Revictimization Through Arbitration: Keeping Outrageous and Unforeseeable Torts in Court

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INTRODUCTION

Imagine you have just landed a new job at a restaurant. You've jumped through all the hoops and signed all the paperwork to get started. You've even completed a six-week training process as part of your employment. Then you show up for work, and on your first real day, your boss grabs you by the arm and physically forces you into a corner, preventing you from moving away from him. While he has you trapped, he expresses his sexual interest in you.

This is Deborah Page's story.[1] Page brought suit against her boss, her employer, and other individuals for a slew of claims including assault, battery, and intentional infliction of emotional distress.[2] Yet Page never got her day in court.[3]

Before commencing her employment with restaurant Captain D's, Page signed an agreement allowing her or Captain D's to elect to pursue binding arbitration of "any and all legal claims, demands or controversies between the Company and its employees."[4] Based on this language, the court granted the defendants' motion to compel arbitration before Page ever got to say her

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1. *See* Page v. Captain D's LLC, No. 12-cv-105, 2012 WL 5930611 (S.D. Miss. Nov. 27, 2012). Page was also subjected to lewd and harassing text messages by another assistant manager and retaliation. *Id.* at *2. Her suit included claims premised on these occurrences as well. *Id.* at *3. Of note, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, which passed almost a decade later, may have saved Page's claims from arbitration if it had been in place when she filed suit. *See* 9 U.S.C. §§ 401–402. However, even without the sexual aspect of the claims, the court could use the same reasoning to compel the assault, battery, and intentional infliction of emotional distress claims to arbitration today. *See infra* notes 143–45 and accompanying text.
2. *Page*, 2012 WL 5930611, at *3.
3. *Id.* at *9.
4. *Id.* at *1.

piece, let alone be made whole by the court.[5] As a result, Page's abusers avoided having to face a jury of their peers for the physical and mental anguish they caused her at work.[6] Instead, Page was left to fight a likely losing battle[7] in arbitration over claims most employees would probably never foresee arising in the workplace.[8]

This has been the fate of innumerable intentional tort claims brought by the "little guy" against not only employers,[9] but also merchants[10] and even organized religions.[11] Under the Federal Arbitration Act ("FAA"), a court may compel arbitration if the parties to a contract agreed to arbitrate, a dispute arose within the scope of the arbitration agreement, and a party refused to arbitrate.[12] Although the original purpose of arbitration primarily concerned saving time and money in disputes between merchants,[13] the Supreme Court greatly expanded the scope of arbitration in the 1980s when it adopted a "national policy favoring arbitration."[14] Now, arbitration clauses are found in virtually every type of contract, including contracts of adhesion, where one party has substantially more bargaining power than the other.[15] Courts routinely enforce these arbitration agreements, depriving plaintiffs of their day in court for even the most outrageous intentional torts and relegating them to arbitration.[16] In arbitration, however, two particular issues arise. First, plaintiffs are far less likely to win in arbitration.[17] In fact, one study has found that more people are struck by lightning in the U.S. every year than win a

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5. *Id.* at *9.

6. *See* Andrew McWhorter, *A Congressional Edifice: Reexamining the Statutory Landscape of Mandatory Arbitration*, 52 COLUM. J.L. & SOC. PROBS. 521, 555 (2019) (noting that arbitration does not involve a jury).

7. *See* AM. ASS'N FOR JUST., THE TRUTH ABOUT FORCED ARBITRATION 13 (2019).

8. *See infra* Section III.C.

9. *See, e.g.*, Steigerwalt v. Terminix Int'l Co., 246 F. App'x 798, 802 (3d Cir. 2007).

10. *See, e.g.*, Griffin v. Burlington Volkswagen, Inc., 988 A.2d 101 (N.J. Super. Ct. App. Div. 2010).

11. Petition for Writ of Certiorari at 1–3, Haney v. Church of Scientology and Religious Tech. Ctr., 142 S. Ct. 91 (2021) (No. 20-1647), 2021 WL 2181521.

12. Zurich Am. Ins. Co. v. Watts Indus., Inc., 417 F.3d 682, 687 (7th Cir. 2005).

13. Margaret L. Moses, *Arbitration Law: Who's in Charge?*, 40 SETON HALL L. REV. 147, 147 (2010) (citing H.R. REP. NO. 68-96, at 1 (1924)).

14. Southland Corp. v. Keating, 465 U.S. 1, 2 (1984).

15. Margaret L. Moses, *The Pretext of Textualism: Disregarding Stare Decisis in* 14 Penn Plaza v. Pyett, 14 LEWIS & CLARK L. REV. 825, 853–54 (2010).

16. *See, e.g.*, Duff v. Christopher, 223 N.E.3d 109 (Ohio Ct. App. 2023).

17. AM. ASS'N FOR JUST., *supra* note 7, at 13.

monetary award in consumer arbitration.[18] Second, arbitration keeps defendants' conduct shrouded from the public's eye.[19]

Congress recognized this issue recently when it passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 ("EFASASHA"), which statutorily prohibited mandatory arbitration of sexual assault and harassment claims.[20] However, courts are not precluded from compelling arbitration of other claims involving similar violations of personal safety and security, including what this article will call "personal intentional torts": assault, battery, false imprisonment, and intentional infliction of emotional distress. Personal intentional torts cut to the core of personal safety and security—violations of which are of the utmost importance to remedy and should never be hidden behind the closed doors of arbitration.

Courts currently lack a uniform approach to mandatory arbitration of personal intentional torts. When an arbitration agreement covers "all claims," many courts simply send all claims between the parties to arbitration.[21] When arbitration clauses are narrower in scope, some courts still interpret the clauses broadly enough to include personal intentional torts,[22] while other courts have construed narrower arbitration clause language to exclude personal intentional tort claims.[23] Still others take a more fact-based approach, excluding claims from mandatory arbitration if those claims were unforeseeable.[24] This last approach is the most promising for preserving judicial resolution of personal intentional tort claims because personal intentional torts are often unforeseeable in employment, consumer, and other arbitration clause-containing contracts.[25] As one example, South Carolina courts have implemented a foreseeability analysis, refusing to send claims to arbitration if (1) they are outrageous and (2) a reasonable person would not have foreseen them.[26] In applying this test to personal intentional torts, this Comment argues that personal intentional torts are almost always outrageous and do not sufficiently meet the requisite of foreseeability. Thus, personal

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18. *Id.* at 15.

19. *Ex parte* Discount Foods, Inc., 711 So. 2d 992, 994 (Ala. 1998); 168 CONG. REC. H987 (daily ed. Feb. 7, 2022) (statement of Rep. Gaetz) ("[B]ig business wins more cases, shuts down more awards, and is able to reduce awards in the arbitration setting as opposed to the setting that anybody else would be able to enter in a taxpayer-funded court.").

20. 9 U.S.C. §§ 401–402.

21. *See infra* notes 132–42 and accompanying text.

22. *See infra* notes 157–67 and accompanying text.

23. *See infra* notes 151–56 and accompanying text.

24. *See infra* Section II.B.

25. *See infra* Section III.C.

26. Aiken v. World Fin. Corp., 644 S.E.2d 705, 709 (S.C. 2007).

intentional torts should be legislatively prohibited from mandatory arbitration.

This Comment proceeds in four parts. Part I provides background on arbitration's misalignment with its original goals and the various attempts that have been made to remedy this disconnect. Part II breaks down the approaches courts currently take to mandatory arbitration of personal intentional torts, analyzing the implications of each, and concluding with a discussion of the promising foreseeability approach implemented by South Carolina. Part III then uses this approach and other policy considerations, including the importance of public adjudication and disincentivizing intentional wrongdoing, to support the proposal that personal intentional torts should be statutorily prohibited from mandatory arbitration.

I. THE EVOLUTION OF ARBITRATION

To determine whether arbitration's scope should be restricted from its current reach, it is first necessary to examine arbitration's goals and determine whether the current arbitral landscape is aligned with arbitration's purposes. A discussion of the history of arbitration in the United States, including the attempts that have been made to rein it in, demonstrates the extensive expansion of arbitration beyond the original goals for which it was implemented.

A. Arbitration's Goals and the FAA's Inception

Arbitration is a method of alternative dispute resolution which can enhance efficiency and lower costs for parties as compared to traditional litigation.[27] It achieves these benefits by eliminating or restricting standard litigation procedural protections that courts use to ensure justice.[28] These restrictions include limiting the scope of discovery, rules of civil procedure, and rules of evidence.[29] Moreover, arbitration awards generally cannot be

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27. Thomas V. Burch, *Regulating Mandatory Arbitration*, 2011 UTAH L. REV. 1309, 1337.

28. *See generally Current Rules of Practice & Procedure*, U.S. COURTS, https://www.uscourts.gov/rules-policies/current-rules-practice-procedure/federal-rules-civil-procedure [https://perma.cc/7YLC-YCRH] (noting that the Federal Rules of Civil Procedure exist to secure the just determination of every action).

