From Statute to Contract: The Law of the Employment Relationship Reconsidered

Eileen Silverstein
FROM STATUTE TO CONTRACT: THE LAW OF THE EMPLOYMENT RELATIONSHIP RECONSIDERED

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Most observers would say that the employment relationship is regulated largely by statutes. Personnel decisions must comply with the nondiscrimination and accommodation mandates of federal laws like Title VII, the ADEA, the ADA, the FMLA, and their state counterparts. Pay equity between the sexes is explicitly required by the EPA, while the FLSA establishes minimum wages and prescribes the circumstances under which employees are compensated for working overtime. Conditions at the workplace that implicate health and safety are subject to OSHA standards. Pension benefit plans are closely regulated by ERISA, and ERISA’s preemption provision appears to oust common law oversight of welfare benefit plans. Even the judicially-created case law eroding employment-at-will is finding expression in statutes such as the Montana Wrongful Discharge From Employment

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1. Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17 (1994 & Supp. IV 1999) (amended 1999). The familiarity of these statutes allows me to refer to them by their common acronyms in the text and to relegate full titles, like citations, to the footnotes.
Act, the New Jersey Conscientious Employee Protection Act, and the ABA’s Model Employment Termination Act.

These statutes that regulate aspects of the employment relationship are premised on the failure of the market to produce outcomes that correspond to social preferences and ideas about the treatment of different groups. Congressional declarations assert that “wage differentials based on sex” depress income, to the detriment of workers’ health and efficiency, and prevent maximum utilization of available labor resources; that “arbitrary age limits regardless of potential for job performance” disadvantage older workers in their efforts to retain or regain employment; that “the continuing existence of unfair and unnecessary discrimination and prejudice” denies people with disabilities employment opportunities; that “[v]ast resources that could be available for productive use are siphoned off to pay workmen’s compensation benefits and medical expenses;” that “many employees with long years of employment [lose] anticipated retirement benefits” because of the absence of vesting provisions and inadequate funding of pension plans; and that “the lack of employment policies to accommodate working parents” may force a choice between job security and parenting.


13. See, e.g., Barrentine v. Ark.-Best Freight Sys., 450 U.S. 728, 735 (1981) (stating that labor and employment laws are “[p]redicated on the assumption that individual workers have little, if any, bargaining power”). See also the National Labor Relations Act (NLRA), 29 U.S.C. § 151 (1994) (“The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce . . . .”). The NLRA also protects individuals from adverse employment decisions motivated by union animus. See 29 U.S.C. §§ 158(a) (1), 158(a) (3) & 158(b) (1) (A).


19. 29 U.S.C. §2601(a) (3).
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Having identified the market failure, each statute provides an enforcement scheme which will enable individuals and government agencies to, in the words of the Equal Pay Act, "correct and . . . eliminate the conditions above referred to . . ." by, for example, promoting employment on the basis of ability rather than age or race or gender; by providing places of employment "free from recognized hazards that are causing or likely to cause death or serious physical harm to . . . employees"; and by assuring the soundness of pensions "for the protection of the revenue of the United States, and to provide for the free flow of commerce . . .".

Unsurprisingly, the rights recognized by these statutes are routinely described as both private and public ones, established for the benefit of individuals and society as a whole. In one of the first decisions interpreting Title VII, the Supreme Court instructed that federal court relief not only compensates the victims of discrimination but vindicates the broader public interest in deterring future discrimination. Also, unsurprisingly, the remedial schemes of these statutes correspond to the dual nature of the rights, authorizing compensation to make individuals whole, including attorneys fees for prevailing plaintiffs, while also making injunctive relief presumptively appropriate, thus reinforcing the prophylactic or deterrent purpose of the legislation. As emphasized by the Supreme Court as recently as in 1998, the "primary objective" of

22. 29 U.S.C. § 654(a) (1).

[T]he primary objective was a prophylactic one: "It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. . . ." If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. . . . Backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.

25. See id. at 421.
26. See Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968) (Congress authorized individuals injured by racial discrimination to be awarded attorney's fees because they are acting as "'private attorney[s] general' vindicating a policy that Congress considered of the highest priority"); see also Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 420-22 (1978) (prevailing plaintiffs routinely receive attorney's fees while prevailing defendants receive them only if the plaintiff's claim was frivolous, unreasonable, or without foundation).
27. See Newman, 390 U.S. at 402.
statutes, like Title VII, that are meant "to influence primary conduct, is not to provide redress but to avoid harm."  

However, and remarkably, the statutory regulation of the employment relationship, and its correction of market failures, is disappearing under the cloak of judicial decisions upholding contracts which, in one form or another, find individuals to have waived their and the public's statutory rights. In a variation on the nineteenth century's transformation of the employment relationship from status to contract, we have the contemporary move from statute to contract.

This Article challenges the return to contract in the regulation of the employment relationship on two related but independent grounds. First, I contend that contractual waivers both annul the "primary objective" of avoiding harm established by employment statutes and invite the very conduct these laws were designed to stop. Second, I argue that the standard for testing the legality of waivers, whether they are entered into "knowingly and voluntarily," misconstrues the circumstances under which employees make a meaningful choice to accept the terms of employment contracts.

Part I of this Article examines how contractual waivers operate within the framework of the statutory regulation of the employment relationship: Employers remove future disputes from statutory regulation by requiring applicants for employment and incumbent employees to agree, as the price of securing or retaining a job, to have all employment-related disagreements, including alleged violations of statutory rights, decided by arbitration rather than litigation. Employers insulate current and prior employment decisions from legal challenge by requiring employees to release all claims, including those based on statute, as the price of receiving enhanced benefits. In both of these circumstances, an individual who has not challenged an employment practice or personnel decision agrees to forego statutory rights whose significance may not yet be appreciated, in order to secure something of immediate value, like a job or a benefit. I call these agreements

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29. See discussion infra Section II. These waivers also preclude assertion of common law claims.
31. See discussion infra Section II.B.
32. See discussion infra Section II.A.
33. Unlike this Article, the literature tends to focus on either contractual clauses that substitute arbitration for litigation as the forum for disposing of statutory claims or clauses that condition benefits on the waiver of accrued statutory claims. Among the best articles are: David S. Schwartz, Enforcing Small Print To Protect Big Business: Employee and Consumer Rights Claims
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Part II addresses the question of whether the move from statute to contract is a cause for concern. Many would answer no because allowing the waiver of statutory claims empowers workers to decide for themselves the value of these rights. For example, a female employee earning $30,000 a year may suspect that gender played a role in the employer’s decision to eliminate her job by combining it with that of her retained male colleague; but rather than litigate the matter she might prefer to accept the employer’s offer of $100,000 in severance pay conditioned on a release of accrued but as yet unchallenged legal claims. Indeed, one could argue that the statutory entitlement of a workplace in which gender does not play a decisive role in employment decisions has created a background legal rule that prompts compensation of employees when employers either indulge their unlawful preferences or try to shield themselves from litigation over economically-motivated personnel decisions. And one law, the ADEA, explicitly authorizes waivers-for-private-gain as long as they are “knowing and voluntary” in the sense of meeting minimal procedural safeguards.

On the other hand, the statutes regulating the employment relationship do not authorize the courts to compromise the goals of compliance and compensation by applying contract principles which are designed for the quite different purpose of resolving private, commercial disputes. Nor have the conditions which animated the Congressional legislation vanished or been substantially ameliorated. Not a single employment-related law has been repealed; indeed, one could argue that the accumulation of rights-based legislation demonstrates Congress’ (and the state legislatures’) awareness of continuing failures in the labor


34. 29 U.S.C. § 626(f) (1) (1994); see also infra notes 60-65 and accompanying text.

Having discussed the operation and impact of waivers-for-private-gain, I proceed in Part II of the Article to examine the criteria for allowing these private agreements as long as they meet some type of "knowing and voluntary" waiver of statutory rights. Although the courts in applying the various statutes use somewhat different terms and standards in describing a "knowing and voluntary" waiver, the core, shared concept is procedural regularity. For example, courts enforce agreements to arbitrate, rather than litigate, future employment disputes as long as there is some evidence in the record that the employee could have been alerted to the promise that an arbitrator would resolve future disputes at the workplace. And judges satisfy themselves that waivers of the right to challenge past and present employment practices in exchange for enhanced benefits are "knowing and voluntary" by insisting on strict compliance with requirements that an individual receive adequate information and sufficient time to consider the proposed trade-off, so that evidence of compliance with a legal requirement of 21 days to consider a waiver of claims is evidence of both knowledge (time to consider) and voluntariness (time to consider without feeling coerced). Thus, the law denies the concept of voluntariness any independent meaning, and, as I argue in Part III, ignores the rich philosophical literature on voluntariness and its counterpoint coercion. Part III concludes that only a fully realized conception of voluntariness provides a legitimate baseline for examining the authenticity of contractual waivers of statutory rights in the employment relationship.

I. WAIVERS-FOR-PRIVATE-GAIN AND WAIVERS-BY-SETTLEMENT COMPARED

The use of waivers-for-private-gain, whether to foreclose litigation of present or past statutory claims or to substitute arbitration for


38. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); infra note 98 and accompanying text.

39. See Oubre, 522 U.S. at 424.
adjudication of future claims of statutory violations, rests to a large extent on an analogy with ending civil litigation through settlement rather than by trial. The rationale is that waivers-for-private-gain function in a manner similar to waivers-by-settlement.40

The analogy does not appear in the statutes themselves. When enacting laws like Title VII and the ADEA, Congress focused on defining the nature of the newly-recognized rights and on the means for enforcement;41 there is no reference to the possibility of, or the conditions under which, beneficiaries of the legislation could contract out of the statutes’ provisions. Indeed, at the time Congress was enacting laws to regulate employment relations, the raison d’être for government intervention was dissatisfaction with practices in the workplace, whether established through arms-length negotiation or set by employers and at least tacitly agreed to by employees.42 During this period as well, judges dismissed the arbitral forum as inadequate.43 It was simply unimaginable that the enactment of complex statutory regimes designed to give judicial protection to workers who “have little, if any, bargaining power”44 could be supplanted by private agreement.

Although it could be argued that Congressional silence on the use of contractual waivers signaled Congressional expectation that statutory rights could never be compromised through contract, even through settlement,45 this argument proves too much. Congress authorized lawsuits by individuals, thus recognizing that compliance pursuant to agency initiatives alone could not bring about a rapid transformation in employment practices.46 To enable employees to secure legal representation, in most circumstances the legislation provides for fee-

41. See, e.g., S. REP. No. 88-872 (1964) (giving the legislative history of Title VII).
42. See, e.g., id.
43. The exception to this judicial hostility was in labor-management disputes where the parties, as part of a negotiation about terms and conditions at the workplace, agreed to final, binding arbitration as the means to settle disputes arising under a collective bargaining agreement. See United States v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).
44. Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 735 (1981). But cf. 29 U.S.C. § 151 (providing that in order to remedy unequal bargaining power, the NLRA authorizes collective bargaining so that employees through their unions can participate in setting the rules at the workplace).
45. In the 1960s and the 1970s the case law did not allow waivers of statutory rights by employees. See discussion infra Section II.B.
46. Recent figures only underline the significance of private enforcement. See Scharf, supra note 10, at 137 (stating that the EEOC was a party to less than one-quarter of one percent of employment litigation).
Having opened the courthouse doors to individual litigation, it is highly unlikely that Congress by its silence intended private litigants in statutory employment cases to have fewer tactical options than litigants in other civil disputes. Indeed, the inference could be drawn instead that Congress anticipated waivers-by-settlement, by authorizing the administrative agencies charged with enforcement to engage in conciliation and to negotiate conciliation agreements. But are the prospective waivers of statutory rights in exchange for a job or enhanced benefits similar enough to waivers-by-settlement for us to infer implicit Congressional acceptance of waivers-for-private-gain? The contexts appear significantly different in relevant ways.

In waivers-by-settlement, attorneys negotiate terms that will put an end to the legal dispute between a person who has already filed a complaint or administrative charge and the employer against whom the claims are lodged. Typically, the complainant accepts a sum of money in exchange for dropping the pending claims and taking a vow of confidentiality. Sometimes the employer may agree to ameliorative steps related to the underlying complaint that will benefit the remaining workforce, such as training supervisors to combat sexual harassment or adapting criteria for promotions that take into account a group’s distinct and previously undervalued talents. Less frequently, the complaining employee also returns to the workplace under negotiated conditions that address the alleged violations.

Ending disputes through settlement rather than litigation is characteristic of most civil litigation, since without the possibility of settlement lawyers and potential plaintiffs might be deterred from challenging unlawful practices. Although problematic in the

47. See, e.g., 42 U.S.C. § 2000e-5(k); see also H. REP. No. 94-1558, at 1 (1976); H. REP. No. 102-40(1) (1991) (restoring “the efficacy of Title VII’s fee-shifting provision in order to accomplish Title VII’s goals”).

48. See, e.g., 42 U.S.C. § 2000(e)-5(b) (Title VII); 29 U.S.C. § 626(b) (ADEA). This inference is bolstered by Congress’ explicit and repeated rejection of an EEOC plan to permit private litigation to proceed to settlement without EEOC oversight. See Blumrosen, supra note 33, at 979 n.111 (for discussion and citations).


50. See generally Galanter & Cahill, supra note 40, at 1359-60 (discussing how settlement can be more responsive to parties’ needs and more “accommodating [to] nonmonetary claims”).

