that if the arbitration process was more transparent then victims would be able to heal and employers would be more likely to end the sexual harassment occurring in the workplace. *Id.*

239. *See supra* Section III.A.

by the Mandatory Arbitration Transparency Act and the Arbitration Fairness Act, steps can be taken to mitigate the harmful psychological effects of mandatory arbitration without completely eliminating mandatory arbitration within the alternative dispute resolution system all together.[240]

The last step of the TJ analysis is to provide suggestions on how to reform the current state of the mandatory arbitration process. Statutes such as the Mandatory Arbitration Transparency Act and the AFA are the most tangible way to reform the current state of arbitration in America. Both reforms are narrowly tailored to allow victims of workplace sexual harassment to choose the forum in which their claim is brought. This outward push toward changing the way that mandatory arbitration is enforced against victims of sexual harassment shows that the public acknowledges the harms of mandatory arbitration in the sexual harassment context. Ideally, if truly therapeutic results are to be achieved, mandatory arbitration would not be written into employment contracts. More tangibly, if arbitration was a voluntary, fair process, then more employees would bring claims against their employers. If therapeutic consequences are to truly be addressed, then changes in arbitration need to be made. The results of arbitration disputes need to be made public, employers need to address their alleged toxic workplace environments in an open court of law, and employees need to be able to speak with one another and band together in order to cognitively heal from the trauma of sexual harassment. There are bound to be anti-therapeutic results when a weaker party is unable to pursue a cause of action in their chosen forum after gaining the courage to come forward with workplace issues. In the wake of the #MeToo movement, it is evident that changes in the workplace need to occur, and acknowledging anti-therapeutic consequences that result from the current arbitration process will help heal the toxic, anti-therapeutic work environment that employees subjected to sexual harassment currently face.

240. Mandatory Arbitration Transparency Act of 2017, 115 H.R. 4130, 115th Cong. (2017); Arbitration Fairness Act of 2015, 144 S. 1133, 114th Cong. (2015).