29. M. Isabelle Chaudry, *An Analysis of Legislative Attempts to Amend the Federal Arbitration Act: What Policy Changes Need to Be Implemented for #MeToo Victims*, 43 SETON HALL LEGIS. J. 215, 224 (2019); Emma Kate Dillon, *Bombshell Bipartisanship: The Fate of Related Claims Within the Confines of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021*, 91 UMKC L. REV. 909, 914 (2023).

appealed.[30] Arbitration can also shield companies from class action lawsuits.[31] And notably, arbitration does not subject claims to scrutiny by a jury.[32]

The early twentieth century saw a growing trend of judicial hostility toward arbitration agreements stemming from "the fear that extrajudicial tribunals were 'instrument[s] of injustice' that 'deprive[d] parties of rights.'"[33] In response to this attitude, Congress adopted the FAA in 1925.[34] The FAA renders arbitration clauses in contracts dealing with interstate commerce enforceable in the absence of a valid contract defense.[35] Essentially, the FAA generally allows one party to a contract with an arbitration clause to compel another party to arbitrate claims.[36]

Congress intended the Act to apply to merchants of roughly equal bargaining power.[37] Statements by legislators and arbitration reform advocates from 1921 to 1926 were explicit in their intent that the FAA have a narrow scope, applying only to voluntary agreements between businesses.[38] Notably, those shaping and advocating for the Act did not intend for it to apply to contracts of adhesion or employment contracts.[39] Moreover, Congress rooted the Act in its power to establish and control lower federal courts, evidencing an intent that the Act apply only in federal courts—not state courts.[40]

By laying down the foundational procedural law to promote arbitration between commercial entities, Congress hoped the FAA would "(1) reduce consumer costs; (2) reduce court delays; (3) save time and money for the disputants; (4) preserve business relationships; and (5) simply enforce voluntary agreements to arbitrate disputes."[41]

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30. McWhorter, *supra* note 6, at 522.

31. *Id.*

32. *Id.* at 555.

33. David Horton, *Infinite Arbitration Clauses*, 168 U. PA. L. REV. 633, 645–46 (2020) (quoting Tobey v. Cnty. of Bristol, 23 F. Cas. 1313, 1320–21 (C.C.D. Mass. 1845) (No. 14,056)).

34. Burch, *supra* note 27, at 1315.

35. 9 U.S.C. § 2.

36. *See id.*

37. *See* Epic Sys. Corp. v. Lewis, 584 U.S. 497, 543 (2018) (Ginsburg, J., dissenting); Moses, *supra* note 13, at 147.

38. *See* Burch, *supra* note 27, at 1317 (noting one arbitration reform advocate's comments that the FAA would "preserve business friendships" and apply only to "voluntary" agreements).

39. *See id.* at 1318–19.

40. *See id.* at 1316. Personal injury claims are most often filed in state court. *See, e.g.*, *Arizona Courts—Where Personal Injury Claims Are Filed*, ENJURIS, https://www.enjuris.com/arizona/where-to-file-claims [https://perma.cc/6387-84HC]. The FAA was not originally intended to cover claims in state court. *See* Burch, *supra* note 27, at 1316.

41. *Id.*

B. Benefits and Drawbacks of Arbitration

Through the years, arbitration has exhibited a couple of primary benefits. For instance, it reduces judicial caseloads and lowers dispute resolution costs.[42] In cases between commercial parties of roughly equal bargaining power, arbitration can provide flexibility and predictability in structuring disputes, thus increasing efficiency and reducing expenses.[43]

However, arbitration's benefits often come at the expense of the less powerful contracting party—for example, a plaintiff bringing a personal intentional tort claim. First, the more powerful party to a contract often chooses the arbitrator.[44] This enables the more powerful party to choose an arbitrator more agreeable to their position.[45] Further, parties give up their right to extensive discovery when agreeing to arbitrate.[46] Arbitrators also need not provide a fully-reasoned opinion,[47] nor are arbitral awards usually appealable.[48] And while arbitration is insulated from judicial scrutiny, it is also insulated from public scrutiny; parties to arbitration waive their Seventh Amendment right to a trial by jury.[49] Moreover, arbitration proceedings, evidence, and awards are confidential.[50] Therefore, "[w]ithout such checks and balances, the deck is stacked heavily against workers, patients, and consumers, and systemic misconduct is allowed to continue in secret."[51]

Mandatory arbitration harms consumers, employees, and other noncommercial plaintiffs in two primary ways. First, mandatory arbitration

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42. *See id.* at 1310.

43. *See* Jeremy Wright, *Arbitration in the Workplace: The Need for Legislative Intervention*, 117 NW. U. L. REV. 1, 6–10 (2022).

44. McWhorter, *supra* note 6, at 527.

45. *Id.*

46. Matthew J. Clark, *The Legal and Ethical Implications of Pre-Dispute Agreements Between Attorneys and Clients to Arbitrate Fee Disputes*, 84 IOWA L. REV. 827, 839 (1999).

47. *Id.* Judges also need not provide reasoned opinions. Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 526 (2015). However, the absence of a requirement for arbitrators to provide reasoned opinions further insulates them from judicial scrutiny. Clark, *supra* note 46, at 839 n.68.

48. McWhorter, *supra* note 6, at 522. The FAA allows vacatur of an award only where it was procured by corruption, fraud, or undue means; any arbitrator evidenced partiality or corruption; the arbitrators were guilty of misconduct; or the arbitrators exceeded their powers. 9 U.S.C. § 10(a).

49. *See* Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 670 (2001).

50. John Abbott, *Confidentiality in Arbitration: How Confidential Is Confidential?*, LAYTONS (July 4, 2023), https://www.laytons.com/publications/confidentiality-in-arbitration-how-confidential-is-confidential [https://perma.cc/B8EG-MEQG].

51. AM. ASS'N FOR JUST., *supra* note 7, at 6.

severely reduces the number of claims brought forward at all.[52] To use consumer arbitration as an example, between 2014 and 2019, only about 6,000 claims were arbitrated each year.[53] In contrast, plaintiffs bring two million claims annually in small claims court.[54] Noncommercial plaintiffs bring fewer claims when they are subject to mandatory arbitration because arbitration often blocks class action suits and because noncommercial plaintiffs often have a "profound lack of understanding" of arbitration.[55]

Second, noncommercial plaintiffs are much less likely to win in forced arbitration.[56] Because of the inconsistent nature of arbitration reporting, it is difficult to quantify the exact statistics regarding plaintiff "wins" in mandatory arbitration.[57] However, one study noted that more people are struck by lightning each year in the U.S. alone than win a monetary award in consumer arbitration.[58] Moreover, consumers sometimes win in arbitration yet *still end up losing money* due to fees.[59]

Thus, arbitration's gold-plated goals can be well-achieved in commercial cases between similarly powerful parties, but arbitration can woefully underserve plaintiffs outside of those contexts. Therefore, this Comment argues not for total elimination of mandatory arbitration, but rather for its limitation—there is a time and a place for arbitration, where its benefits shine and its potential for abuse is low. Arbitration's rapid expansion elucidates this need.

C. Arbitration Expands

Over time, the Supreme Court has expanded arbitration far beyond its original scope, using the FAA to systematically erode the judiciary's ability to effect justice.[60] Arbitration has become extremely widespread, covering more claims and claimants. A major shift in this direction occurred in the

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52. *Id.* at 8.

53. *Id.*

54. *Id.*

55. *See id.* at 11–12 (quoting Jeff Sovern et al., *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. L. REV. 1, 2 (2015)).

56. *See id.* at 13 (noting the rarity with which consumers win in arbitration).

57. *Id.*

58. *Id.* at 15.

59. *Id.* at 17. Despite arbitration's supposed cost-effectiveness, corporations sometimes renege on promises to pay costs and force consumers to pay 100% of the arbitration fees or drop their cases. *Id.*

60. *See* Suzette M. Malveaux, *Is It Time for a New Civil Rights Act? Pursuing Procedural Justice in the Federal Civil Court System*, 63 B.C. L. REV. 2403, 2425–26 (2022).

1980s, when the Supreme Court professed a "national policy favoring arbitration" in *Southland Corp. v. Keating*.[61] In *Southland*, the Supreme Court compelled a plaintiff to arbitration by ruling that the FAA displaced a state statute that would have preserved the plaintiff's access to the courts.[62] The Court made its policy pronouncement despite "[t]he 1925 Congress [having] never indicated in the slightest way that arbitration was to be favored over judicial resolution of disputes."[63] In fact, this policy "appears to be one created by the judiciary out of whole cloth," potentially influenced by the national labor policy favoring arbitration of collective bargaining agreements—a policy based on preventing worker strikes and violence.[64] Since then, the Supreme Court itself and lower courts—both state and federal—have cited the "national policy favoring arbitration" to justify depriving myriad plaintiffs and claims of their days in court.[65]

And how did the FAA go from originally applying only to federal courts to now covering state courts, too? The FAA does not include a preemption clause in its text.[66] However, in addition to evincing pro-arbitration policy, *Southland* was also the first in a series of FAA preemption cases.[67] The *Southland* Court noted in its decision to compel the plaintiff to arbitration that "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."[68] Thus, the Court summarily invalidated legislation by states that attempts to limit arbitration, shrinking the available tools for voiding arbitration clauses down to standard contract defenses.[69]

In subsequent cases, the Court shrunk this toolbox even further by holding that the FAA preempts state law on various contract defenses.[70] The FAA contains a savings clause which purports to allow courts to invalidate arbitration clauses when standard contract defenses apply.[71] Despite this

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61. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

62. *Id.* at 14–15.

63. Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 123 (2006).

64. *Id.* at 123–24.

65. *See, e.g.*, *infra* note 161 and accompanying text.

66. David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 446 (2011).

67. *See id.* at 453–54; Anita Bernstein, *Privity 2.0 May Be Even Better for Tort Defendants*, 49 FLA. ST. U. L. REV. 765, 785 (2022).

68. 465 U.S. 1, 16 (1984).

69. Horton, *supra* note 66, at 453–54.

70. *See* Bernstein, *supra* note 67, at 784–87.

71. 9 U.S.C. § 2 (declaring that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").

savings clause, the Supreme Court has invalidated defenses of public policy[72] and unconscionability[73] as asserted against arbitration clauses in certain circumstances.

Unconscionability has taken a particular beating from pro-arbitration caselaw. Although "[n]othing in the Federal Arbitration Act overrides normal rules of contractual interpretation,"[74] the Supreme Court has "calibrated the unconscionability doctrine in a manner that is quite deferential to arbitration."[75] In *AT&T Mobility LLC v. Concepcion*, the Supreme Court held that "a court cannot apply the unconscionability doctrine in a way that discriminates against arbitration."[76] Since then, some courts have interpreted *AT&T Mobility* to preclude relying on an unconscionability defense when the reasoning is that the arbitration clause covers too many claims.[77]

Though the Supreme Court has chipped away at judicial and state legislative resources for limiting arbitration, the FAA is still supposedly limited to contracts concerning interstate commerce.[78] However, at the time of the FAA's adoption, the definition of commerce had not been fully explored or expanded by the Supreme Court.[79] Seventy years later, the Supreme Court clarified that the FAA "reach[es] to the limits of Congress'[s] Commerce Clause power."[80] Due to the seemingly ever-expanding reach of the Commerce Clause—regarded by many as the broadest power of the federal government[81]—the FAA covers consumer contracts, employment contracts, and any other contracts tangentially relating to interstate

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72. Bernstein, *supra* note 67, at 786 (noting that a public policy rationale failed in the Supreme Court case *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530 (2012)).

73. *See infra* notes 74–77 and accompanying text.

74. Stone v. Doerge, 328 F.3d 343, 345 (7th Cir. 2003).

75. Horton, *supra* note 66, at 456.

76. Horton, *supra* note 33, at 665; *see also* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 343 (2011).

77. *E.g.*, Wexler v. AT&T Corp., 211 F. Supp. 3d 500, 504 (E.D.N.Y. 2016); *see* Horton, *supra* note 33, at 666.

78. *See* Anjanette H. Raymond, *It Is Time the Law Begins to Protect Consumers from Significantly One-Sided Arbitration Clauses Within Contracts of Adhesion*, 91 NEB. L. REV. 666, 667–68 (2013).

79. *Id.*

80. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 268 (1995).

81. David S. Schwartz, *An Error and an Evil: The Strange History of Implied Commerce Powers*, 68 AM. U. L. REV. 927, 940 (2019); *see also* Linda R. Monk, *The Commerce Power*, PBS, https://www.pbs.org/tpt/constitution-usa-peter-sagal/federalism/the-commerce-power [https://perma.cc/6HEE-6GCS].

commerce.[82] Thus, the FAA often reaches the same contracts of adhesion that its original supporters vehemently opposed it covering. The American Arbitration Association itself has recognized the power imbalance so often present in arbitration clause-containing contracts.[83] In fact, because entire industries now implement arbitration clauses in their contracts as standard practice, people "often have no choice but to accept them."[84] Under the FAA's command—or rather, the Supreme Court expansive interpretation of that command—courts routinely compel claims arising out of contracts between parties of "greatly disparate economic power" to arbitration.[85] Some businesses even use this power imbalance to tilt arbitral rules in their favor by shortening statutes of limitation, restricting discovery, and otherwise manipulating procedures.[86] The formidable combination of widespread arbitration clause usage and the lack of power among plaintiffs, state lawmakers, and courts to invalidate them makes mandatory arbitration provisions ripe for abuse.

In conjunction with the Supreme Court's broad application of the FAA, changes in arbitration clause language have paved the way for courts to send more claims to arbitration.[87] Traditionally, arbitration clauses generally covered claims connected to the arbitration clause-containing contract.[88] Lately, contract drafters have been increasingly using what David Horton calls "infinite arbitration agreements."[89] Horton's infinite arbitration agreements may exhibit several characteristics tending to increase the number of claims and claimants compelled to arbitrate.[90] For the purposes of this Comment, "infinite arbitration agreements" refers to those arbitration provisions which are not limited to claims "arising from or related to" the

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82. *See* Raymond, *supra* note 78, at 690; EDWARD BRUNET, *The Core Values of Arbitration*, *in* ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 3, 8 (2006) ("[R]epeat users of arbitration include banks, credit card issuers, computer manufacturers, physicians, securities brokers, car dealers, and chain restaurant franchisers . . . .").

83. *See* CONSUMER DUE PROCESS PROTOCOL STATEMENT OF PRINCIPLES 4 (AM. ARB. ASS'N 1998) ("[B]ecause consumer contracts . . . frequently consist of boilerplate language presented on a take-it-or-leave it basis by suppliers of goods or services, there are legitimate concerns regarding the fairness of consumer conflict resolution mechanisms required by suppliers.").

84. Moses, *supra* note 15, at 853–54; *see also* J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3092 (2015).

85. Moses, *supra* note 15, at 853.

86. Glover, *supra* note 84, at 3065.

87. *See generally* Horton, *supra* note 33 (discussing how Supreme Court rulings regarding arbitration agreements have led to an expansion of the FAA).

88. *See id.* at 639.

89. *Id.*

90. *See id.* at 639–40.

contract at issue.[91] Doing away with the limiting language of arbitration clauses past, infinite arbitration clauses contain language that covers "all claims."[92] And some courts bite, meaning they send every single claim between the parties to arbitration, regardless of whether such claims involve violent conduct, emotional abuse, or otherwise threatening behavior.[93]

In totality, courts have overwhelmingly expanded the FAA's coverage and severely crippled the states' ability to limit the FAA's reach. Contract drafters have caught on and now frequently take advantage of this expansion by construing arbitration clause language in their favor through infinite arbitration agreements.[94] The result is a reality for plaintiffs where arbitration is seemingly becoming the rule rather than the exception.[95] Because arbitration is no longer aligned with its original goals, legislative intervention is necessary—and many attempts have been made.

D. Shift Toward Limits on Arbitration

In recent years, Congress has begun to chip away at arbitration's broad reach in an effort to realign it with arbitration's goals and ensure the accessibility of justice.[96] The piecemeal changes Congress has made to restrict arbitration in certain contexts indicates legislators' concern for the breadth of claims and claimants subject to mandatory arbitration.[97] Congress has found the most success with legislation shielding certain categories of claimants from mandatory arbitration.[98] For example, Congress has limited some motor vehicle companies from mandating arbitration under franchise agreements, military personnel from needing to arbitrate consumer-credit disputes, and livestock and poultry companies from being forced into arbitration under certain contracts.[99] Another successful statute includes the Dodd-Frank Wall Street Reform Consumer Protection Act, which shields

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91. *See id.* at 639.

92. *See, e.g.*, Page v. Captain D's LLC, No. 12-cv-105, 2012 WL 5930611, at *1 (S.D. Miss. Nov. 27, 2012); Steigerwalt v. Terminix Int'l Co., LP, 246 F. App'x 798, 802 (3d Cir. 2007).

93. *See infra* notes 132–42 and accompanying text (including examples of cases being sent to arbitration because arbitration clauses covered "all claims").

94. Horton, *supra* note 33, at 639.

95. For more on the data concerning the hundreds of millions of consumers and sixty million employees that are subject to arbitration, see AM. ASS'N FOR JUST., *supra* note 7, at 6–7.

96. Between 1995 and 2010, congressmembers introduced 139 bills seeking to limit arbitration, but only 5 were passed into law. Burch, *supra* note 27, at 1332–33.

97. *See generally id.* at 1332–37 (discussing recent trends in Congress to limit arbitration).

98. Malveaux, *supra* note 60, at 2465.

99. Burch, *supra* note 27, at 1334.

whistleblowers exposing federal securities law violations from being forced to arbitrate claims.[100]

Other legislation has limited which parties and claims can be compelled to arbitration based on the personal nature of the claims. Congress passed the first legislation somewhat limiting arbitration of personal torts in 2010: the Franken Amendment to the Department of Defense Appropriations Act ("DoD Act").[101] The DoD Act was enacted in response to Jamie Leigh Jones's case.[102] Jones was allegedly raped by coworkers while working abroad.[103] When she brought suit against her employer, the employer tried to compel Jones to arbitration.[104] This moved Senator Al Franken to sponsor the amendment, which disallows the government from entering contracts of over $1 million with defense contractors unless those contractors agree not to require their employees to arbitrate Title VII or tort claims arising out of sexual assault or sexual harassment.[105] Franken noted that "arbitration does have a place in our system, but handling claims of sexual assault and egregious violations of civil rights is not its place."[106] This was a large step for Congress, as it was the first federal legislation preventing employers from subjecting their employees to mandatory arbitration.[107] However, the Act still only protects a small group of claimants: defense contractor employees.[108]

Congress's latest and most notable success in limiting arbitration is the passage of EFASASHA.[109] EFASASHA became law in 2022.[110] It prohibits

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100. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, sec. 922(a), § 21F, 124 Stat. 1376, 1841 (2010) (codified at 15 U.S.C. § 78u-6).