51. But see Owen M. Fiss, Against Settlement, 93 YALE L.J. 1073, 1085 (1984) (stating that settlement trivializes the remedial dimension of a lawsuit and reduces the social function of a lawsuit to one of resolving private disputes); Galanter & Cahill, supra note 40, at 1351-78 (questioning the arguments in favor of settlement and arguing for a rigorous examination of the quality of settlements); LoPucki, supra note 49, at 1469 (stating that settlement strategies can generate outcomes that “lie entirely outside the range of possible outcomes from litigation”).
employment context, because they tend to privatize public rights, waivers-by-settlement are accepted as a cost of promoting compliance with remedial statutes.\footnote{In practice, few settlements acceptable to the complaining party will be rejected. For examples of the EEOC’s recognition that settlement is part of the litigation process in Title VII, ADEA and ADA disputes, see 1 EEOC Compl. Man. (CCH) § 556(2) (“In exchange for satisfactory fulfillment by respondent of the promises contained in paragraph (3) of this Agreement, the charging party agrees not to institute a lawsuit with respect to the above referenced charge.”).} And, as is common with settlements in other areas of the law, waiver of the right to continue to sue over alleged past unlawful employment practices is judged acceptable, in part, because at the time of the waiver the complainant has had an opportunity to identify and analyze the wrong done to her, to assess the damage and calculate the money needed to speed recovery, and to trade some private benefit in the form of adjusted compensation for some public benefit in the form of employer obligations to the remaining work force.\footnote{McKennon v. Nashville Banner Publ’g Co., 513 U.S. 352, 358 (1995). “[T]he private litigant who seeks redress for his or her injuries vindicates both the deterrence and compensation objectives of [the anti-discrimination statutes].” Id. at 358. In addition, the administrative agency charged with enforcing the remedial statute may have the authority or be required to supervise the settlement process or review the settlement, thus protecting the public interest. Cf. Brooklyn Sav. Bank v. O’Neil, 324 U.S. 697, 704-08 (1945) (analyzing the FLSA).} Thus, though less than perfect, waivers-by-settlement tend to promote compliance and compensation, the twin goals of statutory regulation at the workplace.\footnote{ERISA in particular presents formidable and complex issues concerning information, which I do not address. See generally Lorraine A. Schmall, Keeping Employer Promises When Relational Incentives No Longer Pertain: “Right Sizing” and Employee Benefits, 68 GEO. WASH. L. REV. 276 (2000) (discussing the passage of ERISA and its effects).}

In contrast, when employers condition jobs or enhanced benefits on waiving statutory rights, they are the right to have a jury assess future claims or the right to challenge current and past employment practices, applicants and employees are asked to anticipate conflicts that may not yet have occurred and to evaluate workplace practices in light of technical, perhaps unknown, standards.\footnote{Pauline Kim’s intriguing empirical studies suggest that employees’ perceptions of their legal protections are inaccurate and that information and experience do not routinely change those perceptions. See Pauline T. Kim, Norms, Learning and Law: Exploring the Influences On Workers’}

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To the extent that waivers-for-private-gain are enforced, employees may compromise not only their rights but those of the public as well. Indeed, and perversely, waivers-for-private-gain may invite employers to ignore statutory requirements by reducing the risk of complete remedial relief or of any challenge at all. Thus, with waivers-for-private-gain employers contract around or out of statutory obligations before the ripening of any claim, while in waivers-by-settlement employers merely reduce the cost of resolving already-identified challenges to violations of statutory rights. Given these differences, Congressional acceptance of waivers-by-settlement in no way implicates Congressional approval of waivers-for-private-gain.

This analysis is confirmed by reference to the one contemporary circumstance in which Congress has explicitly approved waivers of statutory rights in the employment context. The Older Workers Benefit Protection Act of 1990 (OWBPA), an amendment to the ADEA, authorizes waivers of past and present statutory rights in exchange for enhanced benefits, but only if employees have been alerted to the nature of the claims being released and have had the opportunity to consult a lawyer. The OWBPA was prompted by the widespread practice of


57. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Nixon, 210 F.3d 814, 818 (8th Cir.) (providing that a public agency may pursue claims for injunctive relief only despite claimant's loss at arbitration of Title VII termination claim), cert. denied, 121 S. Ct. 383 (2000); EEOC v. Kidder, Peabody & Co., Inc., 156 F.3d 298, 300-01 (2d Cir. 1998) (stating that the EEOC is compelled to arbitrate actions it brings on behalf of individual plaintiffs who have prospectively waived the right to a judicial forum). But cf. EEOC v. Waffle House, Inc., 193 F.3d 805, 812-13 (4th Cir. 1999), cert. granted, 121 S. Ct. 1401 (2001); EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448 (6th Cir. 1998); EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1536 (2d Cir. 1996) (stating that the EEOC retains the right to litigate in the public interest despite waiver by individual claimant).

58. Or, in the words of several commentators, employers purchase "a license to discriminate...." Richard J. Lussier, Title II of the Older Workers Benefit Protection Act: A License for Age Discrimination? The Problem Identified and Proposed Solutions, 35 Harv. J. on Legis. 189, 194 (1998); see also Blumrosen, supra note 33, at 1011; Harper, supra note 33, at 1294-98. This contractual move is not limited to the employment context. See, e.g., Lawrence Lessig, Code and Other Laws of Cyberspace (1999); G. Richard Shell, Contracts in the Modern Supreme Court, 81 Cal. L. Rev. 433, 527 (1993) (noting that the modern Supreme Court approves strict and literal enforcement of adhesion contracts in virtually every case). Compare Green Tree Fin. Corp. v. Randolph, 121 S. Ct. 513, 516 (2000) (holding an arbitration provision which is silent on costs and fees enforceable in a case involving the Truth in Lending Act, unless party seeking to invalidate arbitration provision proves the procedure would be prohibitively expensive) with Goodman v. ESPE Am., Inc., 2001 U.S. Dist. LEXIS 433, at *13, 84 Fair Empl. Prac. Cas. (BNA) 1629 (E.D. Pa. 2001) (holding the same under Title VII).


60. Although prompted by waivers offered in exchange for enhanced benefits on termination,
employers conditioning severance benefits on the signing of agreements to forego any legal claims arising from the about-to-be-terminated employment relationship.\textsuperscript{61} To insure that departing employees have adequate information to assess their choices, Congress mandated that a waiver, whether offered to an individual or a group, "may not be considered knowing and voluntary unless at a minimum\textsuperscript{62} it (1) is in understandable language, (2) specifically refers to ADEA rights and claims, (3) does not include claims arising after the date of the document, (4) is supported by adequate consideration, (5) advises the employee to consult an attorney, (6) gives the employee at least 21 days (and in the case of group incentives 45 days) to consider the offer (and in the case of a group incentive provides employees with the program's eligibility criteria, time limits, and data regarding job titles and ages of those not selected as well as those eligible), and (7) provides a seven-day revocation period.\textsuperscript{63} So the most that can be said regarding Congressional approval of waivers-for-private-gain is that, in the one instance where Congress addressed them,\textsuperscript{64} it established an elaborate set of

\footnotesize{\textsuperscript{61} Prior to the OWBPA, courts permitted these waivers-for-private-gain under all of the employment statutes as long as they were "voluntary and knowing" under all the circumstances. Following passage of the OWBPA, courts continue to speak of "voluntary and knowing" waivers of statutory rights, sometimes using the OWBPA requirements even though that Act applies only to age discrimination claims, sometimes rely on the totality of the circumstances test. See infra note 67.}

\footnotesize{\textsuperscript{62} 29 U.S.C. § 626(f) (1).}

\footnotesize{\textsuperscript{63} See 29 U.S.C. § 626(f) (1) (A)-(G).}

\footnotesize{\textsuperscript{64} The 1991 Civil Rights Act expresses Congressional approval of alternative dispute resolution "to the extent appropriate and authorized by law." Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991). The Civil Rights Act invalidated four Supreme Court decisions from the 1989 term which had significantly altered existing interpretations of Title VII, none of which involved waivers-for-private-gain. Indeed, at the time of initial passage in 1990, federal courts assumed that neither an agreement to arbitrate a Title VII claim nor an adverse arbitral ruling could act as a waiver of the right to proceed with that same claim in court; President Bush refused to sign the Act in 1990. After the 1991 version of the Act was drafted and committee reports were issued, but before final passage, the Supreme Court issued its decision in \textit{Gilmer v.}}
requirements to reduce concerns about asymmetrical knowledge and to improve employees' opportunities to secure timely, informed advice regarding known or knowable claims. 

Of course, the minima specified by Congress for a "voluntary and knowing" waiver are procedural in nature. On further reflection one may conclude that the procedural protections are inadequate to the task for which they are intended. However, at this point my only concern is to demonstrate that nothing in the legislation regulating the employment relationship supports the analogy between waivers-by-settlement and waivers-for-private-gain.

II. THE LAW OF WAIVERS-FOR-PRIVATE-GAIN

This section explores the ways in which waivers-for-private-gain defeat rather than accomplish the statutory goals of the employment laws, commenting first on agreements to waive accrued statutory claims and then on agreements to arbitrate future statutory claims. Crucial to this discussion is recognition of the law's reliance on procedural regularity in lieu of an inquiry into the substantive fairness of contractual waivers.

A. Waivers-for-Private-Gain I: Agreeing Not to Challenge Present and Past Claims of Statutory Violations

In the introduction to this Article I emphasized the significance to employees' well-being of statutory rights at the workplace, but offered the hypothetical situation in which a female employee foregoes the opportunity to challenge her arguably gendered dismissal in exchange

Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), which enforced a compelled arbitration clause against a securities broker who had accepted it as a condition of employment, but who later sought to litigate an ADEA claim in federal court. Although Gilmer involved enforcement of rights under the ADEA, most federal courts have assumed that the Supreme Court's approval of mandatory, pre-dispute waiver applies to other federal employment laws. See infra, note 98 and accompanying text.

65. It appears that the OWBPA applies solely to age discrimination claims because supporters feared tying the fate of the OWBPA to the uncertain success of attempts to invalidate the four Supreme Court decisions involving Title VII. See Blumrosen, supra note 33, at 984 n.124. Some courts of appeals stress that the OWBPA establishes minimal requirements and allow inquiry into whether nonstatutory circumstances, such as fraud, duress or coercion, render otherwise valid waivers void. See Bennett v. Coors Brewing Co., 189 F.3d 1221, 1229 (10th Cir. 1999); Griffin v. Kraft Gen. Foods, Inc., 62 F.3d 368, 373-74 (11th Cir. 1995). These decisions are questionable in light of Oubre v. Entergy Operations, Inc., 522 U.S. 422, 426-27 (1998) (rejecting common law tender back doctrine to ratification of otherwise invalid OWBPA waivers because OWBPA supplants the common law with reference to waivers under ADEA).
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for three times her annual salary. Why might she make that choice? Probably due to uncertainty. At the time of electing the guaranteed compensation she does not have enough information to evaluate whether the termination is in fact tainted in a way prohibited by statute.

66. See supra Section II. In an alternative scenario, she is among a pool of employees who have been offered the option of leaving with enhanced benefits or risking termination, in a circumstance in which the employer has made clear its intention to reduce costs by reducing the number of employees. Having been targeted as expendable, it makes more sense for the employee to accept the buy-out rather than gamble on continued employment.

67. Although the requirements of the OWBPA apply only to waivers of present and past ADEA claims, courts closely scrutinize waivers of substantive rights under other employment laws. Some courts have used the OWBPA standard to test the legality of waivers-for-private-gain under other employment laws, reasoning that, if asked, Congress would want any compromise of statutory rights at the workplace to occur only after the employee secured adequate information and advice. See Rangel v. El Paso Nat. Gas Co., 996 F. Supp. 1093, 1096-99 (D.N.M. 1998) (applying the no tender back rule mandated by the OWBPA to claims of national origin discrimination under Title VII). See also Blumrosen, supra note 33, at 1019-20 (endorsing the use of ADEA/OWBPA criteria in determining whether waivers of accrued claims of Title VII violations, and of all statutes enforced by the EEOC, are voluntary and knowing). However, the majority of the courts addressing the issue have taken the position that waivers of the right to litigate non-ADEA statutory claims need not comply with the OWBPA requirements. These courts ask instead whether the “totality of the circumstances” evidences a “knowing and voluntary” waiver of present or past statutory violations. See Vital v. Interfaith Med. Ctr., 168 F.3d 615, 622 (2d Cir. 1999) (holding a waiver of Title VII claims was a knowing and voluntary release when examined in light of the totality of the circumstances); Puentes v. United Parcel Serv., Inc., 86 F.3d 196, 198 (11th Cir. 1996); Webb v. Merck & Co., 1999 U.S. Dist. LEXIS 7742, 80 Fair Empl. Prac. Cas. (BNA) 59 (E.D. Pa. May 20, 1999) (common law doctrine that fraud, accident, or deceit vitiates effect of releases applicable to claims arising under 42 U.S.C. § 1981, Title VII and state fair employment practices law); Laramee v. Jewish Guild for the Blind, 72 F. Supp. 2d 357, 359 (S.D.N.Y. 1999) (holding that the totality of circumstances, not OWBPA criteria, should be used to evaluate validity of waiver of claims of violations of ADA, Title VII and state human rights law). The “totality of the circumstances” test examines: (1) the plaintiff's education and business experience; (2) the amount of time the plaintiff considered the agreement before signing; (3) the plaintiff's opportunity to consult with a lawyer; (4) the employer's encouragement or discouragement of consultation with an attorney; and (5) the consideration for the waiver when compared with benefits to which the employee was already entitled. See id. at 360. Thus, the “totality of the circumstances” inquiry provides less assurance that waivers of accrued statutory rights are based on accurate relevant information, and leads to the odd result that the same waiver may be found “voluntary and knowing” as to some claims of employment discrimination but not others. For example, in Tung v. Texaco, Inc., 150 F.3d 206 (2d Cir. 1998), the Court of Appeals for the Second Circuit held a release of legal claims in exchange for enhanced benefits on termination “voluntary and knowing” as to Title VII claims of race and national origin discrimination, using the “totality of the circumstances” test, but not “voluntary and knowing” as to ADEA claims, because the employer did not timely supply OWBPA-required information on the ages of the other employees involved in the same group termination program. See id. at 208-09; see also Am. Airlines, Inc. v. Cardoza-Rodriguez, 133 F.3d 111 (1st Cir. 1998) (holding waivers invalid for ADEA claims and remanding on the issue of the validity of waivers on non-ADEA claims); Long v. Sears Roebuck & Co., 105 F.3d 1529, 1545 (3rd Cir. 1997); Raczak v. Ameritech Corp., 103 F.3d 1257, 1268 (6th Cir. 1997) (holding a general release valid, except for claims relating to age discrimination, and common law rules regarding tender-back applicable to general release but inapplicable to age discrimination claim); Clark v. Buffalo Wire Works Co., 3 F. Supp. 2d 366, 372 (W.D.N.Y. 1998) (holding a waiver valid under state law, not valid under
Although she might have heard about multi-million dollar awards in sex discrimination lawsuits, a single visit to a competent lawyer educates her about the hazards and costs of litigation, as well as the difference between believing in and being able to prove discriminatory employment practices. See Galanter & Cahill, supra note 40, at 1352. They state that:

[The existence of a general preference for settlement does not mean that the pursuit of settlement in any particular instance is an informed and uncoerced expression of such a preference. . . . In some settings, lawyers spend a great deal of effort “educating” their clients about the virtues of settlement compared to the cost, uncertainty, and arbitrariness of adjudication.]