101. Department of Defense Appropriations Act, Pub. L. No. 111-118, 123 Stat. 3409 (2009).

102. Eric Koplowitz, *"I Didn't Agree to Arbitrate That!"—How Courts Determine if Employees' Sexual Assault and Sexual Harassment Claims Fall Within the Scope of Broad Mandatory Arbitration Clauses*, 13 CARDOZO J. CONFLICT RESOL. 565, 571 (2012).

103. Jones v. Halliburton Co., 583 F.3d 228, 230 (5th Cir. 2009).

104. *Id.* at 233.

105. Department of Defense Appropriations Act § 8115(b)(1) (prohibiting mandatory arbitration of "any claim under [T]itle VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention"); Koplowitz, *supra* note 102, at 571.

106. Letter from Al Franken, U.S. Sen., to Shay Assad, Dir. of Def. Procurement & Acquisition Pol'y, U.S. Dep't Def. (Mar. 2, 2010).

107. Koplowitz, *supra* note 102, at 571.

108. *See* David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 YALE L.J.F. 1, 8 (2022).

109. *See id.* at 9–11.

110. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (2022) (codified at 9 U.S.C. §§ 401–402). *See generally* Hirsh Joshi, *You Have Got to Be Keating Me: Why the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act Is a Good Start*, 2023 J. DISP. RESOL. 113, 114.

mandatory arbitration of claims arising out of sexual assault or sexual harassment.[111] It defines a sexual assault dispute as "a dispute involving a nonconsensual act or sexual contact" and a sexual harassment dispute as "a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law."[112] Congress passed the Act in response to the #MeToo movement.[113]

EFASASHA is notable because it marks Congress's first successful foray into claim-based approaches to limiting arbitration.[114] Unlike the Franken Amendment, the Dodd-Frank Act, and various other one-off arbitration-limiting laws, EFASASHA prohibits forced arbitration based on the nature of the claims themselves—not who brings them.[115]

Other attempts to limit arbitration based on the nature of the claims have not found the same success.[116] The fatal flaw of those failed statutes has been their over-broadness.[117] For example, the Forced Arbitration Injustice Repeal Act ("FAIR Act") has been introduced in Congress repeatedly, never making it past the Senate.[118] The FAIR Act would prohibit mandatory arbitration in employment, consumer, civil rights, and antitrust disputes.[119] In the past, the bill has been criticized as disregarding the benefits of arbitration and likely increasing litigation, costs, and inefficiency.[120]

EFASASHA likely survived the legislative process due to its narrow scope and the nature of the claims it saves from arbitration.[121] EFASASHA represents a good start to limiting arbitration of personal intentional torts by ensuring no sexual assault or harassment victim is deprived of her day in court.[122] However, EFASASHA does not cover assault and battery outside of

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111. 9 U.S.C. § 402(a).

112. *Id.* § 401(3)–(4).

113. *See* Heidi M. S. Sandomir, *The End of Forced Arbitration of Sexual Violence and the Uncertain Future*, 29 CARDOZO J. EQUAL RTS. & SOC. JUST. 111, 151 (2022).

114. *See* Burch, *supra* note 27, at 1334 (describing the other congressional limits on arbitration, each of which is claimant-based).

115. 9 U.S.C. § 402(a).

116. Burch, *supra* note 27, at 1335–36.

117. *Id.* at 1333–37 (noting that while some bills proposing total elimination of arbitration received widespread attention in Congress, only narrower bills have passed).

118. *See* H.R. 2953, 118th Cong. (2023); H.R. 963, 117th Cong. (2022).

119. H.R. 2953.

120. *Statement of Administration Policy: H.R. 1423—Forced Arbitration Injustice Repeal (FAIR) Act*, AM. PRESIDENCY PROJECT (Sept. 17, 2019), https://www.presidency.ucsb.edu/documents/statement-administration-policy-hr-1423-forced-arbitration-injustice-repeal-fair-act [https://perma.cc/DJ3V-5HA3].

121. *See* Horton, *supra* note 108, at 2, 25 (noting that EFASASHA was a milestone for the #MeToo movement and that it is narrower than other proposed limits on arbitration).

122. *See* Malveaux, *supra* note 60, at 2408.

a sexual context, nor does it cover false imprisonment or intentional infliction of emotional distress, unless these claims "relate to" a sexual assault or harassment dispute.[123] Thus, as scholar Suzette Malveaux recognized, EFASASHA is just the beginning—"it is time to go even further, to cover a greater array of procedural barriers and a broader swath of Americans."[124]

II. APPROACHES TO MANDATORY ARBITRATION OF PERSONAL INTENTIONAL TORTS

The Supreme Court and Congress have been in a tug of war over arbitration's limits since the FAA's inception, with increasing fervor in the last forty years. The former has repeatedly broadened the FAA's coverage while the latter has made a motley of attempts to restrain it. One thing neither has done, though, is provide usable guidance to lower courts wrestling with motions to compel claims to arbitration.

Lower courts have a couple of parameters when addressing such motions. First, they know the FAA generally makes arbitration provisions enforceable in federal and state courts.[125] Second, they know of the national policy favoring arbitration[126] and that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[127] These minimal guardrails leave courts a great degree of flexibility when deciding whether to compel claims to arbitration.[128] Resultingly, different courts take different approaches to arbitration overall, including arbitration of personal intentional torts.[129]

This Comment divides courts' approaches to determining whether to compel arbitration of personal intentional torts into two categories based on broad trends throughout the caselaw on the subject. The first category is the Deferential Approach, where courts adhere as closely as possible to the wording of an arbitration provision. The second approach is the Foreseeability Approach, where courts have developed different formulations for deciding when to send claims to arbitration based on some foreseeability aspect. Analyzing how courts have decided when a personal

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123. EFASASHA provides no guidance for construing the meaning of "relate." Dillon, *supra* note 29, at 923–28.

124. Malveaux, *supra* note 60, at 2408.

125. Raymond, *supra* note 78, at 669.

126. *See* Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

127. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983).

128. *See generally* Horton, *supra* note 33, at 651–55 (describing the disagreement among courts when deciding whether to compel arbitration of claims).

129. *See id.* at 641 ("[C]ourts disagree about whether to compel arbitration of claims that seek relief for shocking misconduct").

intentional tort (or similar—e.g., sexual assault) claim should be compelled to arbitration provides insight into the most promising paths forward for removing these claims from arbitration's reach. This Part discusses these approaches and their implications. The following Part then describes how one iteration of the Foreseeability Approach that South Carolina has implemented can offer sound guidance for legislation limiting arbitration of personal intentional torts.

A. The Deferential Approach

Some courts give great deference to the language of arbitration agreements.[130] This poses problems particularly when a court is dealing with an infinite arbitration agreement.[131] Some courts will send all claims to arbitration when the court believes that two parties consented to arbitrate "all claims" between them—not just those "arising out of" the contract in some way.[132]

This approach has deprived numerous plaintiffs from bringing their personal intentional torts in court.[133] For example, in the 2017 case *Haasbroek v. Princess Cruise Lines, Ltd.*, Michelle Haasbroek, a cruise ship spa employee, was raped by a coworker while off-duty.[134] Unfortunately for Haasbroek, the employment contract she signed subjected "any and all disputes, claims or controversies whatsoever" to arbitration.[135] When Haasbroek brought claims, including sexual assault, against her employer, the Southern District of Florida Court compelled her claims to arbitration.[136] When Haasbroek argued that her claims arising out of rape, sexual assault, and sexual harassment were "beyond the scope" of the arbitration clause in her employment contract, the court noted that such torts *can* be subject to arbitration.[137]

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130. *See id.* at 642.

131. *See id.*

132. *See id.*

133. *See, e.g.*, Steigerwalt v. Terminix Int'l Co., 246 F. App'x 798, 801–02 (3d Cir. 2007) (compelling arbitration of plaintiff's intentional tort claims because the arbitration clause the parties signed subjected "all claims" to arbitration); Shimkus v. O'Charley's, Inc., No. 11-CV-122, 2011 WL 3585996, at *4 (N.D. Ind. Aug. 16, 2011) (compelling arbitration of intentional infliction of emotional distress claim for the same reason).

134. 286 F. Supp. 3d 1352, 1355–58 (S.D. Fla. 2017).

135. *Id.* at 1355.

136. *Id.* at 1360.

137. *Id.* at 1358–59.