Id. See Hebert v. Mohawk Rubber Co., 872 F.2d 1104, 1112 (1st Cir. 1989) (“[T]o accept the reasoning . . . that a person’s acceptance of an early retirement package is voluntary when faced with a ‘choice’ between the Scylla of forced retirement or the Charybdis of discharge . . . is to turn a blind eye on the ‘take-it-or-leave-it’ nature of such an ‘offer.’


71. See Simon J. Nadel, Analysis & Perspective: Exchanging Enhanced Severance Packages For Waiver of Legal Rights Raises Questions, 68 U.S.L.W. 2243 (Nov. 2, 1999); see also Abdallah v. Coca-Cola Co., 1999 WL 527835, at *2, 79 Fair Empl. Prac. Cas. (BNA) 1409 (D.N.Ga. July 16, 1999) (where a judge ordered the employer to clarify the terms of a buy-out so that accepting employees understood they waived their right to join an ongoing race discrimination lawsuit challenging pay, performance and evaluations, but that the waiver did not bar them from testifying in the case). Subsequently Coca-Cola permitted departing African-American employees to receive
benefits, along with the morale-enhancing effect on the remaining employees, justify the cost, even when a particular employee is an unlikely plaintiff.72

Thus, it could be argued that both parties come out ahead; and the question legitimately asked, why is this a problem? To answer this inquiry, it is necessary to recall the dual nature of statutory rights at the workplace. The legislature’s goal was not to enable some employees to benefit while employers engaged in business as usual. The legislative purpose was instead to change the way in which business was being done. Permitting employers to systematically purchase the right to discriminate—or to be free of the fear of being accused of discriminatory practices—wasn’t part of the plan. All of the parties don’t come out ahead when employer and employee deregulate by contract. Legislative will is thwarted; the “primary purpose” of preventing harm suffers.73

Equally pernicious, the security of believing that legal action will not follow allows decision-makers, if they wish, to engage in the very conduct prohibited by the laws. With the threat of litigation removed, fair-minded managers do not have the incentive to make sure that subtle prejudices have not affected decision-making; and bigoted managers may indulge every preference, including ageism and sexism, in deciding which employees should be bought-out and which should be retained.74


72. See Weber, supra note 70, at 597. Of course, employers are not alone in engaging in opportunistic behavior. If only some firms offer contractual waivers, their reputation in the community might cause workers who wish to be bought out of employment rights to seek employment at those firms in order to perform poorly and be offered the buy-out. Further, if all firms offer contractual waivers, the statutes operate to transfer (some) wealth from (some) employers to (some) employees, but that wasn’t the reason for legislative recognition of employee rights.

73. There is no reason to assume that these contractual waivers of statutory rights in exchange for enhanced benefits is limited to situations involving termination. For example, a yearly bonus or promotion or increase in compensation could be conditioned on a waiver of any legal claims arising from the employment relationship up until the time of the signing of the waiver. In this way the waiver looks similar to the no strike clause in a collective bargaining agreement, where economic benefits are traded for the right to strike during the term of the agreement. Alternatively, conditioning a job or promotion on an agreement not to compete, including an agreement that breach establishes irreparable injury, substitutes a private for the traditionally judicial determination on the propriety of injunctive relief. I am indebted to Judith Ravel for bringing this aspect of privatization to my attention. Interview with Judith Ravel, Attorney, Law Offices of Judith Ravel (Feb. 2001).

74. See Vallas v. Gen. Motors Corp., 170 F.3d 367, 370-72, 376 (3d Cir. 1999) (employer challenged, as preempted by section 301 of the NLRA, allegations of common law fraud based upon the employer’s intentionally lying about an alleged plan to close a plant in order to induce older
The twin goals of deterrence and compensation are simply not served by allowing employers to contract out of the non-discrimination mandate by drafting sophisticated waiver clauses. 75

B. Waivers-for-Private-Gain II: Agreeing to Take Future Disputes Over Statutory Rights to Arbitration

In addition to the exchange of money for the agreement not to pursue possible legal claims, waivers-for-private-gain occur when employers require employees, at the start of the employment relationship or as a condition for continuing it, to agree to arbitrate, rather than litigate, any disputes that arise in the future. Misleadingly termed waivers of fora, rather than waivers of rights, 76 courts that enforce these agreements ignore the qualitative differences between arbitration and litigation, including the relaxation or absence of evidentiary and procedural rules in arbitration,77 the limitation on pre-hearing discovery in arbitration,78 the circumscribed opportunity for judicial review of arbitration decisions,79 and the bias against awarding significant back and

employees to voluntarily accept early retirement); Bunnion v. Consol. Rail Corp., 108 F. Supp. 2d 403, 430-32 (E.D. Pa. 1999) (holding an agreement to participate in voluntary separation program, not age, barred the rehired workers from employee status; and holding an employer did not violate ADEA in rehiring workers as independent contractors or leased employees to do the same work they had formerly done for less pay, without benefits while hiring younger employees into regular full-time positions with full fringe benefits).

75. See Oubre v. Entergy Operations, Inc., 522 U.S. 422, 427 (1998) (stating that one reason for not applying the common law tender back doctrine to ADEA waivers is the possibility that contract doctrine would create a perverse incentive for employers to offer noncomplying waivers, gambling on employees’ inability to tender back benefits that induced acceptance of the offer); Thorn v. Sundstrand Aerospace Corp., 207 F.3d 383, 387 (7th Cir. 2000) (demonstrating that a committee review of a decision-maker’s choices for termination in reduction-in-force “appears to have been ‘a liability shield invented by lawyers’”(citation omitted)).

76. See Schwartz, supra note 33, at 40-53 & nn.18-56 (describing a case study illustrating and identifying the rights sacrificed when a dispute is resolved through arbitration rather than litigation); see also id. at 95-98 & nn.242-265 (for further discussion).

77. See id. at 41 n.18, 45 n.33, 46 n.34, 48 n.42 and 50 n.45 (reviewing the standards used by various private entities that offer dispute resolution services to the public).

78. See id. at 47 n.35; see also COMSAT Corp. v. Nat. Sci. Found., 190 F.3d 269, 275-76 (4th Cir. 1999) (stating that the Federal Arbitration Act, 9 U.S.C. § 7, does not authorize arbitrators to subpoena non-parties to appear at pre-hearing depositions or to present documents during pre-hearing discovery; section 7 only authorizes arbitrators to subpoena non-parties to appear at hearings which is consistent with the “limited discovery process” and “efficiency that mark arbitration proceedings.”).

79. See Schwartz, supra note 33, at 52 n.50; see also Stephen J. Ware, Default Rules from Mandatory Rules: Privatizing Law Through Arbitration, 83 MINN. L. REV. 703 (1999) (discussing cases and studies). Compare Green v. Ameritech Corp., 200 F.3d 967, 969-70 (6th Cir. 2000) (stating that the arbitrator did not exceed his authority under arbitration agreement that required him...
front pay or punitive and compensatory damages in arbitration.\textsuperscript{50} And once again, the loser is the legislative decision to correct market failures through statutory regulation. Instead of contributing to a body of public law that reinforces legislative recognition of systemic and corrosive wrongs at the workplace and that establishes new rules of the game consistent with the statutory goals, complainants must seek compensation or promotion or freedom from harassment in a context that suggests the problem—be it racism or favoritism—is trivial because it occurs in isolated and individualized, perhaps even atypical, situations.\textsuperscript{81}

The analytic device facilitating the privatization of dispute resolution in the workplace is the judicial discovery in 1991 of a Congressional presumption in favor of enforcement of arbitration agreements entered into as a condition of new or continued employment. Initially, the Supreme Court declared contractual waivers of the judicial forum for resolving alleged violations of statutory employment rights unenforceable,\textsuperscript{82} even while upholding similar prospective waivers of

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\textsuperscript{50} See Schwartz, supra note 33, at 64-66; see also infra notes 105-07 and accompanying text.

\textsuperscript{81} The shielding from public view of systemic violations of employment laws is particularly pernicious in light of workers' misperceptions about their legal rights. See generally Kim, supra note 56.

statutory rights in antitrust and securities cases.83 Alexander v. Gardner-Denver Co.,84 a 1974 decision, set the tone. The Court forcibly instructed that "there can be no prospective waiver of an employee's rights under Title VII"85 and refused to foreclose a claimant's right to a trial de novo under Title VII because of prior submission of his claim to final arbitration pursuant to a collective bargaining agreement, since "federal courts have been assigned plenary powers to secure compliance with Title VII."86 As the Court of Appeals for the Eighth Circuit later noted, the presumption in favor of the arbitral forum could attach in antitrust and securities cases because the claims involved commercial relations; but "in the passage of Title VII it was the congressional intent that arbitration is unable to pay sufficient attention to the transcendent public interest in the enforcement of Title VII."87 Similar considerations barred collectively-negotiated, prospective waivers of the right to a judicial forum under 42 U.S.C. § 198388 and the Fair Labor Standards Act.89

But in 1991, the Supreme Court reconsidered whether certain pre-dispute waivers of the judicial forum for resolving statutory claims could be binding on employees, and extended the presumption in favor of an arbitral forum from commercial to employment cases. In Gilmer v. Interstate/Johnson Lane Corp.,90 a manager signed the standard, mandatory securities industry registration form requiring arbitration of "any" disputes as a condition of employment.91 When the manager subsequently claimed violations of the ADEA, the employer

85. Id. at 51.
86. Id. at 45.
89. See Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 740 (1981) (refusing to enforce a prospective waiver of rights under the FLSA pursuant to a collective bargaining agreement).
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successfully argued that the appropriate forum for resolving the ADEA claim was arbitration; that is, that the manager’s waiver of the judicial forum in the registration form, required of everyone in order to work in the securities industry, was enforceable by the non-signatory employer.\(^{92}\) Adopting the analysis used in the antitrust and securities cases, the Court found a presumption in favor of enforcement of contractually-based arbitration clauses unless the plaintiff could point to evidence of Congressional intent to preclude a waiver of judicial remedies for the statutory rights at issue.\(^{93}\) Evidence of Congress’ intent to defeat the presumption in favor of arbitration may be found “in the text [of a law], its legislative history, or an ‘inherent conflict’ between arbitration and the [law’s] underlying purposes.”\(^{94}\)

In *Gilmer*, the plaintiff argued only the inherent conflict prong of this test,\(^{95}\) having conceded that nothing in the ADEA as then enacted or in its legislative history demonstrated a Congressional intention to preclude prospective waivers of a judicial forum for ADEA claims.\(^{96}\) And the Court, wrongly or not, found the arbitral forum not to compromise substantive rights under the ADEA.\(^{97}\) Currently, lower

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93. See id. at 26.
94. Id. at 26.
95. See *Gilmer*, 500 U.S. at 26-27.
96. See *Gilmer*, 500 U.S. at 26-27.
97. See id. at 28 (“[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.” [quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, Inc., 473 U.S. 614, 637 (1985)]). Commentators have stated that the Supreme Court’s insistence that the waiver of a judicial forum is not a waiver of substantive rights “is simply wrong,” and others have ably established this in discussing the myriad ways that arbitration annuls statutory rights. See *Ware*, *supra* note 79, at 725 nn.101 & 103 (citing treatises and casebooks); see also *Schwartz*, *supra* note 33; *supra* notes 76-80 and accompanying text. But even if the waiver of the judicial forum is not a “substantive” right, it is a statutory one, as the Court recognized in 1974 in *Alexander v. Gardner-Denver Co.* See *supra* and notes 84-86 and accompanying text. The Court reaffirmed its holding in *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998), discussed infra notes 131-35 and accompanying text. But see Lorene D. Park, *Jumping to Preclusions: Is Continuing Employment an Implicit Acceptance of a Mandatory Pre-dispute Agreement to Arbitrate Statutory Employment Discrimination Claims?* (2001) (unpublished manuscript on file with author) (citations omitted):

The *Gilmer* Court noted that “[a]lthough those procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party ‘trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.’” The disturbing thing about this statement is that it is not always clear that the employee actually takes part in the trading when mandatory pre-dispute arbitration is imposed unilaterally as a condition of continuing employment. Furthermore, the Supreme Court ruled in the *Erie* line of cases that a change in procedural rules can have substantive effects.\(^8\)

8Gasperini v. Center for Humanities, Inc. (“Under the *Erie* doctrine, federal courts
federal courts use *Gilmer* as authority to enforce pre-dispute agreements to arbitrate claims under all employment laws.\(^{98}\)

The analysis in *Gilmer* should not end the inquiry, however, because contemporaneous with the Court’s consideration of *Gilmer*, Congress was amending employment discrimination laws in ways that speak directly to Congressional intent to limit the use of pre-dispute waivers of the judicial forum. First, as we have seen, Congress in 1990, in the OWBPA amendments to the ADEA,\(^{99}\) addressed the extent to which contractual agreements could override statutory rights and singled out as enforceable only those agreements which, at a minimum, met the Congressional standards for a “voluntary and knowing” waiver of statutory rights. Central to these standards are the right to sufficient

sitting in diversity apply state substantive law and federal procedural law... [c]lassification of a law as 'substantive' or 'procedural' for *Erie* purposes is sometimes a challenging endeavor."); *Erie R.R. Co. v. Tompkins*. In the *Erie* line of cases, the question was whether state or federal law applied in a particular case where jurisdiction was based on diversity of citizenship. The answer to this question, turning upon whether the particular rule or law was procedural or substantive, resulted from an in-depth analysis of whether the outcome would change depending on which rule applied as well as whether or not the particular case implicated the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws. . . . Presumably, if a given rule or law would change the outcome depending on whether or not it was applied, would provide a reason why a party would shop around for a particular forum, and would administer laws inequitably among the various fora, then it was defined as substantive. It would be interesting to see how the Supreme Court would apply a similar analysis to the issue of whether or not statutory based discrimination claims are appropriately resolved in an arbitral forum. As discussed with reference to the criticisms of arbitration, the procedures vary greatly between the judicial and arbitral fora. Further, the fact that employers prefer the arbitral forum and increasingly require it as a condition of employment is analogous to forum shopping. Finally, one could make the case that, given the differences in the outcomes between the two fora, there is an inequitable administration of the laws regarding employment discrimination.

Id. (citations omitted). Rather than simply applying a presumption of arbitrability, perhaps the Courts should look more closely at the actual intent of the parties to a particular contract where procedural rights with substantive implications are potentially being traded away, especially when the employer is using standardized terms for all employees rather than dealing with employees individually.

98. *See, e.g.*, *Williams v. Imhoff*, 203 F.3d 758, 767 (10th Cir. 2000) (agreeing with second, third, fourth and eighth circuits that a pre-dispute agreement requiring compelled arbitration is enforceable as to ERISA claims); *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 203-06 (2d Cir. 1999) (same holding with regard to Title VII, citing cases from other circuits), *cert. denied*, 121 S. Ct. 756 (2001); *EEOC v. Waffle House, Inc.*, 193 F.3d 805, 808-09 (4th Cir. 1999) (same holding as to the ADA), *cert. granted*, 121 S. Ct. 1401 (2001). The Supreme Court decided *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 1306 (2001), while this article was in press; the Court held that the Federal Arbitration Act applies to contracts of employment.

99. *See supra* notes 59-65 and accompanying text.
information and the opportunity to consult with an attorney before signing the waiver.\textsuperscript{100} No other waivers or releases of statutorily-guaranteed employment rights have been expressly approved by Congress, thus evidencing Congressional intent that other statutory rights are not to be compromised through pre-dispute contractual provisions.\textsuperscript{101}

Second, in its 1991 amendments to Title VII and the ADA\textsuperscript{102} Congress codified certain rights of employees and expanded the remedies available under various statutes, most importantly for this discussion, by providing for compensatory and punitive damages and for the right to a jury trial in Title VII and ADA actions.\textsuperscript{103} Expressly adding to plaintiffs' rights and remedies is surely evidence of a Congressional intent to allow plaintiffs to choose, at the time of claiming an alleged injury, the forum for dispute resolution. It is for the plaintiff contemplating litigation to weigh the benefits and disadvantages of asking the community or a privately-chosen arbitrator to assess the defendant's conduct; it is for the plaintiff contemplating litigation to choose whether to open up the discussion about discriminatory employment practices and their consequences by electing a civil trial or not. Additionally, compensatory and punitive damages are tort remedies, rooted in law not contract, and are not waivable by agreement in advance of a dispute.\textsuperscript{104}

The statutory right to punitive damages in particular speaks to the powerful public purpose of general deterrence. As the Supreme Court understood in 1975, monetary awards, at that time back pay, could be denied only if doing so "would not frustrate the central statutory

\textsuperscript{100} See 29 U.S.C. § 629(f) (1) (E).

\textsuperscript{101} The Gilmer court did refer to the OWBPA, stating "Congress, however, did not explicitly preclude arbitration or other nonjudicial resolution of claims, even in its recent amendments to the ADEA." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 29 (1991). This statement while accurate is misleading. \textit{See supra} notes 82-86 and accompanying text. When Congress considered the issue of waivers of statutory employment rights, Supreme Court precedent and all appellate decisions held pre-dispute waivers unenforceable, making unnecessary an explicit Congressional intent to preclude use of the arbitral forum. \textit{See id.}


\textsuperscript{103} \textit{See supra} note 65 (explaining why the OWBPA was not included in the 1991 Civil Rights Act).

\textsuperscript{104} \textit{See generally} Schwartz, \textit{supra} note 33, at 112 (stating that "[c]ourts generally hold contract clauses to be void as against public policy if their effect is to exempt a party from liability for its own future fraud or intentional torts, violations of statute[s] and injuries caused by gross negligence or recklessness").
purposes of [civil rights laws] because employers subject only to injunctive relief would have “little incentive to shun practices of dubious legality.” Twenty years later, commenting on the damages provision of the 1991 Civil Rights Act, the Court reiterated these observations, adding that compensatory and punitive damages “can be expected to give managers an added incentive to take preventative measures to ward off discriminatory conduct by subordinates before it occurs.”

Rightly characterized as “strengthening” and enlarging plaintiffs rights and remedies, the 1991 Act also included a seemingly innocuous statutory and historical note, section 118:

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law as amended by this title.

This “polite bow to the popularity of ‘alternative dispute resolution’” has been cited, by lower federal courts, as all but incontrovertible evidence of Congressional intent that prospective waivers of the judicial forum be enforced against individuals who subsequently find themselves in employment disputes.

While it could plausibly be argued that section 118 supports the substitution of an arbitral forum for a judicial one if the provision stood alone, section 118 is not free-standing; it is a minor part of remedial legislation that proclaims its intention to strengthen employee rights and specifies, for the first time, the right to compensatory and punitive damages as well as the right to a jury trial in Title VII and ADA cases.

106. Id. at 417.
112. In Seus v. John Nuveen & Co., 146 F.3d at 182-83, the Third Circuit takes the position that section 118 refers to case law under the Federal Arbitration Act (FAA), not case law under title
As already pointed out, granting courts the authority to award previously unavailable remedies is inconsistent with an intent to cut back on the use of the judicial forum. And grouping arbitration with other means of resolving disputes once they have arisen does not indicate a preference for enforcement of pre-dispute waivers of statutory rights.13

Moreover, this is one of those instances in which ambiguity, if there is any, can be resolved by resort to the legislative history. The House Committee Report accompanying the 1991 Civil Rights Act stated:

The Committee emphasizes, however, that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII.14

Further, the Committee Report evidenced its understanding of the law, and the extent to which the Supreme Court had spoken on the enforceability of pre-dispute arbitration agreements: “This view is consistent with the Supreme Court’s interpretation of Title VII in Alexander v. Gardner-Denver Co. The Committee does not intend for the inclusion of this section be used to [sic] preclude rights and remedies that would otherwise be available.” 15 The reference to Gardner-Denver, VII, the ADA and the ADEA. Section 118’s endorsement of arbitration “simply cannot be ‘interpreted’ to mean that the FAA is impliedly repealed with respect to agreements to arbitrate Title VII and ADEA claims that will arise in the future.” Id. at 182. One of the many problems with this assertion is that nothing in the legislative history refers to the FAA; and Congress explicitly refused to adopt a provision that would have allowed enforcement of binding arbitration agreements, unless made when “knowing and voluntary.” See infra note 116. Compare Thompson v. Thompson, 484 U.S. 174, 185 (1987) (Congress’ choice of one of several conflicting proposals provides strong evidence of intent) with Landgraf v. USI Film Prods., 511 U.S. 244, 263 (1994) (stating that rejection of proposed language concerning retroactivity of 1991 Act not determinative since “the history of the 1991 Act conveys the impression that legislators agreed to disagree about whether and to what extent the Act would apply to preenactment conduct”) (emphasis supplied).

113. In this regard the practice of appellate courts, in providing edited versions of the text of section 118, is particularly unfortunate. See, e.g., Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 9 (1st Cir. 1999) ("This section encourages the use of alternative means of dispute resolution, where appropriate and to the extent authorized by law. These methods include . . . arbitration."); Seus v. John Nuveen & Co., 146 F.3d 175, 182 (3d Cir. 1998) ("Where appropriate and to the extent authorized by law, the use of alternative dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under [Title VII and the ADEA].") (citation omitted).


115. Id. (citation omitted). Similar language appears in the Committee Report accompanying
which emphasizes Congress' intent to create multiple remedies through which to eliminate employment discrimination, and the wording of section 118, encouraging many forms of alternative dispute resolution that are used only after a claim arises, strongly reinforce the view that the text of the 1991 Civil Rights Act is not evidence of a Congressional intent to permit prospective waivers of the judicial forum.

The attentive reader may wonder why Congress, in the report accompanying the 1991 Civil Rights Act, did not address *Gilmer* and the purported preference for arbitration in resolving employment disputes expressed by the Gilmer court. The simple answer is that, at the time the Committee Report was drafted, the decision in *Gilmer* had not been issued\(^\text{116}\) and the only Supreme Court and appellate court

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\(^\text{116}\) Concededly, when the 1991 Civil Rights Act was passed, *Gilmer* had been decided. The only mention of *Gilmer* in the legislative history occurs in identical interpretive memos, submitted during the floor debate by then-Senator Robert Dole (R) and Representative Henry Hyde (R), which are at odds with this reading of the Committee Reports, as is true with most federal legislation; the Committee Reports are the "authoritative source for finding the Legislature's intent" because they "represent[ ] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." Garcia v. United States, 469 U.S. 70, 76 (1984) (then-Justice Rehnquist) (internal citations and quotations omitted).

See H.R. REP. No. 101-485 (II), at 76-77 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 499-500. The Committee also noted that Congress rejected a proposal that would have explicitly permitted prospective agreements to arbitrate because "employers could refuse to hire workers unless they signed a binding statement waiving all rights to file Title VII complaints" in court and "American workers should not be forced to choose between their jobs and their civil rights." H.R. REP. No. 102-40 (I) at 104, reprinted in 1991 U.S.C.C.A.N. 549, 642. Individual statements of members of Congress both support and are at odds with this reading of the Committee Reports, as is true with most federal legislation; the Committee Reports are the "authoritative source for finding the Legislature's intent" because they "represent[ ] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." Garcia v. United States, 469 U.S. 70, 76 (1984) (then-Justice Rehnquist) (internal citations and quotations omitted).
pronouncements on prospective waivers of employment rights followed Gardner-Denver's unambiguous refusal to enforce them.117 Decisions establishing the preference for arbitration had appeared only in securities and anti-trust cases involving prospective waivers of the judicial forum, and those decisions did not hint at extending the presumption in favor of arbitration to resolution of statutory claims in the employment context.118

The one Court of Appeals that has seriously examined the text and legislative history of the relevant statutes, the Court of Appeals for the Ninth Circuit in Duffield v. Robertson Stephens & Co.,119 found direct evidence of Congressional intent not to permit pre-dispute waivers of the judicial forum for resolving employment disputes based on statutory rights.120 However, the Ninth Circuit's learning is either dismissed or denigrated by the other Courts of Appeal, which enforce prospective waivers as long as the employee could have conceivably been aware of the obligation to use arbitration to resolve future disputes involving statutory rights.121 Thus, some courts find a waiver if an employment application includes language that "any" dispute goes to arbitration;122 some courts test a waiver's "appropriateness" by insuring that the employer provided the information it promised to the prospective employee at the time of signing;123 and some courts find waivers


118. As Geraldine Szott Moohr neatly summarizes: "[t]he claims in the [commercial cases] shared a common ground: all of the plaintiffs alleged injury to economic interests sustained by violations of laws aimed at regulating business dealings . . . . [while civil rights injuries] are based on rights to employment and personal dignity." Moohr, supra note 79, at 418-19 n.126 (citations omitted).

119. 144 F.3d 1182 (9th Cir. 1998).