The *Haasbroek* court turned to *Doe v. Princess Cruise Lines, Ltd.* for support.[138] A few years earlier, the *Doe* court had refused to send rape-based claims for intentional infliction of emotional distress and false imprisonment to arbitration.[139] Although this seems like a step in the right direction, the *Doe* court's reasoning deprived Haasbroek of her day in court years later. To elaborate, the *Doe* court only refused to compel arbitration of the personal intentional torts because the arbitration clause in that case limited arbitration to those disputes "relating to" or "arising out of" the employment or contract.[140] The *Doe* court specifically noted that the rape claims would have gone to arbitration if the arbitration clause had been broader.[141] Thus, the *Haasbroek* court reasoned the infinite arbitration clause in the plaintiff's employment contract ensured all claims would be arbitrated.[142]

Of note, the *Haasbroek* case (as well as *Page* and other cases which also compelled arbitration of sexual assault claims) occurred before EFASASHA was enacted.[143] Under EFASASHA, these claims probably would not have gone to arbitration.[144] Nonetheless, remove the sexual aspect of these claims and the outcome is the same: plaintiffs in battery, assault, and intentional infliction of emotion distress cases are denied access to the courts. Thus, giving such deference to infinite arbitration agreements creates a blanket answer as to a claim's arbitrability; if a claim arises, it goes to arbitration without question.[145]

Alternatively, as *Doe* illustrates, when arbitration agreements are not infinite, courts that give deference to the terms of the agreement still delineate the scope of the agreement.[146] As opposed to infinite arbitration agreements purporting to cover "all claims," non-infinite arbitration provisions include language limiting mandatory arbitration to claims "arising out of" or "relating

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138. *Id.* at 1359.

139. 657 F.3d 1204, 1221 (11th Cir. 2011).

140. *Id.* at 1214–15, 17–18.

141. *Id.* at 1218.

142. 286 F. Supp. 3d at 1360. Other courts have used similar reasoning. *See, e.g.*, Page v. Captain D's LLC, No. 12-cv-105, 2012 WL 5930611 (S.D. Miss. Nov. 27, 2012); Morales v. Rent-A-Ctr., Inc., 306 F. Supp. 2d 175 (D. Conn. 2003); Moss v. Rent-A-Ctr., Inc., No. 06-CV-3312, 2007 WL 2362207 (E.D.N.Y. Aug. 15, 2007).

143. *See Haasbroek*, 286 F. Supp. 3d at 1354.

144. *See* 9 U.S.C. § 402(a). This is because EFASASHA prohibits mandatory arbitration of claims *related to* sexual assault and sexual harassment claims, which the personal intentional torts alleged in these cases would likely satisfy as having arisen out of sexual assault and harassment occurrences. *See* Horton, *supra* note 108, at 10–11.

145. *See Haasbroek*, 286 F. Supp. 3d at 1360.

146. *See* Horton, *supra* note 33, at 651 (noting that judges decide questions of whether a particular dispute is subject to arbitration); *Doe*, 657 F.3d at 1219 (determining exactly which claims were governed by the arbitration agreement).

to" the subject of the contract in some way.[147] Courts struggle to interpret such language.[148] This leads once again to courts taking various approaches.[149] Some courts choose to construe non-infinite clauses narrowly, holding that they do not extend to personal intentional torts.[150] Conversely, others construe them broadly and hold that they do cover personal intentional torts.[151]

Courts that construe non-infinite arbitration clauses narrowly compel arbitration only of claims which clearly and directly relate to the subject of the contract.[152] This narrow delineation of the arbitration clause's scope can save personal intentional tort claims from arbitration. For example, in *Hill v. Hilliard* the court refused to compel arbitration of rape, assault, battery, and false imprisonment claims because they did not arise out of the employment context—and the arbitration clause only covered those claims which did.[153] Hill brought claims against her employer after he allegedly raped her during a work convention.[154] The court noted that the "mere fact that these tort claims might not have arisen but for the fact that the two individuals were together as a result of an employer-sponsored trip cannot be determinative."[155] The arbitration clause did not extend to these claims because rape and the other personal intentional torts at issue were not part of the employment relationship.[156]

However, plaintiffs do not always avoid mandatory arbitration just because the arbitration agreement they signed uses limiting "arising out of" or "relating to" language, making it non-infinite. Some courts "read the terms 'arising out of' or 'relating to' a contract as indicative of an 'extremely broad' agreement to arbitrate any dispute relating in any way to the contract."[157]

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147. *See supra* note 91 and accompanying text (defining infinite arbitration clauses as *not* arising from or related to the transaction or contract at issue); *see also* Horton, *supra* note 33, at 651.

148. Koplowitz, *supra* note 102, at 574.

149. *See generally* Horton, *supra* note 33 (discussing how courts take different approaches to deciding whether any dispute is arbitrable, construing arbitration clauses narrowly or broadly).

150. *See id.* at 651–52.

151. *See id.* at 651–54.

152. *See id.* at 651.

153. 945 S.W.2d 948, 950, 952 (Ky. Ct. App. 1996).

154. *Id.* at 950.

155. *Id.* at 952.

156. *See id.*

157. *E.g.*, Griffin v. Burlington Volkswagen, Inc., 988 A.2d 101, 103 (N.J. Super. Ct. App. Div. 2010) (quoting Angrisani v. Fin. Tech. Ventures, L.P., 952 A.2d 1140, 1146 (N.J. Super. Ct. App. Div. 2008)).

For example, in *Griffin v. Burlington Volkswagen, Inc.*, the arbitration clause in a contract between a car dealership and a buyer covered claims "that may arise out of or relat[e] to the purchase or lease . . . and the financing thereof."[158] When the buyer's financing fell through, the dealership reported the car stolen.[159] The buyer was arrested and subsequently brought claims of false imprisonment and intentional infliction of emotional distress against the dealership.[160] Notwithstanding the tenuous relationship between the personal intentional tort claims and the consumer contract, the court compelled the claims to arbitration, noting that the "favored status afforded to arbitration" supports reading arbitration agreements "liberally in favor of arbitration."[161] The court held the claims were connected to the contract because understanding the ownership rights to the car required reference to the underlying contract.[162]

Similarly, the court in *Forbes v. A.G. Edwards & Sons, Inc.* compelled personal intentional tort claims to arbitration despite the narrow language of the arbitration clause at issue.[163] The plaintiff brought claims of assault, battery, and intentional infliction of emotional distress against her employer, alleging that a coworker sexually assaulted her at a work conference.[164] The arbitration clause in the plaintiff's employment contract purported to cover claims "arising from [plaintiff's] employment."[165] However, the court construed the clause broadly and asked whether the allegations underlying the claims "touch[ed] matters" covered by the parties' contracts.[166] Because the sexual assault was by a coworker and at a work-related event, the court found that it satisfied the test.[167]

Such reasoning sets a precedent that as long as intentional tortfeasors commit torts at work (or in any situation which otherwise relates to the contract), they can be saved from court by an arbitration agreement.[168] Using this reasoning, if an individual signs a contract containing an arbitration

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158. *Id.* at 518.

159. *Id.* at 517.

160. *Id.*

161. *Id.* at 516–18, 520–21 (quoting Garfinkel v. Morristown Obstetrics & Gynecology Assocs., 773 A.2d 665, 670 (N.J. 2001)).

162. *Id.* at 520–21.

163. No. 08-CV-552, 2009 WL 424146 (S.D.N.Y. Feb. 18, 2009).

164. *Id.* at *1–2.

165. *Id.* at *1.

166. *Id.* at *8.

167. *Id.*

168. *See* Koplowitz, *supra* note 102, at 574–75 (noting that sending any claim that would not have arisen "but for" employment to arbitration would theoretically send every work-related claim to arbitration).

clause to join a religion, a member of that religion could batter the individual at a church-sponsored event and never have to face a jury for his actions.

Ultimately, courts can easily justify sending claims to arbitration when an arbitration clause is infinite, but even when the clause is not infinite, they have power to construe it broadly and compel arbitration anyway. Thus, banning infinite arbitration clauses would not save personal intentional torts from mandatory arbitration.[169] Regardless of the specific wording of a given arbitration agreement, none of the above formulations "yields a principled way of . . . deciding whether these claims should be sent to arbitration."[170] The Foreseeability Approach, however, delineates a slightly more concrete boundary for arbitration based on the nature of the claims.

B. The Foreseeability Approach

Courts using the Foreseeability Approach include in their decisions some analysis of the foreseeability of the claims at issue arising. This has taken shape differently in different courts, with some using a foreseeability analysis to declare arbitration unconscionable,[171] others simply refusing to compel unforeseeable claims to arbitration without further detail,[172] and still others implementing a reasonable person test to decide the arbitrability of claims.[173]

At least one court has employed a foreseeability analysis to support a finding that arbitrating an intentional tort would be unconscionable under the circumstances.[174] Specifically, the *Valued Services of Kentucky v. Watkins* court refused to send a false imprisonment claim to arbitration because it had so little relation to the underlying contract that the parties could not have foreseen it.[175] Thus, the court held that compelling arbitration of the claim would be unconscionable.[176] Notably, the Supreme Court has indicated that the unconscionability doctrine should be deferential to arbitration.[177] This

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169. *See supra* notes 158–67 and accompanying text (discussing cases in which plaintiffs who signed non-infinite arbitration agreements were compelled to arbitrate their personal intentional tort claims).

170. Leadertex, Inc. v. Morganton Dyeing & Finishing Corp., 67 F.3d 20, 28 (2d Cir. 1995).

171. *See* Valued Servs. of Ky., LLC v. Watkins, 309 S.W.3d 256, 265 (Ky. Ct. App. 2009).