120. See id. at 1185.


122. Id. at 184.

123. See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 17, 20, 21 (1st Cir. 1999). The court refused to compel plaintiff to submit her Title VII claim to arbitration only because the defendant, Merrill Lynch, used the standard Form U-4 but failed to take "the modest effort required to make relevant information regarding the arbitrability of employment disputes available to [the plaintiff] as it committed itself to do [in the Form U-4 waiver document]" thus making non-enforcement of the waiver "appropriate and authorized by law" under section 118; "[i]f Merrill Lynch had provided the rules [regarding arbitration] to Rosenberg but she did not read them, that would not save her." Id. at 21 n.17 (citations omitted). Rosenberg is a particularly dispiriting decision because the district court authored a thoughtful, scholarly opinion explaining why the 1991 amendments to Title VII preclude prospective waivers of judicial determination of employment discrimination claims. See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 995 F. Supp.
“voluntary and knowing” because the employment application or personnel handbook referred to arbitration.24

Because the issue has become whether the facts support a finding that a particular individual had access to information and, sometimes, whether a particular employer met its obligation to provide that information, the decisions are thick with facts and thin on analysis. The question is not why we would expect a job applicant to fly-speck an employment manual to see how disputes would be resolved. The question is whether she had constructive notice to do so, with her waiver of the judicial forum upheld even though the manual talked about taking disputes to arbitration, not about substituting private arbitration for public judgment by jury and judge, and even though the manual referred to employment disputes without referencing disputes arising from alleged violations of statutes relating to employment. As one court concluded after reviewing the cases: “[a]n agreement to arbitrate is to be treated like any other contract, Gilmer, 500 U.S. at 24, ... and a failure to fully read and consider the contract cannot relieve [a claimant] of its provisions.”125

It is difficult to explain the insistence by the courts that section 118 is powerful evidence of Congressional intent to permit pre-dispute

190 (D. Mass. 1998). The district court also discussed the “structural bias” of the arbitral forum in the securities industry, Id. at 207. Under facts virtually identical to those in Rosenberg, the Court of Appeals for the Sixth Circuit enforced the agreement to arbitrate. See Haskins v. Prudential Ins. Co. of Am., 230 F.3d 231, 241 (6th Cir. 2000).

124. See Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 835 (8th Cir. 1997); see also Michalski v. Circuit City Stores, Inc., 177 F.3d 634, 637 (7th Cir. 1999) (concluding that an employer’s promise to be bound by arbitration contained in handbook is adequate consideration for employee’s agreement to use arbitration contained in separate document).

125. Bryant v. Am. Express Fin. Advisors, Inc., 595 N.W.2d 482, 486 (Iowa 1999). See also First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995) (instructing courts to apply state law principles that govern the formation of contracts in deciding whether parties agreed to arbitrate a certain matter); Haskins, 230 F.3d at 239 (adopting contract law standards in applying agreements to arbitrate); Michalski, 177 F.3d at 636 (same holding). One barrier to enforcement of an individual’s pre-dispute agreement to arbitrate occurs when the complainant might bear substantial filing fees and/or the cost of the arbitration. See, e.g., Shankle v. B-G Maint. Mgmt. of Colo., Inc., 163 F.3d 1230, 1235 (10th Cir. 1999) (holding that a fee-splitting provision renders arbitration agreement unenforceable); Paladino v. Avnet Computer Tech., Inc., 134 F.3d 1054, 1062 (11th Cir. 1998) (same holding); Cole v. Burns Int’l Sec. Servs., Inc., 105 F.3d 1465, 1468 (D.C. Cir. 1997) (requiring employer to bear the sole costs of an arbitrator’s fee as a condition of enforcing the agreement to arbitrate). But see Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549, 556 (4th Cir. 2001) (rejecting per se rule against all fee-splitting agreements in favor of case-by-case inquiry on individualized costs). Alternatively, some courts view the possibility that arbitral fees will be imposed on the complainant as an insufficient reason for not enforcing the agreement to arbitrate, but note that judicial review can ultimately protect a complainant subjected to excessive fees. See Koveleskie v. SBC Capital Mks, Inc., 167 F.3d 361, 366 (7th Cir. 1999); Rosenberg v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 16 (1st Cir. 1999).
contracting away of the right to a judicial forum to resolve statutory claims, particularly in the face of the Duffield court's careful examination of the text and legislative history of the relevant statutes.\textsuperscript{126} Ideology may have something to do with what, to the educated observer, appears to be an almost willful perversion of statutory language and legislative history.\textsuperscript{127} Or perhaps, judges understand that the Supreme Court's now-repeatedly expressed preference for arbitration is policy-based, and they assume it is futile to engage in fresh analysis of evidence in statutory language or legislative history of Congress' intent to overcome that presumption. Like employment disputes committed to arbitration even before they arise, statutory analysis does not benefit from a fair hearing.

Insistence on a presumption in favor of the arbitral forum in employment cases leads to a further anomaly. Unions routinely agree in collective bargaining agreements that arbitration is the final and binding means of dispute resolution.\textsuperscript{128} Does this mean that waiver of the judicial forum by a union is a bar to the judicial forum for employees working under collective bargaining agreements? As Judge Posner wryly observed:

\begin{quote}
It would be at least a mild paradox for Congress, having in another amendment that it made to Title VII in 1991 conferred a right to trial by jury for the first time, \ldots to have empowered unions, in those same amendments, to prevent workers from obtaining jury trials in these
\end{quote}

\textsuperscript{126} See Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir. 1998).
\textsuperscript{127} See, e.g., David Sherwyn et al., \textit{In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing A New Sink in the Process}, 2 U. PA. J. LAB. & EMP. L. 73, 103-04 (1999) (where the authors insist that commentary about the deliberate ambiguity of some provisions in the 1991 Civil Rights Act means that section 118 was a product of political compromise). Unfortunately for the authors, the articles they cite discussing the legislative history of the 1991 Civil Rights Act address ambiguity concerning some sections of the law, but not section 118. See Robert Belton, \textit{The Unfinished Agenda of the Civil Rights Act of 1991}, 45 RUTGERS L. REV. 921, 924-25, 961 (1993) (the Sherwyn et al. article’s citation to Belton is to page 924, which refers to the debates on affirmative action, but at page 961 Belton observes that if ADR becomes a “take it or leave it” condition of employment, the protections of the OWBPA will need to be applied in evaluating the voluntariness of the agreement to arbitrate); Rebecca Hanner White, \textit{The EEOC, the Courts and Employment Discrimination Policy: Recognizing the Agency’s Leading Role in Statutory Interpretation}, 1995 UTAH L. REV. 51, 58 (arguing for judicial deference to EEOC determinations; the EEOC, of course, rejects mandatory arbitration of employment disputes); Reginald C. Govan, \textit{Honorable Compromises and the Moral High Ground: The Conflict Between the Rhetoric and the Content of the Civil Rights Act of 1991}, 46 RUTGERS L. REV. 1, 237-38 (1993) (the Sherwyn et al. article’s citation is to page 238 which, like Belton’s article, refers to the debates on affirmative action; unlike Belton’s article, I could not find a reference to alternative dispute resolution or section 118 in Govan’s article).
\textsuperscript{128} See Sherwyn, supra note 127, at 102.
The Supreme Court recognizes, but has not resolved, the tension between Gardner-Denver's absolute prohibition of prospective waivers of statutory rights and Gilmer's presumption in favor of enforcing prospective agreements to arbitrate employment disputes. In Wright v. Universal Maritime Service Corp., the Court refused to force a union-represented individual with an ADA claim to substitute arbitration pursuant to a collective bargaining agreement for the judicial forum. Repeating that use of the judicial forum "is not a substantive right," the Court nonetheless held that in the context of bargaining agreements the presumption in favor of arbitration did not apply unless the waiver was "clear and unmistakable" because "Gardner-Denver at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a [collective bargaining agreement]." Because on the facts in Wright there was no "clear and unmistakable" waiver, the Court did not address, and noted that it did not address, whether it would enforce a "clear and unmistakable" union waiver of statutory employment rights.
Of course, the "clear and unmistakable" standard does not apply in the *Gilmer* context, because "*Gilmer* involved an individual's waiver of his own rights." 36 Logically, the distinction drawn by the Court is incoherent, since the terms of collective bargaining agreements are in fact negotiated—which means discussed, bargained over, traded, known—while the terms of most individual employment contracts are imposed unilaterally by employers in circumstances unlikely to put employees and prospective employees on notice about collateral details concerning the forum for resolving future, hypothetical disputes involving statutory rights. 37

The legal standard for a knowing waiver of the judicial forum thus appears to be whether there was some reference to arbitration or to dispute resolution procedures in some document provided by the employer to an applicant or employee at some time during the process of hiring, retaining or promoting an employee that could conceivably have put the worker on notice that a dispute would be heard in arbitration, regardless of whether this notice also spelled out that use of arbitration entails waiver of a judicial forum.

What of the concept of voluntariness as an independent prerequisite for enforcement of waivers-for-private-gain? Most decisions do not separately address the issue, discussing the phrase "knowing and voluntary" as a single requirement and deploying the same evidence to establish this now-unified element. 38 Judges must wrangle with the meaning of voluntariness, however, in those instances where a worker

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See also *Kennedy v. Superior Printing Co.*, 215 F.3d 650 (6th Cir. 2000); *Brown v. ABF Freight Sys., Inc.*, 183 F.3d 319, 321-22 (4th Cir. 1999) (same). On the other hand, the Court of Appeals for the D.C. Circuit has held that unions are precluded, under *Gardner-Denver*, from prospectively agreeing to binding arbitration of individual statutory claims and that employer-required arbitration agreements covering statutory claims are not a mandatory subject of bargaining (under the RLA, but using cases decided under the NLRA); but employers may require employees to sign pre-dispute agreements to arbitrate statutory claims as condition of employment. See *Air Line Pilots Ass'n v. Northwest Airlines, Inc.*, 199 F.3d 477, 480 (D.C. Cir. 1999), *vacated*, 2000 U.S. App. LEXIS 3756 (D.C. Cir. Mar. 9, 2000) (en banc, without opinion), *reinstated*, 2011 F.3d 1312 (D.C. Cir. 2000) (en banc without explanation).


137. However, if the employee is a very highly compensated individual he may be put on notice about the collateral details. See *Focus On... Employment Agreements*, 18 IER 72 (Nov. 28, 2000) (discussing individual contracts in the "new-economy companies").

challenges the enforceability of an obligation to arbitrate disputes where worker knowledge is unquestioned: for example, where incumbent employees are required to sign stand-alone agreements to arbitrate as a condition of continued employment; or where applicants expressly refuse the arbitration clause and are explicitly told they are therefore being denied a job; or where applicants accept arbitration under protest and subsequently seek release from the promise to use arbitration at the time an employment dispute arises.

Courts utilize different approaches, none of which satisfactorily clarifies the meaning of voluntariness in the context of waiving statutory rights. Some state courts will examine a worker's agreement through the lens of the common law, using traditional concepts of duress, fraud, and unconscionability, usually concluding that the promise to arbitrate is enforceable. The leading authority on arbitration under the Federal Arbitration Act states that it is highly unlikely that "unconscionability or adhesion doctrine [will] result in the unenforceability of an arbitration clause."

Other courts obviate the need to determine the voluntariness of the worker's promise to arbitrate by finding the employer-mandated arbitration procedure so one-sided as to constitute a sham. For example,

139. See Bailey v. Fed. Nat'l Mortgage Ass'n, 209 F.3d 740, 746-47 (D.C. Cir. 2000) (continuing to work for employer that imposes arbitration as dispute resolution policy may not be evidence of acceptance necessary to bind employee who protested the policy at the time it was announced). State courts are divided on whether requiring employees to sign pre-dispute arbitration agreements as a condition of employment violates public policy. Compare Lagatree v. Luce, Forward, Hamilton & Scripps, 88 Cal. Rptr. 2d 664, 672 (Cal. Ct. App. 1999) (finding no violation) with Phillips v. CIGNA Invs., 27 F. Supp. 2d 345 (D. Conn. 2000) (applying Connecticut law to find no acceptance of agreement to arbitrate in employee's continuing to work for employer after institution of new arbitration policy).


142. See, e.g., Pichly v. NorTech Waste, 86 Cal. Rptr. 2d 460 (Cal. Ct. App. 1999) (arriving at the same result after reconsideration in light of Armendariz v. Found. Health Psycheval Servs., Inc., 6 P.3d 669 (Cal. 2000), which held an arbitration agreement unconscionable per California state law because the employee had no reasonable choice but to sign and because agreement bound employee but not employer); Strawn v. AFC Enter., Inc., 70 F. Supp. 2d 717, 726 (S.D. Tex. 1999) (voiding as against public policy an agreement to accept compensation for future job injuries, where compensation was substantially less than that afforded in state scheme when combined with an agreement to arbitrate future disputes). But see Adams, 121 S. Ct. at 1306 (reaffirming in dicta the holding in Southland Corp. v. Keating, 465 U.S. 1 (1984), which held that the Federal Arbitration Act preempts state arbitration laws and applies in state as well as federal courts).

in *Hooters of America, Inc. v. Phillips*, a six-year employee complained after a Hooters official and brother of the principal owner grabbed and slapped her buttocks. When management told her to “let it go,” she quit her job. Her sexual harassment complaint was met with a lawsuit to compel arbitration of the dispute, pursuant to an eight-year-old alternative dispute resolution program, implemented as a condition for eligibility for raises, transfers and promotions. Phillips signed the agreement to arbitrate twice, but in both instances Hooters failed to give her the rules and regulations referred to in the document. The Court of Appeals for the Fourth Circuit, after reviewing Supreme Court authority and affirming that in general pre-dispute agreements to arbitrate Title VII claims are valid and enforceable, found that “Hooters materially breached the arbitration agreement by promulgating rules so egregiously unfair as to constitute a complete default of its contractual obligation to draft arbitration rules and to do so in good faith. ... [T]he result was hardly recognizable as arbitration at all.” At every point in the rules, the employer had no obligation to disclose information and was given flexibility as to the claims it could present while the employee was bound by specific time lines, early and detailed notice of claims, identification of witnesses, etc. In addition the Hooters system provided for no compensatory damages and capped punitive damages at one year’s gross cash compensation, estimated at $13,000, since the plaintiff derived most of her income from tips. But the crowning insult was Hooters’ total control of the list of arbitrators from which the employee had the “right” to choose one as her representative on the three-person panel. In addition to unilaterally determining the list of arbitrators, Hooters did not limit the selection criteria it employed to

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144. 173 F.3d 933 (4th Cir. 1999).
145. See id. at 935.
146. Id.
147. See id. at 935-36.
148. See id. at 936.
149. *Hooters*, 173 F.3d at 938, 940.
150. See id. at 938.
151. The estimate of the worth of the punitive damage claim is from Phillips’ attorney. See *Seymour*, *supra* note 91, at 150. For a detailed arbitration scheme that has met mixed judicial responses, see Michalski v. Circuit City Stores, Inc., 177 F.3d 634, 636 (7th Cir 1998); Morrison v. Circuit City Stores, Inc., 70 F. Supp. 2d 815, 828 (S.D. Ohio 1999) (upholding arbitration agreement, which sets a one-year limit on filing claims, restricts discovery, bars class claims, limits back pay, does not allow front pay, and caps punitive damages at $5,000). But see Johnson v. Circuit City Stores, 203 F.3d 821 (4th Cir.), *cert. denied*, 530 U.S. 1276 (2000) (refusing to enforce arbitration agreement because it did not provide for full remedies available under 42 U.S.C. § 1981).
152. See *Hooters*, 173 F.3d at 938.
insure neutrality and in no way agreed to keep on the list any arbitrators who perchance upheld a plaintiff's claim. The appellate court was careful to note, however, that:

[t]his case . . . is the exception that proves the rule: fairness objections should generally be made to the arbitrator, subject only to limited post-arbitration judicial review as set forth in section 10 of the FAA . . . . To uphold the promulgation of [Hooters'] aberrational scheme under the heading of arbitration would undermine, not advance, the federal policy favoring alternative dispute resolution.

In addition to preserving for the historical record the sad development of the case law upholding prospective waivers of statutory rights in cases involving employment claims, this part of the Article offers further evidence that an agreement to waive statutory rights requires little more than adherence to procedures which give constructive notice to the employee or prospective employee that securing a job or a benefit is conditioned on waiving statutory rights. There is no legal requirement of being in a position to consent in an environment conducive to an informed judgment.

So far I have questioned the enforceability of waivers-for-private-gain, whether of present and past substantive claims or of future opportunities to litigate statutory claims, as unauthorized by the statutory regimes regulating the employment relationship and as undermining the goal of deterring unlawful conduct. Further, I have claimed that the courts and Congress in the OWBPA recognize the potential weakening of statutory regulation of the employment relationship but find solace in the fiction that these waivers are entered into "knowingly and voluntarily." However, I have suggested that these waivers, even if executed knowingly in the sense of having been disclosed by the employer, cannot be described as agreed to by the employee voluntarily, unless voluntary agreement means no more than acceptance following disclosure without reference to the substance of the terms of the agreement. Part III of this Article now tests the law's standard for a

153. See id. at 939.

154. Id. at 941; see also Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306, 315-16 (6th Cir. 2000) (prehire arbitration agreement between employees and arbitration service unenforceable, because service "reserved the right to alter the applicable rules and procedures without any obligation to notify, much less receive consent from, [plaintiffs]. [Service's] right to choose the nature of its performance renders its promise illusory."), cert. denied, 121 S. Ct. 763 (2001); Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 681, 692 (Cal. 2000) (holding an agreement to arbitrate not enforceable because it does not meet minimal requirements to vindicate statutory rights and is against public policy and unconscionably unilateral).
voluntary waiver against recent philosophical literature that rigorously analyzes the concept of voluntariness.

III. NON-VOLUNTARINESS THAT VITIATES CONSENT

Standard contract analysis holds that consent is uncoerced as long as it is not the product of duress, which normally means physical force or fraud.\(^{155}\) Congress and the courts are recognizing, however, that a prospective waiver of statutory rights requires more than the mere absence of force or fraud to be considered voluntary.\(^{156}\) On the basis of the OWBPA, *Gilmer* and appellate decisions, it appears that the law will find a prospective waiver voluntary if individual employees or applicants had constructive notice of the waiver. This applies even if they did not have the incentive or background knowledge to understand the real world consequences of the waiver and regardless of whether they were unable to negotiate adjustments to employers' take-it-or-leave-it offers.\(^{157}\) In this section I argue that the over reliance on a due process model to qualify offers as non-coercive stems from a fundamental misunderstanding of the concept of voluntariness, and that a nuanced analysis will produce a more satisfactory method for inquiring into the enforceability of waivers-for-private-gain. I will proceed by showing that force and fraud ought not be the only bases for vitiating voluntary consent, relying primarily on the work of Joel Feinberg and G. A. Cohen.\(^{158}\) This philosophically-based understanding of voluntary consent will in turn aid in demonstrating the inadequacy of a due process model for assessing the enforceability of waivers-for-private-gain.

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156. See 29 U.S.C. § 626(f) (1); supra note 67.
157. *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 70 (1998), adds the wrinkle, in the unionized workplace, that statutory rights may be waived prospectively only if the union, as representative of the workers, signs off on a provision that clearly and unambiguously agrees to the arbitral forum as the exclusive means for challenging alleged violations of enumerated statutory rights during the term of the collective bargaining agreement. This formula fits within the due process model referred to in the text.
158. See JOEL FEINBERG, HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW (1986); G. A. Cohen, Capitalism, Freedom and the Proletariat, in LIBERTY 160 (David Miller ed., 1991). I remind the reader that we are inquiring into the voluntariness of the employee's assent to waivers-for-private-gain; thus the perspective from which we judge the offer is the employee's. We have no reason to inquire whether consent is vitiated for purposes of judging a defendant's reliance on the victim's consent pursuant to the criminal law.
A. Defining Voluntariness

In *Henn v. National Geographic Society*, Judge Frank Easterbrook discusses the legality of an early retirement program and the voluntariness of the plaintiffs' agreements to participate. Because the approach is typical of legal analysis, superficially persuasive and often repeated, *Henn* is a good place to begin an inquiry on whether agreements obtained short of physical force or fraud should vitiate consent.

[W]e start by assuming that the employer is complying with the ADEA. . . . Now the employer adds an offer of early retirement. Provided the employee may decline the offer and keep working under lawful conditions, the offer makes him better off. He has an additional option, one that may be (as it was here) worth a good deal of money. He may retire, receive the value of the package, and either take a new job (increasing his income) or enjoy new leisure. He also may elect to keep working and forfeit the package. This may put him to a hard choice; he may think the offer too good to refuse; but it is not Don Corleone's "Make him an offer he can't refuse." "Your money or your life?" calls for a choice, but each option makes the recipient of the offer worse off. When one option makes the recipient better off, and the other is the status quo, then the offer is beneficial. That the benefits may overwhelm the recipient and dictate the choice cannot be dispositive. The question "Would you prefer $100,000 to $50,000?" will elicit the same answer from everyone, but it does not on that account produce an "involuntary" response.

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159. 819 F.2d 824 (7th Cir. 1987).

160. See id.

161. See, e.g., Raskin v. Wyatt Co., 125 F.3d 55, 62 (2d Cir. 1997); Bilstein v. St. John's Coll., 74 F.3d 1459, 1469 (4th Cir. 1996); Quinn v. Newspaper Ass'n, No. 95-1653, 1996 U.S. App. LEXIS 25307 (6th Cir. 1996); Houghton v. SIPCO, Inc., 38 F.3d 953, 959 (8th Cir. 1994); Vega v. Kodak Caribbean, Ltd., 3 F.3d 476, 480 (1st Cir. 1993); Gray v. York Newspapers, Inc., 957 F.2d 1070, 1081 (3d Cir. 1992); Mitchell v. Mobil Oil Corp., 896 F.2d 463, 467 (10th Cir. 1990); Bodnar v. Synpol, Inc., 843 F.2d 190, 192 (5th Cir. 1988). Of the 177 citing references reported by Shepard's on September 3, 2000, the few that distinguished *Henn* relied on factual records that included evidence of explicit threats of dismissal or fraud. See, e.g., Cooper v. Neiman Marcus Group, 125 F.3d 786, 791 (9th Cir. 1997) ("[Plaintiff] was not given the choice of continuing to work indefinitely . . . . To the contrary . . . [she was] to be terminated at the end of 50 days at the latest, whichever option she took."); Maez v. Mountain States Tel. & Tel., Inc., 54 F.3d 1488, 1498-5001 (10th Cir. 1995) (purposeful deceit to induce retirement).

162. *Henn*, 819 F.2d at 826. See also Lighton v. Univ. of Utah, 209 F.3d 1213, 1221 (10th Cir. 2000); Connors v. Chrysler Fin. Corp., 160 F.3d 971, 974 (3d Cir. 1998) (same holding as to claim of constructive discharge); Johnson v. Shulman & Hall, L.P.A., 15 I.E.R. Cas. (BNA) 1204 (Ohio Ct. App. 1999) (holding no duress where contract employee assents to new status as employee-at-
The structure of this argument is: (1) the choice for each salesman is an individualized determination of whether he prefers continued employment or "a great deal of money" with which to finance leisure or a new job; and (2) beneficial offers are never coercive, even if consent is tricked or forced, because, accepted or not, the recipient is not worse off. There are two problems with this approach: it uses the wrong baseline for testing whether an offer is coercive; and it uncritically denies the possibility that offers which increase options can at the same time be coercive.

1. The Baseline Problems

By describing a salesmen's choice as between remaining employed and retiring with increased funds, Easterbrook takes the reality, and thus the sting, out of the offer of early retirement.\(^{163}\) In *Henn*,\(^{164}\) the National Geographic Society offered generous benefits to fifteen employees over the age of fifty-five to induce them to retire early.\(^{165}\) Supervisors had earlier informed each employee that his sales record was sluggish,\(^{166}\) and all fifteen had received a generally-distributed report recommending the discharges of older salesmen because "[s]erious repercussions will result if younger sales personnel are not available to cultivate clients in new growth industries and insure future sales."\(^{167}\) The Society did not explain what actions it would take if the salesmen did not take early retirement.\(^{168}\)

The effect of the offer, given the uncertainty about the opportunity for continued employment, was, and could be foreseen to be, a choice between no employment with benefits or no employment without benefits. So the appropriate baseline was no employment. Continued employment, a condition essential to Judge Easterbrook's description of the employees' consent to the offer as voluntary, was simply not one of the options they could choose, because none could safely assume that if he refused the offer, he would be retained.\(^{169}\) Viewed in the context of the

\(^{163}\) See *Henn*, 819 F.2d at 826.

\(^{164}\) 819 F.2d at 824.

\(^{165}\) See *id.* at 826.

\(^{166}\) See *id.* at 829-30.

\(^{167}\) *Id.* at 830.

\(^{168}\) See *Henn*, 819 F.2d at 829.

\(^{169}\) While it is true that the law does not require an employer to guarantee job security, the offer of early retirement suggests that an employer views one's services as less than necessary to the enterprise. *See McNab v. Gen. Motors Corp.*, 162 F.3d 959, 960 (7th Cir. 1998) (Easterbrook, J.).
actual circumstances of the offer, the absence of unlawful deceit or threats does not answer the question whether the Society so manipulated the choices presented to its older salesmen as to force them to take early retirement. And, I would argue, the proper baseline for considering the coercion of offers in the employment context must recognize the motive of the offeror and its predictable effect on the offerees, taking into account their actual, not hypothetical, situation.\(^{170}\)

Another, and different, baseline problem arises if we look not at each salesman's individual decision to accept or decline the early retirement offer, but focus instead on the decision faced by all the salesmen. Easterbrook notes that three salesmen did not take early retirement and remained on the job, inferring that continued employment was indeed an option.\(^{171}\) But just because it turned out that some salesmen \((n)\) could refuse the offer and remain employed, all could not. That is, remaining employed depended on others not choosing to remain employed, so the consent of all could not be uncoerced. G. A. Cohen has described the circumstances in which not more than \(n\) can exercise the freedom all have.\(^{172}\) He uses as his example a locked room with 10 people each equi-distant from the single key which will unlock the door that is the means of escape for one person only.\(^{173}\)

Since the freedom of each is contingent on the others not exercising their similarly contingent freedom, we can say that there is a great deal of unfreedom in their situation. Though each is individually free to leave, he suffers with the rest from what I shall call collective

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The offer in Henn took on added significance in the context of warnings that older employees were not being effective. See Henn, 819 F.2d at 830. The observation of Easterbrook's colleague on the Seventh Circuit Court of Appeals, Richard Posner, is that:

\(\text{[a]n offer of early retirement usually reflects a desire by the employer to reduce the number or average age of its employees . . . . The employee knows this and knows, therefore, that if he turns down an offer of early retirement today, he may be fired or laid off tomorrow. . . . It might actually pay an employer to engage in outright age discrimination from time to time to increase the incentive of older employees to elect early retirement.}\)


170. See FEINBERG, supra note 158, ch. 24 (Failures of Consent: Coercive Offers). It is an empirical question whether employees offered generous benefits to quit their employment can ever believe that they are entitled to remain. In Henn the invitation to leave was undisguised, as it usually is with waivers-for-private-gain.