172. *See* Fuller v. Guthrie, 565 F.2d 259, 261 (2d Cir. 1977).

173. *See* Aiken v. World Fin. Corp., 644 S.E.2d 705, 709 (S.C. 2007).

174. *See Valued Servs.*, 309 S.W.3d at 265.

175. *Id.*

176. *Id.*

177. *See supra* notes 74–77 and accompanying text.

may make courts hesitant to hold arbitration clauses unconscionable.[178] Furthermore, unconscionability cannot provide wide-scale relief from arbitration of personal intentional torts because it operates on a case-by-case basis.[179]

However, some courts have used a similar foreseeability analysis in contexts outside of unconscionability to avoid sending personal intentional tort claims to arbitration.[180] In *Fuller v. Guthrie*, the court opted not to compel arbitration of intentional tort claims because it was "highly unlikely that the parties could have foreseen, no less intended, to provide a forum for wholly unexpected tortious behavior."[181] The court in *Victoria v. Superior Court* likewise refused to compel arbitration of claims arising out of a hospital employee's rape of a patient because neither party would have contemplated such a violent act being committed.[182] Therefore, the court held the parties could not have agreed to arbitrate claims arising out of that act.[183]

South Carolina has gone even further with a unique approach to limiting arbitration's broad reach. The state has adopted a reasonable person standard for determining when a dispute sufficiently relates to an underlying contract such that it is arbitrable.[184] Although there is no consensus definition of the reasonable person standard, the standard generally asks what a typical, reasonable person would think or do in a given situation.[185] In *Aiken v. World Financial Corp. of South Carolina*, the court held that it "refuse[s] to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings."[186] The court did not compel claims including intentional infliction of emotional distress arising from the plaintiff's employer's misuse of his personal information to arbitration because it was "wholly unexpected tortious conduct."[187]

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178. *See* Horton, *supra* note 33, at 656 (noting that the Supreme Court's jurisprudence on unconscionability as applied to arbitration clauses has influenced at least one court to refuse to apply the doctrine to an arbitration agreement).

179. Burch, *supra* note 27, at 1325.

180. *See, e.g.*, Fuller v. Guthrie, 565 F.2d 259 (2d Cir. 1977); Victoria v. Super. Ct., 710 P.2d 833 (Cal. 1985) (discussing foreseeability in deciding whether to compel claims to arbitration).

181. *Fuller*, 565 F.2d at 261.

182. *Victoria*, 710 P.2d at 839.

183. *Id.*

184. *See* Aiken v. World Fin. Corp., 644 S.E.2d 705, 709 (S.C. 2007).

185. *See* Christopher Brett Jaeger, *The Empirical Reasonable Person*, 72 ALA. L. REV. 887, 889 (2021).

186. 644 S.E.2d at 709.

187. *Id.*

Unlike the Deferential Approach, a foreseeability analysis provides a more concrete guideline for courts. Specifically, rather than leaving room for complete judicial discretion regarding whether to compel arbitration,[188] the foreseeability analysis guides courts to answer the question, "was the claim foreseeable?"[189] If the answer is no, courts following the Foreseeability Approach will not send the claim to arbitration.[190]

However, few courts use the Foreseeability Approach, and it is not without drawbacks. A foreseeability analysis leaves open the possibility for judges to still send personal intentional torts to arbitration.[191] Because a judge, not a jury, decides whether a claim goes to arbitration,[192] the judge alone makes the reasonableness call. Yet, the way reasonableness is determined varies greatly.[193] This leaves uncertainty as to whether a given judge will compel a given personal intentional tort claim to arbitration. Furthermore, the foreseeability approach is arguably in tension with *AT&T Mobility* because it is unique and applies only to arbitration.[194] Resultingly, some courts may hesitate to apply it.[195] Part III explores how a legislative solution can solve these problems.

III. PERSONAL INTENTIONAL TORTS SHOULD FALL OUTSIDE THE SCOPE OF MANDATORY ARBITRATION CLAUSES

The national policy favoring arbitration has led many courts like the ones just discussed to send personal intentional tort claims to arbitration, regardless of the scope of the arbitration agreement.[196] This has allowed countless intentional tortfeasors to keep their wrongdoings private, never

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188. *See supra* Section II.A (discussing the myriad ways courts using the Deferential Approach decide cases of arbitrability).

189. *See, e.g.*, *Aiken*, 644 S.E.2d at 709; Fuller v. Guthrie, 565 F.2d 259, 261 (2d Cir. 1977); Victoria v. Super. Ct., 710 P.2d 833, 839 (Cal. 1985).

190. *See, e.g.*, *Aiken*, 644 S.E.2d at 709; *Fuller*, 565 F.2d at 261.

191. *See, e.g.*, Timmons v. Starkey, 671 S.E.2d 101 (S.C. Ct. App. 2008) (using South Carolina's foreseeability test and still compelling intentional infliction of emotional distress claim to arbitration).

192. Patrick Austin, *Sample Motion to Compel Arbitration*, SOLOSUIT (Apr. 11, 2024), https://www.solosuit.com/posts/motion-compel-arbitration-sample [https://perma.cc/AC8V-WEQ8].

193. *See* Jaeger, *supra* note 185, at 889.

194. Horton, *supra* note 33, at 666.

195. *See id.* at 642 (noting that Supreme Court decisions make some judges hesitate to rule against arbitration).

196. *See supra* Section II.A.

subjected to public adjudication.[197] To limit the potential for abuse that comes from the unchecked reach of arbitration, personal intentional torts should never be compelled to arbitration.

In *Aiken*, South Carolina espoused a clear test for arbitrability which asks whether (1) the claims are outrageous and (2) the claims were foreseeable.[198] The South Carolina test should theoretically prevent many personal intentional tort claims from being sent to arbitration. In the case of infinite arbitration agreements, this test would prevent the default approach of sending "all claims" to arbitration by requiring further factual inquiry. In dealing with narrower arbitration clauses, the test would implement safeguards to prevent courts from compelling arbitration of outrageous and unforeseeable torts that nonetheless appear to "arise from or relate to" the underlying contracts. However, leaving the outrageousness and foreseeability analyses entirely to the judge gives the judge too much discretion to still compel arbitration of personal intentional torts. Thus, to ensure no victim of a personal intentional tort is deprived of her day in court, a legislative approach is necessary.

Applying the South Carolina test to personal intentional torts reveals that most are outrageous and unforeseeable, meaning that personal intentional torts satisfy the test to avoid arbitration nearly every time. This outcome supports a sweeping ban on mandatory arbitration of personal intentional torts that would resolve the judicial discretion issue. Furthermore, policy favors the public adjudication of personal intentional torts such that a legislative solution is appropriate.

A. Personal Intentional Torts Are Outrageous and Unforeseeable

South Carolina's reasonableness test asks (1) whether the claim is outrageous and (2) whether a reasonable person would foresee the claim arising.[199]As previously noted, the test as applied by courts can present issues.[200] However, because personal intentional torts should nearly always satisfy this test, a legislative ban on their mandatory arbitration is appropriate.

Firstly, personal intentional torts are nearly always "outrageous." *Aiken* does not clarify what it means for a tort to be outrageous, but the court held that intentional infliction of emotional distress satisfied the test.[201] In fact,

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197. McWhorter, *supra* note 6, at 522.
198. Aiken v. World Fin. Corp., 644 S.E.2d 705, 709 (S.C. 2007).
199. *Id.*
200. *See supra* notes 193–97 and accompanying text.
201. 644 S.E.2d at 707, 709.

intentional infliction of emotional distress is called the "tort of outrage" in some states.[202] Further, scholars like Eric Koplowitz have noted that "[c]learly, acts of sexual assault, rape, and false imprisonment are outrageous torts that a reasonable employee could not foresee arising out of their employment."[203] Removing the sexual aspect of a tort should not make it less outrageous. Studies show that victims of personal intentional torts even without a sexual component can suffer serious mental harm, including post-traumatic stress disorder ("PTSD") and anxiety.[204] Personal intentional torts can also cause physical harm. For example, physical injury often results from battery.[205]

Furthermore, in the context of deciding whether conduct is outrageous enough to create a cause of action for intentional infliction of emotional distress, courts in several states ask whether the conduct exceeds that which is usually tolerated in a civilized society.[206] This analysis can be applied to other personal intentional torts to conclude that those torts are also outrageous because they are not tolerated in our society. The fact that criminal penalties exist for the criminal analogs of assault, battery, and false imprisonment[207] clearly demonstrates that our society does not tolerate this intentional tortious

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202. *See, e.g.*, 6 WASH. STATE SUP. CT. COMM. ON JURY INSTRUCTIONS, *WPI 14.03 Tort of Outrage*, *in* WASH. PRAC.: PATTERN JURY INSTRUCTIONS—CIVIL (Thomson Reuters, 7th ed. 2022).

203. Koplowitz, *supra* note 102, at 588.

204. *See generally* Daniel Freeman et al., *Paranoia and Post-Traumatic Stress Disorder in the Months After a Physical Assault: A Longitudinal Study Examining Shared and Differential Predictors*, 43 PSYCH. MED. 2673 (2013) (finding that individuals who have been physically assaulted commonly suffer from anxiety disorders—such as paranoia and post-traumatic stress disorder—which are "distinct experiences" yet "positively correlated").