171. See Henn, 819 F.2d at 826.

172. See Cohen, supra note 158, at 180.

173. See id.
The concept of collective unfreedom challenges us to think about the voluntariness of consent in a different way than Easterbrook does. Within the structure created by the employer (and supported by the law), each individual may consent voluntarily to remain, but not all salesmen may do so. In assessing the coerciveness of the offer to retire, its uncoerced refusal by some cannot mask others’ coerced acceptance. When we consider the salesmen collectively we see that none of the acceptances of the offer of early retirement are sufficiently voluntary to qualify as uncoerced.

The baselines I have identified as relevant for determining voluntariness are vulnerable to the following argument: the preferences of the employees have no legal basis, that is, employees do not have the right to secure employment either individually or as a group. And so, according to this argument which uses what is called a moralized concept of coercion, if an employee does not have a legal right to something there can be no claim that his employer coerces him when the employer does not give it to him. Just as I may forbid stranger and friend alike from pitching a tent on the 100 acres of undeveloped property that I own without coercing them, and call on the state to oust them as trespassers, an employer may, again backed up by the enforcement power of the state, withdraw capital from and close a business, thereby depriving employees of jobs and income, without exercising any coercion over them. In both circumstances, ownership by conferring state-enforced authority to control and dispose precludes coercion. And it matters not if the trespassers are homeless Mother Theresas or the employees impoverished parents of ill children, because the legal entitlement to property not only trumps claims based on preference, sentiment, need or good deeds, but prevents its owner from coercing others so long as the owner does not violate the legal rights of others.

The moralized concept of coercion, predicated on the legitimacy of control of private property, makes sense to many people. But it is just
part of a theory, a way of looking at the world, and when subjected to scrutiny perhaps a less than convincing one. Three observations should suffice to, at the least, raise doubts about using rights to establish a baseline for judging whether coercion has occurred in the employment context. First, and obvious once it is pointed out: although the current land owner or employer has legal title to her wealth, if we traced that title back far enough we would find at some point the use of physical force or fraud to capture the property which later generations acquire or inherit "cleanly." But, on the moralized account, how the employee or employer came to their legal entitlements is irrelevant. Instead we take a snapshot of their legal entitlements at the moment the offer is made. The moralized baseline depends on each person's rights, but these rights have no history, moral or otherwise. It is not self-evident why the history of acquisition is not relevant to the question of who has wealth and who does not, if wealth is a basis for having rights.

Second, ownership of property operates just like force and fraud in increasing the cost of performing actions; we're simply not accustomed to thinking about private property in this way. If someone makes me an offer that raises the cost of my preferred action enough to stop me from choosing to do it, my consent to his offer is not voluntary. This is easy to see when physical force or fraud raises the cost, because force and fraud are commonly thought to reduce voluntariness. However, when one considers the effect private property has on raising the cost of actions, property owners acting within their rights are generally not considered to make the actions of those who do not own property sufficiently less voluntary to count as coerced.

G. A. Cohen suggests that one reason for this asymmetrical thinking is the tendency to confuse a social or legal constraint with an

179. See Robert L. Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 POL. SCI. Q. 470, 472-73 (1923); BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT ch. 3 (1998) (discussing the intellectual influences on and around Hale); see also Frank H. Knight, Some Fallacies in the Interpretation of Social Cost, 38 Q. J. ECON. 582, 591 (1924) ("The original 'appropriation' of such opportunities by private owners involves investment in exploration, in detailed investigation and appraisal by trial and error of the findings, in development work of many kinds necessary to secure and market a product—besides the cost of buying off or killing or driving off previous claimants.").

immutable one. He uses the example of humans being unable to fly without major mechanical assistance; wingless-ness is part of the human condition and not a social or legal constraint on flying.  

Now I suggest that one explanation of [] theorists’ failure to note that private property constrains freedom is a tendency to take as part of the structure of human existence in general, and therefore as no social or legal constraint on freedom, any structure around which, merely as things are, much of our activity is organized. A structure which is not a permanent part of the human condition can be misperceived as being just that, and the institution of private property is a case in point. It is treated as so given that the obstacles it puts on freedom are not perceived, while any impingement on private property itself is immediately noticed. Yet private property, like any system of rights, pretty well is a particular way of distributing freedom and unfreedom... To think of capitalism as a realm of freedom is to overlook half its nature.  

And, as Cohen notes, the more private property one has, the more one understandably (if wrongly) considers the distribution of property to be the natural way things are, and thus one is led to ignore the constraints that the lack of property makes people endure, when deciding if their choices are coerced or voluntary. However, when an owner closes her buggy whip business and uses the capital thus freed-up to finance an internet enterprise, she certainly seems to make the choice of her now-former employees to stop working for her involuntary. Buying their consent to waive any past or present claims of statutory violations in exchange for enhanced benefits does not change the basic situation of involuntary unemployment.

The fundamental weakness in the moralized conception of coercion that underlies Easterbrook’s decision is its undefended (or under-defended) claim that no (coercive) action which a property owner has the right to do diminishes the voluntariness of anyone else’s act. But

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181. See Cohen, supra note 158, at 169.
182. See id.
183. Id. at 169-70 (emphasis in the original). See also Jeffrey Reiman, Exploitation, Force, and the Moral Assessment of Capitalism: Thoughts on Roemer and Cohen, 16 Phil. & Pub. Aff. 3, 11-12 (1987) (“The force in capitalism is... elusive... This is because, unlike the masters of classical slaves, capitalists are normally prohibited from using physical violence against their workers either on the job or at the negotiating table. Consequently, that workers are forced to work in order not to starve... appears as no more than the natural fact that food doesn’t fall from the sky and thus people must work in order to eat... [I]n capitalism, overt force is supplanted by force built into the very structure of the system of ownership and the classes defined by that system.”).
184. See Cohen, supra note 158, at 170.
when the employee must choose between unemployment with benefits or without, or the applicant must choose no job or a job conditioned on waiving the judicial forum, her choices certainly seem to be restricted. Consent does not appear to be voluntary, even though the employer may have the right to act as it did.

So the question of voluntariness is not automatically resolved by establishing the presence or absence of a right, and this analytic observation accords with our intuitions. Spotting two ten year-olds in the park and observing that one sits on the grass enviously watching the other ride a slick racing bike, we may realize that the bike rider is privileged to use the bicycle because she owns it. We also know, or at least may conclude without further inquiry, that the other child is not "voluntarily" grass-bound. This being a hypothetical, we may assume that our grass-bound child is an impoverished but expert racer. Our conclusion is no different if the rider offers the grass-bound child the opportunity to remain sitting on the grass for nothing (the status quo) or offers the opportunity to ride the bike for an hour in exchange for a $100 payment. The decision to remain grass-bound does not seem voluntary in the relevant sense. It is forced on the grass-bound child because she lacks both the $100 to purchase an hour’s ride and the funds to purchase a bike of her own.\footnote{185. G. A. Cohen makes a further point, that the moralized theory of coercion seems to rely on two inconsistent definitions of freedom—the normatively neutral account of freedom, which recognizes decreases in freedom along with increases; and the rights-based account of freedom, in which the normative judgment is made that those with rights are justified in forcing choices on those without rights. The form of the argument, quoting Robert Nozick, is: "Other people’s actions place limits on one’s available opportunities ([a normatively neutral account of freedom]). Whether this makes one’s resulting action non-voluntary depends upon whether these others had the right to act as they did ([a rights account of freedom])." Cohen, \textit{supra} note 158, at 170-71. According to Cohen, the statement about other people’s actions is consistent with the normatively neutral account of freedom, which recognizes that protection of property rights increases the freedom of owners but also decreases the freedom of non-owners. \textit{See id.} at 171. The statement that voluntariness depends on whether the others had the right to act as they did rejects this normatively neutral account of freedom. Justified interference does reduce freedom; and control of private property is justified interference. \textit{See id.} Here we run into a problem: how does the defender of the property owner know that use of private property to exclude is justified? Those adopting the moralized definition of freedom seem to take it for granted that interference with private property reduces freedom. \textit{See id.} But, as we have seen, to explain the protection of private property in terms of freedom necessarily entails recognition of the unfreedom of the property-less. The proposition that interference with private property reduces freedom thus depends on the normatively neutral definition of freedom. Yet to defend the proposition that the property owner is justified in interfering with the choices of non-owners, proponents return to the rights definition of freedom. "And so they go, back and forth, between inconsistent definitions of freedom, not because they cannot make up their minds which one they like better, but under the propulsion of their desire to occupy what is in fact an untenable position." \textit{Id.} at 171-72. (I am told that Cohen misrepresents
2. Beneficial Coercive Offers

This brings us to the second problem with Easterbrook's formulation, the proposition that it does not matter if an act or promise is forced as long as the offeree is left better off. Easterbrook states: "'Your money or your life?' calls for a choice, but each option makes the recipient worse off. When one option makes the recipient better off, and the other is the status quo, then the offer is beneficial [and noncoercive]." That is, if A offers B something to which B is not otherwise legally entitled in order to get B to take a legally permissible action, B's decision to accept A's offer can never be coerced or involuntary, and hence is unenforceable, because there is no unlawful pressure of the sort that taints B's consent. This plausible account, which distinguishes between coercive threats and noncoercive offers, finds expression in many areas of the law, and has currency in the philosophical literature. This account, though, is not self-evidently correct and has been convincingly challenged. If it is found faulty, we must rethink whether, under certain conditions, consent induced by economic necessity is sufficiently involuntary to excuse performance of an act or promise.

Joel Feinberg offers a now-famous example that nicely illustrates how a beneficial offer is nonetheless coercive and, as we shall see, the analysis underlying the illustration applies in the employment context as well. A mother with a dying child is unable to afford the expensive surgery that will save the child's life and has no loving family or friends with deep pockets. A lecherous millionaire, learning of her plight and finding the woman attractive, offers her sufficient funds to restore the child's health, on the condition that the woman become his mistress for a period of time. Should she decline the offer, the mother suffers no additional penalty because her child would die anyway. Thus the

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Nozick in this analysis; but colleagues who cite or agree with Nozick repeatedly rely on the shifting and inconsistent definitions of freedom identified by Cohen.).

187. See generally WERTHEIMER, supra note 155, at Pt. 1 (discussing judicial decisions in contract, tort and criminal law, and approving those which invalidate consent only in the face of illegal threats). Interestingly Wertheimer posits a philosophical basis for upholding settlements of lawsuits that implicitly relies on the parties' complete knowledge of the terms of the compromise. See id. at 35.
188. See, e.g., NOZICK, supra note 176, at 90-91; WERTHEIMER, supra note 155, at 202-04.
189. See supra notes 139-41 and accompanying text.
190. See FEINBERG, supra note 158, at 232-33. Feinberg uses the terminology of "freedom-enhancing coercive offers." I prefer the phrase "beneficial coercive offers," since the law tends to speak in terms of increasing options rather than increasing freedom.
mother’s choice is between the status quo of watching her child die, which is unthinkable, and submitting to the millionaire’s desire which, in any other circumstances, would be equally unthinkable. To some, the mother’s choice is “voluntary” and enforceable because the millionaire’s offer gives her the added option of a healthy child purchased by her debasement instead of the sole consequence of a dead child. Yet, describing the mother’s decision to accept the millionaire’s offer as “voluntary” is hard to accept, because the millionaire’s offer is intended to and does have the effect of manipulating the mother to do the millionaire’s bidding. Thus, Feinberg posits, we have an example of a beneficial coercive offer, an offer to which she consents involuntarily, even though it may make her better off. 191

To the claim that someone benefits from getting a new alternative, and the choice of one or the other cannot be coerced, Feinberg responds:

A’s purpose is to force B to do what A wants, so when thought of as an instrument for achieving A’s goals, his offer is an exercise of coercion. From B’s standpoint, as we have seen, her only choice is a coerced one—sleep with me or your child dies—so there is a real point in characterizing A’s offer as coercive. She must now do as he wishes. Yet there is also a point in B’s welcoming an option she did not have before. Hence from B’s standpoint, the description “freedom-enhancing coercive offer” is entirely felicitous in having this double point, and it is a small price to pay for this felicity to jettison the dogma that enlarged freedom and specific coercion cannot coexist. 192

Does Feinberg’s formulation of beneficial, coercive offers help us to understand whether waivers—for-private-gain should be enforced? The choice between two evils is stark in the lecherous millionaire example, but some may question whether the choice between having or not having a job is as wrenching. Feinberg himself, however, having established the analytic basis for the concept of a beneficial coercive offer elaborates using an employment hypothetical as one illustration: A New York employee is offered a position in Houston. 193 If the New York job is:

191. The coercion, thus, vitiates her consent, at least in an action in contract or tort, because we are asking whether from the mother’s perspective she believed she had a choice; on a criminal charge of rape, the mother’s consent would exonerate the defendant because we are asking what the defendant believed at the time of the rape. See FEINBERG, supra note 158, at 262-68.

192. Id. at 233. Feinberg describes his approach as the “compatibilist” solution to the coercive offer problem. Id.

193. See id.
so odious that it is intolerable, no welfare payments are available to him, and the Houston job, his sole alternative, is itself distasteful and unrewarding though by far the lesser of the evils, then the offer has crossed the threshold of coerciveness. . . . [because] at least one of the exclusive alternatives is thought to be in itself a very great evil, and not merely a lesser good. 194

In these circumstances an offer between the status quo and modest improvement qualifies as a beneficial coercive offer. The beneficial job offer is coercive because it is an exclusive alternative to an intolerable evil, 195 not simply a prospect that is much preferred. 196 Unemployment is, of course, a greater evil than intolerable working conditions so an offer of unemployment with benefits, even though it promises a modest economic improvement over unemployment without benefits, crosses the threshold of coerciveness. 197 Conditioning the receipt of benefits on the waiver of enforcement of accrued statutory rights in no way lessens the evil. Conditioning a job on agreement to use an arbitral forum to resolve employment disputes similarly does not make the prospect of unemployment any less intolerable.

A second possible objection to extending the concept of beneficial coercive offers to waivers-for-private-gain is that the example of the lecherous millionaire assumes there is no doubt about the child’s impending death and the millionaire’s delivery on his promise, while in the context of the employment relationship, 198 the offeree is not choosing

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194. Id. at 234-35.
195. Note that Feinberg does not even consider no employment to be a realistic alternative. Jeffrey Reiman usefully points out that in standard cases, like your money or your life, force is understood as limiting people’s options by making all their alternatives but one either unacceptable or prohibitively costly; but with structural force people’s options are limited to a range of things they can do, with options outside the range either prohibitively costly or unacceptable. See Reiman, supra note 183, at 14.
196. If the employee is content in his New York job and the Houston job is similarly attractive but comes with a $30,000 raise, we do not have a coercive offer. Even if the Houston job carries only a $3,000 raise to which the employee is indifferent, the offer is not coercive. For other employment-related illustrations, see FEINBERG, supra note 158, at 257, 259.
197. As Feinberg elaborates: What distinguishes coercive from noncoercive offers then is not only (1) the degree of “differential coercive pressure,” that is, the gap between the value tag of what is offered and the price tag of what is required, but also (2) that at least one of the exclusive alternatives is thought to be in itself a very great evil, and not merely a lesser good. It is possible therefore to explain how the great run of offers are noncoercive (and freedom-enhancing) while holding, nevertheless, that there can be some unusual offers that are coercive (and freedom-enhancing). The latter are those that offer a prospect that is not simply much preferred, but one which is an exclusive alternative to an intolerable evil. FEINBERG, supra note 158, at 234-35.
198. For example, with waivers-for-private-gain, in which the employee agrees to forego civil
between two certainties. To return to Henn, the fifteen members of the sales force knew the plan was to eliminate some unspecified number of older workers;¹⁹⁹ they may have reasoned that if enough of the fifteen did not accept the benefits package some salesmen would be terminated without benefits;²⁰⁰ and they did not know either how many needed to go in order to secure the jobs of the remaining older salesmen, or which of the fifteen, if any, would be retained.²⁰¹ But all knew that rejecting the retirement benefits while remaining employed depended on acceptance of the termination package by many others;²⁰² and all knew the difficulty, perhaps impossibility, of salesmen over the age of fifty-five finding new jobs.²⁰³ The calculation, thus, involves more than choices between unacceptable alternatives; it requires reliance on the probable choices of others and on the probability that the intolerable evil will occur. Does the probabilistic nature of the evil reduce the coercive pressure on the offerees in a way that affects the voluntariness of consent to participate in the termination program? That depends on the probability. If the probability of harm is high enough, there is no meaningful difference from certainty that an intolerable evil will be experienced. And one need not be seriously risk averse to conclude that employers do not make lucrative termination offers to employees who are considered long-term assets to the enterprise or that older workers are disfavored in the hiring process.²⁰⁴

²⁰⁰. See id.
²⁰¹. See id.
²⁰². Easterbrook points out that three salesmen who did not accept early retirement kept their jobs. This fact enabled the court to pose the choice as between continuing employment or a generous retirement package, ignoring that at the time each salesman made his choice none of them knew whether any of them would be retained. See Henn, 819 F.2d at 826. Another possibility ignored by Easterbrook is that among those electing early retirement were the best performing salesmen, secure in the knowledge that they could find new employment, leaving the retained four to await their inevitable performance-based terminations. Cf. McNab v. Gen. Motors Corp., 162 F.3d 959, 960 (7th Cir. 1998) (Easterbrook, J.) (allowing employer to not offer early retirement to employees whose continued employment was "in GM's best interest"); Noorily v. Thomas & Betts Corp., 188 F.3d 153, 158 (3d Cir. 1999), cert. denied, 529 U. S. 1053 (2000) (stating that ERISA permits corporations to create welfare benefit plans, in this case a plan involving severance benefits, that give employers wide discretion consistent with the corporation's business interests). Still another possibility is that the employer kept on four of the salesmen to demonstrate that the retirement offer was not a pretext to eliminate all salesmen over 55. See Posner, supra note 169, at 428-29 ("[A] firm that wants to get rid of an older employee can often do so with near impunity by cashiering a younger employee at the same time. One hears rumors that this is a common practice.").
²⁰³. See Henn, 819 F.2d at 826.
²⁰⁴. As applied to prospective waivers of the judicial forum, the probabilistic element is
But even if Feinberg’s formulation of beneficial coercive offers is not accepted, there is another way to defend the position that waivers-for-private-gain may be coerced and should therefore be unenforceable. While no employer is required to offer a job or enhanced benefits to potential and incumbent employees, employment policies are consciously set, and employers as a class establish the patterns. To some extent, all employers are at least indirectly involved in determining the status quo and the allowable conditions for escaping from that status quo. Thus, it could be argued that employers as a class are active agents in creating the dilemmas faced by employees asked to sign waivers-for-private-gain. The lecherous millionaire, by contrast, is in no way responsible for the desperate mother’s dilemma and is not even remotely associated with the conditions causing the mother’s poverty or the child’s illness.

Even those philosophers who insist that offers cannot be coercive unless they violate rights acknowledge that setting up a situation in which one is able to exploit someone tends to vitiate consent, while merely taking advantage of a situation for which one has no responsibility does not. For example, David Zimmerman posits this example of a coercive offer: B is kidnapped by A and brought to an island where the only work available is in A’s factory. All the jobs in A’s factory are far worse than those available to B on the mainland. A proposes to B: “Take one of the jobs in my factory and I won’t let you starve.” In contrast, Zimmerman contends, that if C also owns a factory on the island and seeing B on the beach beats A to the scene and makes the same kind of proposal, for work equally as odious as in A’s factory, C’s offer is not coercive.

[O]nly A makes a coercive offer. The intuitive idea underlying coercion is that the person who does the coercing undermines or limits the freedom of the person who is coerced, so coercing goes beyond exploiting [taking advantage of a situation one did not create], however objectionable the latter may be.
The employers who determine the terms on which employment or benefits will be granted are, like A, arrangers not opportunists. 208

B. Voluntariness Reconsidered

It appears defensible, at the least, to view waivers-for-private-gain as coercive. The form of the claim is: B does not act voluntarily whenever others interfere with her actions, regardless of others' right to interfere with them and regardless of whether B has the right to perform her actions, where the interference causes and is intended to cause B to take the action desired by others and the choice offered to B is an exclusive alternative to an intolerable evil.

As applied to waivers-for-private gain, the form of the claim is:

Where, (i) employers manipulate the choices open to the employee in order to have the employee take the action the employers want the employee to take, and (ii) the choice of prospectively waiving statutory rights and unemployment is an alternative to unemployment or employment under intolerable conditions,

(a) an employee, choosing to quit with benefits and waive enforcement of accrued statutory claims, consents to do so involuntarily when employers raise the cost enough to stop her from choosing to remain employed, whether or not the employee has a legal entitlement to job security and whether or not employers have the right to discharge employees; and

(b) an applicant for new employment or a promotion does not turn down the position voluntarily when employers raise the cost of her taking the position by conditioning the position on an agreement

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208. Jeffrey Reiman reaches a similar result while insisting that: we must free ourselves from the notion that force occurs only when a person is presented with alternatives all of which are unacceptable except one. Otherwise, we shall miss the way in which social structures force fates on people while appearing to leave their fates up to them. . . . I contend that all a social structure has to do to count as forcing fates on its members is to force them into an array of fates among which they will be distributed or distribute themselves in some manner within the limits of tolerance necessary to the functioning of that structure. This is all that is necessary, because, for the purpose of moral assessment of social structures, what is crucial is how they constrain people's lives, and that is so even if there is enough play in that constraint to allow a role for choice.

Reiman, supra note 183, at 16-17.
to use arbitration, rather than the judicial forum, to resolve future employment disputes.

IV. CONCLUSION

A fundamental problem with enforcing waivers-for-private gain is the inability of employees and applicants to assess the choices offered, because there is no contemporaneous and concrete employment dispute at the time the employees or applicants agree to forego litigation over past and present claims or to submit future claims to arbitration. Courts and legislatures refuse to excuse performance of these waivers on that ground, however. Instead, a due process model is applied to test whether in any given case a particular employee or applicant could have known the meaning and consequences of the waiver in question. The issue of voluntariness is ignored or subsumed under the question of how or whether the employee had actual or constructive knowledge of the terms of the waiver. This model is deficient because it ignores employers' abilities to manipulate choices to secure assents to waivers-for-private-gain. No matter how much time one is given to think about the options and no matter how many consultations with lawyers, the underlying facts do not change; and the employee or applicant must choose between options none of which she prefers, but one of which she will accept to avoid an even more egregious projected consequence. 209

Courts and legislators utilize a due process model in good faith, laboring under a misunderstanding of the criteria for finding the waivers to be voluntary or uncoerced. In addition, they lose sight of the significant statutory rights being waived and see only an agreement between two parties. In this way the law of contracts regains its hold over the regulation of employment disputes. But contracts in the employment relationship are not the equivalent of commercial contracts; and the rules for enforcing commercial contracts ought not be imposed on waivers-for-private-gain. If contract doctrine is appropriate in the employment context then the “peppercorn” of common law lore, which is sufficient to function as consideration in the commercial context, will, in employment cases, become a $5 signing bonus for waiving the right to challenge statutory violations in court. 210

209. In some circumstances, an employee may be able to negotiate a better deal than the one offered. But that is the rare case. Even more rare is the ability of a group of employees to negotiate a better deal for themselves, in the absence of a union.

210. In Blumrosen, supra note 33, at 1011-14, the authors propose that the judiciary inquire
The philosophical understanding of coercion quite clearly repudiates reliance on procedural regularity to assess the voluntariness of waivers-for-private-gain. But because it does not draw clear, bright lines, the philosophical understanding of coercion may cause unease among employers, judges, lawyers and commentators. I want, however, to suggest that we not turn away from adopting a sophisticated understanding of coercion just because its application may at times be messy. The law of employment relations, long held captive by contracts, should not be filtered through the common law. Instead, let us acknowledge the actual experiences of employees "with little, if any bargaining power," and the market imperfections that require correction through statutory regulation, and proceed to use the philosophical understanding of coercion to aid in assessing the voluntariness of waivers-for-private-gain. For the vast majority of prospective and incumbent employees, shopping for a flexible employer is not a simple matter, nor is it likely that the diligent applicant will find many options. In employment, as in most areas of law, standardized into the voluntariness of waivers of accrued statutory violations by evaluating the compensation offered to the employee. In essence, the authors invite the judiciary to develop a common law of proportionality in assessing acceptances of severance benefits in exchange for waivers of accrued claims. Using this approach, the agreement of our terminated female employee who earns $30,000 to waive accrued claims in exchange for $100,000 would certainly be deemed voluntary and enforceable. It is unclear whether industry practice, two weeks of pay for each year of service, would purchase a valid waiver under this approach.

211. Barrentine v. Ark.-Best Freight Sys., 450 U.S. 728, 735 (1981). See also RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 7 (1999) (The vast majority of workers would prefer an alternative dispute resolution system over going to court but they "do not want firms to be allowed to require that workers forgo their rights to legal redress in favor of company-instituted arbitration systems as a condition for employment"). Furthermore, three-fourths of the participants in the study said that it should be illegal for an employer to insist that employees relinquish their right to go to court as a precondition for getting a job. See id. at 135. The study included focus group discussions with fifty-six workers in six occupational groups; twenty-six minute national surveys of 2,308 employees; fifteen-minute follow-up surveys of 801 respondents to the earlier survey; ten-minute surveys of 1,000 respondents; and additional surveys to 1,002 public-sector employees, 1,100 Canadian employees, and 1,000 British employees. See id. at 37. As Lorene D. Park has observed:

The implications of this expectation are two-fold. First, it indicates that when employees agree, before a dispute even arises, to submit any claims to an arbitral forum that it is not just the judicial forum that they are giving up but it is also the right to choose after a dispute arises, which in and of itself has value and should be only [J exchanged for adequate consideration. Second, it indicates that if there is no written contract, and therefore no particularized expression of what an at-will employee actually and legitimately expects, the default position should not be that the employee expects whatever the employer unilaterally offers. Employees already have a baseline expectation that they can go to court for serious disputes and above that... Congress provided an expectation of the right to a jury trial.

Park, supra note 97.
forms and policies prevail. For most employees, most of the time, firm-specific investments may make exit impossible. This reality, rather than a spurious analogy to the circumstances in which commercial contracts are made, is the appropriate and fair basis for inquiring into the voluntariness of agreeing to collateral matters when employees decide whether to accept jobs, promotions, bonuses or transfers.