205. *See* Jose Rivera, *Elements of Criminal Battery*, LEGALMATCH, https://www.legalmatch.com/law-library/article/elements-of-criminal-battery.html [https://perma.cc/6SP2-W93B].

206. *See, e.g.*, Rogers v. Louisville Land Co., 367 S.W.3d 196, 201 (Tenn. 2012); Vasquez v. Franklin Mgmt. Real Est. Fund, Inc., 222 Cal. App. 4th 819, 832 (2013); Garrow v. Earley, No. 2 CA-CV 2018-0053, 2018 WL 6262149, at *2 (Ariz. Ct. App. Nov. 29, 2018); Appleton v. Bd. of Educ., 757 A.2d 1059, 1062 (Conn. 2000).

207. *See, e.g.*, MODEL PENAL CODE §§ 10.2, 212.2. Although the elements of assault, battery, and false imprisonment, along with the burdens of proof, are different in civil and criminal contexts, civil suits for personal intentional torts are often accompanied by criminal cases. *See generally* Melissa J. Pena, *The Role of Appellate Courts in Domestic Violence Cases and the Prospect of a New Partner Abuse Cause of Action*, 20 REV. LITIG. 503, 503–04 (2001) (discussing that in domestic violence cases, victims usually seek legal redress through the criminal justice system but also commonly bring civil actions for battery, assault, and intentional infliction of emotional distress).

behavior.[208] The physical and mental harm associated with personal intentional torts further explains why society is not tolerant of such acts. Because some types of personal intentional torts are widely regarded as outrageous and all personal intentional torts are not tolerated in our society, they should all be considered outrageous for the purposes of this test.

Of course, personal intentional torts can vary based on state law so that not *every single* personal intentional tort is outrageous *every* time. The most notable example of this is battery in a single intent state, which only requires intent to make contact with a person, not intent to harm or offend.[209] Theoretically, in a single intent jurisdiction, an employee could sue her employer for battery because the employer tapped her on the shoulder.[210] However, "[a]bsent special circumstances, an intentional tap on the shoulder is not a battery" because, to any reasonable person, a tap on the shoulder is not outrageous.[211] If we assume that conduct like tapping someone on the shoulder could be a battery, though, the rare personal intentional tort may fail the "outrageous" requirement of the South Carolina test. Thus, banning arbitration of personal intentional torts could mean some non-outrageous claims still get a day in court.

However, this is not detrimental to the proposal because there is no harm in allowing less outrageous intentional tort claims to be properly litigated in court. Certain edge cases like single intent battery may be collaterally saved by legislation prohibiting mandatory arbitration of personal intentional torts, but there is no strong argument to arbitrate these cases anyway. They are still not commercial disputes between merchants, and such claims should be few enough to not greatly interfere with judicial efficiency. The solution of legislatively prohibiting arbitration of personal intentional torts cannot accomplish its purposes if it is narrowed further.

Secondly, personal intentional torts are nearly always unforeseeable. Just as "rape does not ordinarily arise out of the employment context,"[212] battery, assault, false imprisonment, and intentional infliction of emotional distress ordinarily do not arise out of contractual relationships. Before EFASASHA

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208. *See* Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 989 (1991) (arguing that criminal remedies are important because they "send a clear social message that battering is impermissible").

209. *See, e.g.*, Wagner v. State, 122 P.3d 599, 610 (Utah 2005).

210. *Cf.* Erik Encarnacion, *Why and How to Compensate Exonerees*, 114 MICH. L. REV. FIRST IMPRESSIONS 139, 143 (2016) (noting that mistakenly touching someone with no intent to harm or offend could be considered a battery).

211. John C.P. Goldberg & Benjamin C. Zipursky, *The Strict Liability in Fault and the Fault in Strict Liability*, 85 FORDHAM L. REV. 743, 749–50 (2016).

212. Hill v. Hilliard, 945 S.W.2d 948, 952 (Ky. Ct. App. 1996).

passed, scholars noted that it was unlikely that employees intend to arbitrate sexual assault claims.[213] Likewise, employees, consumers, religious organization members, and other individuals signing arbitration agreements likely do not intend to arbitrate personal intentional torts. For example, it is unlikely that a person starting a new job can foresee being assaulted and battered by her coworker,[214] that an individual borrowing money can foresee being locked inside the check-cashing store until he repays it,[215] or that a new member of a religious organization can foresee being falsely imprisoned by church leaders.[216]

People also tend to be overly optimistic when signing contracts containing arbitration clauses, causing them to undervalue the right to sue.[217] This furthers the unforeseeability of being forced to arbitrate personal intentional tort claims. In fact, one study has found that although 43% of consumers recognized when a sample contract included an arbitration clause, 61% believed they would still be able to bring claims in court—and only 9% understood they would be giving up their right to go to court.[218] Thus, not only do individuals not expect to be battered, for example, in the workplace, but they also do not expect to have to arbitrate that claim. Furthermore, individuals signing contracts with arbitration clauses are often signing adhesive contracts.[219] Clearly, contract signers often do not realize what they are giving up when they agree to arbitrate claims.

If courts used a foreseeability analysis when confronted with a motion to compel personal intentional tort claims to arbitration, they would likely often find that they are unforeseeable. Thus, they could hold that the parties could not have contracted to arbitrate them and avoid compelling them to arbitration.[220] However, in addition to many judges' hesitancy to act against the national policy favoring arbitration, another problem arises: contract drafters could easily overcome this foreseeability requirement by specifically including intentional torts in the arbitration clauses to make them "foreseeable." Although this may in theory make personal intentional torts foreseeable, contract signers are still unlikely to foresee those torts actually

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213. *See* Koplowitz, *supra* note 102, at 587.

214. Victoria v. Super. Ct., 710 P.2d 833, 839 (Cal. 1985).

215. Valued Servs. of Ky., LLC v. Watkins, 309 S.W.3d 256, 265 (Ky. Ct. App. 2009).

216. *See* Petition for Writ of Certiorari, *supra* note 11, at *1–3. Although the plaintiff did not put forth a foreseeability argument in this case, the case provides an example of the subjection of personal intentional tort claims to arbitration in a religious context.

217. Koplowitz, *supra* note 102, at 587.

218. AM. ASS'N FOR JUST., *supra* note 7, at 12.

219. CONSUMER DUE PROCESS PROTOCOL STATEMENT OF PRINCIPLES, *supra* note 83, at 4.

220. Victoria v. Super. Ct., 710 P.2d 833, 839 (Cal. 1985).

arising. This also defeats policy considerations for ensuring that plaintiffs can bring personal intentional tort claims in court. A legislative prohibition on mandatory arbitration of personal intentional torts can draw a boundary for arbitration while solving these problems.

B. Policy Dictates that Legislation Is the Right Path Forward

Various policy considerations support the idea that plaintiffs should have a day in court for personal intentional torts regardless of whether contract drafters can implement loopholes to cast such claims as foreseeable. Among these policy considerations are the intentional and personal nature of the tort claims which create an interest in their public adjudication.

To start with an elementary proposition, intentionally tortious conduct is bad. The law has historically recognized fewer defenses for intentional wrongdoing than for negligence.[221] Also, the law more often finds that a defendant's conduct was the legal cause of harm when it was intentional, regardless of foreseeability.[222] Essentially, courts are not inclined to limit the liability of an intentional tortfeasor.[223]

This inclination reflects a public policy of disincentivizing intentional wrongdoing. Mandating arbitration of personal intentional torts does not support this policy.[224] Rather, it does the opposite by shielding intentional tortfeasors from public adjudication of their wrongdoing in front of a jury of their peers.[225] Public adjudication holds defendants accountable by creating a public record of the facts and demonstrating the defendant's acceptance of responsibility.[226] The absence of public adjudication in arbitration does away with this accountability, failing to disincentivize wrongdoing to the same extent as courtroom litigation and exposing plaintiffs to the lower likelihood of prevailing in arbitration than in court.[227]

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221. Kelly A. Meredith, *Who Is Responsible When Someone Commits Suicide? An Examination of* Turcios v. Debruler Co.*, 2015 IL 117962, 32 N.E.3d 1117*, 41 S. ILL. U. L.J. 137, 141 (2016).

222. *Id.*

223. Ralph S. Bauer, *The Degree of Moral Fault as Affecting Defendant's Liability*, 81 U. PA. L. REV. 586, 589 (1933).

224. *See Ex parte* Discount Foods, Inc., 711 So. 2d 992, 994 (Ala. 1998).

225. *Id.*

226. Mary Jo White, Chair, U.S. SEC, The Importance of Trials to the Law and Public Accountability (Nov. 14, 2013), https://www.sec.gov/newsroom/speeches-statements/2013-spch111413mjw [https://perma.cc/GP6W-SXAR].

227. *See supra* notes 56–59 and accompanying text.

In passing EFASASHA, Congress recognized a particular interest in the public adjudication of sexual assault and sexual harassment claims.[228] In light of the inherently intentional and personal nature of personal intentional torts, the same reasoning applies to these claims. EFASASHA was meant to "eliminate institutional protection for harassers and abusers and give survivors the chance to pursue justice."[229] When passing related legislation less than a year after EFASASHA's enactment, Congress noted that prohibiting nondisclosure and non-disparagement clauses in these cases "empower[s] survivors to come forward, hold[s] perpetrators accountable for abuse, improve[s] transparency around illegal conduct, enable[s] the pursuit of justice, and make[s] workplaces safer and more productive for everyone."[230] The public adjudication of personal intentional torts accomplishes the very same goals. Survivors can come forward knowing they will get a day in court and their abusers will be held accountable for their actions. And without public adjudication, Representative Pramila Jayapal noted, "survivors with claims against a company are stripped of the right to decide how to pursue accountability for their perpetrator."[231] Removing arbitration's shield for tortfeasors and the entities that employ them will encourage better workplace policies and oversight, creating not only a more just system for victims, but a safer workplace for everyone.

Next, personal intentional torts are just that—deeply personal. Assault, battery, false imprisonment, and intentional infliction of emotional distress cut to the heart of personal safety and security. These torts can have serious impacts on the mental wellbeing of victims. For example, being assaulted or battered is known to increase the risk of paranoia and PTSD.[232] Courts have also routinely acknowledged that false imprisonment can cause PTSD and extreme anxiety.[233] Intentional infliction of emotional distress can cause

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228. *See* 9 U.S.C. § 402; *see also* H.R. REP. NO. 117-234, at 3–4 (2022).

229. Press Release, Nikema Williams, Congresswoman, House of Reps., Congresswoman Nikema Williams Helps Pass Bill to Empower Survivors of Sexual Harassment and Assault (Feb. 8, 2022), https://nikemawilliams.house.gov/posts/congresswoman-nikema-williams-helps-pass-bill-to-empower-survivors-of-sexual-harassment-and-assault [https://perma.cc/7DWU-GQHH].

230. Speak Out Act, Pub. L. No. 117-224, § 2(7), 136 Stat. 2290, 2290 (2022) (codified at 42 U.S.C. § 19401(7)).

231. 168 CONG. REC. H987 (daily ed. Feb. 7, 2022).

232. Freeman, *supra* note 204.

233. *See, e.g.*, Schanafelt v. Seaboard Fin. Co., 239 P.2d 42, 44 (Cal. Ct. App. 1951) ("[E]xtreme anxiety or emotional distress is recognized in false imprisonment cases as one of the elements of the damage caused by the tortious act."); Miller v. State, 124 A.D.3d 997, 1000 (N.Y. 2015) (finding that the claimant was entitled to $35,000 in damages for being falsely imprisoned

similar mental health issues.[234] Victims of such negatively impactful conduct "deserve the right to choose how their justice is achieved, and to be protected from further discrimination, trauma, and harm."[235]

As an extreme example of the impact a legislative prohibition on mandatory arbitration of personal intentional torts could have, a Los Angeles court recently compelled plaintiff Valerie Haney's claims to arbitration.[236] Haney filed claims including intentional infliction of emotional distress and false imprisonment against Scientology when the church allegedly physically prevented her from leaving.[237] Because Haney had signed a "billion-year contract" agreeing to arbitrate all claims against Scientology, the court summarily denied her a day in court and sent her to the church's chosen forum.[238] It is time to stop protecting abusers and letting them dictate the fate of victims' claims against them. The legislation proposed in this Comment would be a step toward preventing the revictimization of plaintiffs like Haney, assuring them a proper day in court and a better chance to be made whole on at least the most egregious claims.

C. Challenges and Advantages of Congressional Legislation

Considering the legal and policy reasons for ensuring that personal intentional tort claims are adjudicated in court, it is imperative to foreclose the possibility of loopholes in contract drafting that may result in personal intentional torts being compelled to arbitration. Thus, a legislative solution is appropriate.

Importantly, Congress has the power to prohibit certain arbitration agreements.[239] As previously noted, it has done so in a variety of piecemeal

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for three weeks in "Kafkaesque" conditions that "exacerbated his preexisting posttraumatic stress disorder"); Bourque v. Stop & Shop Companies, 814 A.2d 320, 326 (R.I. 2003) (allowing evidence of PTSD resulting from false imprisonment).

234. *See, e.g.*, Stokes v. Puckett, 972 S.W.2d 921, 926 (Tex. App. 1998) (holding that a damages award for intentional infliction of emotional distress was supported by plaintiffs' "depression, anxiety, embarrassment, [loss] of self-esteem, humiliation and various physical manifestations of their mental anguish").

235. Sandomir, *supra* note 113, at 153 (discussing the importance of EFASASHA).

236. Petition for Writ of Certiorari, *supra* note 11, at 1–3.

237. Complaint at 26, 30–31, Doe v. Church of Scientology & Religious Tech. Ctr., No. 19STCV21210 (Cal. Super. Ct. June 18, 2019), 2019 WL 13118036.

238. Tonya Ortega, *She Escaped Scientology in the Trunk of a Car. Her Nightmare Is Far from Over*, ROLLING STONE (Mar. 27, 2023), https://www.rollingstone.com/culture/culture-features/valerie-haney-scientology-escape-car-trunk-religious-arbitration-david-miscavige-tom-cruise-elisabeth-moss-1234703982 [https://perma.cc/5PRV-JMRF].

239. Koplowitz, *supra* note 102, at 590.

ways, with EFASASHA being the most recent.[240] This legal backdrop sets the stage for further legislative limits on arbitration.

However, legislation would be less flexible than a judicial guideline or other solutions. This rigidity gives rise to a number of opposing arguments, many of which were put forth when Congress debated on EFASASHA.

First, opponents to this claim-based limit on arbitration may fear that "Congress is changing existing and agreed-to contracts."[241] Courts generally respect parties rights to contract freely, and legislation prohibiting certain terms from being contracted to infringes on this freedom. However, other concerns override parties' interests in freely contracting in cases of personal intentional torts. First, many arbitration clause-containing contracts are adhesive. Thus, the argument that parties are contracting freely in the first place is suspect. Coupling this with contract signers' overoptimism about terms justifies the infringement. Overriding the freedom to contract for fairness reasons is an established concept and is the basis for various traditional contract defenses, including unconscionability.[242]

Decreasing efficiency of claim resolution is another potential concern. One of arbitration's main goals since its inception has been to increase judicial efficiency.[243] Arbitration can be more efficient than litigation for the same reasons it can cause procedural unfairness: limited discovery, limited opportunities to appeal, and simplified rules of evidence and procedure, for example.[244] Efficiency is thus often cited as a core benefit of arbitration.[245] Removing a category of claims from being subject to mandatory arbitration arguably could undermine this goal by directing more claims into the court system.

However, the efficiency issue can be turned on its head by broadening the scope of the analysis. By legislatively removing personal intentional torts from arbitration's scope, efficiency of claim resolution may actually be *increased* because court resources will no longer need to be dedicated to determining whether personal intentional tort claims should be compelled to

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240. *See supra* Section I.D.

241. 168 CONG. REC. H990 (daily ed. Feb. 7, 2022) (statement of Rep. Michelle Fischbach).

242. Keith W. Diener, *The Doctrine of Unconscionability: A Judicial Business Ethic*, 8 U. P.R. BUS. L.J. 103, 110 (2017).

243. *See* Hiro N. Aragaki, *Constructions of Arbitration's Informalism: Autonomy, Efficiency, and Justice*, 2016 J. DISP. RESOL. 141, 143–45.

244. Donald J. Friedman, *Using Early Case Evaluation with ADR*, *in* TRENDS IN ALTERNATIVE DISPUTE RESOLUTION: LEADING LAWYERS ON UNDERSTANDING THE BENEFITS AND DRAWBACKS OF ARBITRATION, MEDIATION, AND NEGOTIATION IN TODAY'S LEGAL LANDSCAPE 37, 48–51 (2012), 2012 WL 5898582, at *8–9.

245. *See supra* Section I.A.

arbitration. Most of the cases cited in this Comment exemplify court resources going toward resolving motions to compel arbitration of these claims. Additionally, exempting just a few more claims—those particularly ripe for abuse—from arbitration preserves arbitration in most contexts so that contracting parties can continue to enjoy its benefits in almost every situation.[246]

IV. CONCLUSION

Legislation prohibiting mandatory arbitration of personal intentional torts will help realign arbitration's scope with its original goals. Rather than leaving the question of whether to compel arbitration of personal intentional torts up to judicial discretion, legislation will categorically remove from arbitration's scope a subset of noncommercial claims often arising from adhesive contracts. EFASASHA has laid the groundwork for a bill prohibiting the mandatory arbitration of personal intentional torts, and the same interest in publicly adjudicating sexual assault and harassment claims applies to personal intentional torts. EFASASHA was a step in the right direction,[247] but another claim-based bill removing personal intentional torts from arbitration's reach would legislatively ensure procedural protections for victims of the most outrageous and unforeseeable conduct. In a world where arbitration clauses are seemingly part of every transaction, this legislation would protect unsuspecting consumers, employees, and other contract-signers from losing their procedural rights when their personal safety and security has been threatened by an intentional tortfeasor.

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246. *See* McWhorter, *supra* note 6, at 555 (noting that claim-based exemptions to arbitration preserve arbitration "across most contexts" while creating a focused approach to exempting claims "ripe for abuse if subject to arbitration").

247. Malveaux, *supra* note 60, at 2408.