Reflections on the Mandatory Arbitration of Statutory Employment Claims

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Introduction

The United States Supreme Court has upheld an employer's right to require, as a condition of employment, the arbitration of statutory employment discrimination claims (referred to here as "mandatory arbitration").[2]

This being the law, much of the commentary now centers on whether, and to what extent, mandatory arbitration should meet certain minimum standards, whether mandatory arbitration can fulfill the deterrent and remedial purposes of the underlying employment discrimination statutes, and whether legislation may be necessary to achieve either or both of the above.[3] These discussions sometimes refer to, or rely upon, the labor arbitration experience. This paper offers my subjective perspective as a union side lawyer as to how the structure, dynamics and public policy purpose of labor arbitration might inform those issues.

This paper is divided into four sections.

- The first briefly discusses the biases and cognitive habits that influence judges and arbitrators alike and thus weigh heavily on mandatory arbitration's reliance on a single arbitrator.
- The second reviews the structural dynamics of labor arbitration as part of the collective bargaining relationship.
- The third compares such dynamics to those in mandatory arbitration.
- The last section proposes safeguards in the structure of mandatory arbitration to compensate both for inherent arbitral bias and for the employer's disproportionate power in arbitrator selection.

As I discuss below, the idiosyncratic structure of collective bargaining minimizes the biases inherent in using a single decision-maker. Mandatory arbitration does not have an equivalent check on those biases. Indeed, if anything, the structure of mandatory arbitration compounds the implicit pro-employer bias.

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[2] The decision primarily responsible for paving the way for mandatory arbitration of employment discrimination claims is *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

[3] *See* Ariana R. Levinson, *What the Awards Tell Us about Labor Arbitration of Employment-Discrimination Claims*, 46 U. Mich. J.L. Reform 789, 791n 5 & 6 (2013).

This paper makes three suggestions designed to counteract the natural arbitral bias in favor of employers, to neutralize the compounding effect of the disproportionate employer influence on arbitral selection, and to compel uniform compliance with the statutory obligations.

Part 1

Judicial/Arbitral Biases in Decision Making

The 1991 amendments to Title VII allowing for jury trials and additional remedies, including punitive damages, reflected the Congressional view that those enhancements were necessary to achieve the policy goals of the statute. This expansion, as well as the enactment of additional protective legislation, spurred the management adoption of mandatory arbitration provisions that the Supreme Court ruled were enforceable.

> … positive changes in Title VII law under the Civil Rights Act of 1991 allowing the award of compensatory and punitive damages, along with passage of the Americans with Disabilities Act and the Family and Medical Leave Act, have channeled *employers* into constructing alternative dispute schemes.

See Roberto L. Corrada, *The Arbitral Imperative in Labor and Employment Law*, 47 Cath. U. L. Rev. 919, 933 (1998).

The employers' motivation was undoubtedly to lessen the potential increased liability these amendments might bring. The management assumption that arbitrators would be more favorable to their interests than a jury is not surprising. A jury is selected from a broader and more diverse group than the available pool of arbitrators; the viewpoints of the arbitrators are also more likely to coincide with those of the employers. Moreover, as a "jury [is] comprise[d] of a number of individuals, the prejudices of a single juror are not likely to destroy the capacity of the group to render a fair decision." Stephan Landsman, *The Adversary System: A Description and Defense* 3 (1984).

Any discussion of the fairness of substituting arbitration for a jury trial necessarily must account for the impact of implicit biases and cognitive habits on decision making. A brief discussion of those influences follows.

Legal Realism and Adjudicative Decision Making

The view of the so-called legal realists is that legal outcomes are not grounded in the application of neutral syllogistic principles. Rather, the development of the law is inherently subjective and based upon the political, social, and moral predilections of the judiciary. Oliver Wendell Holmes, an early legal realist,[4] repeatedly observed that economic, political, and sociological value judgments shaped supposedly neutral legal principles.

[4] *See* O. W. Holmes, "The Common Law" at 1 (first edition Little, Brown and Company 1881) ("The life of law has not been logic; it has been experience").

> The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes.

Vegelahn v. Gunlner, 167 Mass. 92, 106, 44 N.E. 1077 (1896) (dissenting opinion).[5] Subsequent legal realists expounded these influences of the development of the law:

> Deep below consciousness are other forces, the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions which make the man [or the woman], whether he [or she] be litigant or judge.
>
> The decisions of the courts on economic and social questions depend upon their economic and social philosophy;

Benjamin Cardozo, *The Nature of the Judicial Process*, Lecture IV (Yale Univ. Press 1921) at 167 and 171.[6] *See, e.g.*, Lee Epstein & Jack Knight, *The Choices Justices Make* (1998).

At various meetings of the National Academy of Arbitrators, arbitrators discussed how, like judges, they encounter the same obstacles in overcoming their personal values and biases.[7]

> As any experienced practitioner full well knows, an arbitrator (like a judge) brings to each case a set of qualifications and preconceptions based on education, experience, associations, personal qualities, and perhaps instinct, which often may influence the outcome of a case.

Value Judgments in Arbitration at 218, *citing* Sylvester Garrett, *Contract Interpretation; 1. The Interpretative Process: Myths and Reality,* Chapter 5 in Arbitration 1985; Law and Practice, Proceedings of the 38th Annual Meeting, National Academy of Arbitrators, ed., Gershenfeld (BNA Books 1986), 121, 144-148. *See also Value Judgments in Arbitration* at 225-231 (Chapter by James B. Atleson on the Presence of Values).

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[5] Holmes recognized this dynamic to be particularly evident in the judicial hostility to labor, a bias which is well documented. *See* Felix A. Frankfurter & Nathan Greene, *The Labor Injunction* (1930); Charles O. Gregory, *Labor and the Law* (Norton, 1946); *see also* Ahmed A. White, *Industrial Terrorism and the Unmaking of New Deal Labor Law*, 11 Nev. L.J. 561 (2011).

[6] As quoted in James A. Gross, *Value Judgments in Arbitration: Their Impact on the Parties' Arguments and on the Arbitrator's Decisions*, Chapter 9 in Arbitration 1997: The Next Fifty Years, Proceedings of the Fiftieth Annual Meeting, National Academy of Arbitrators, (Joyce M. Najita ed. 1997) ("Value Judgments in Arbitration") 212, 215.

[7] *See, e.g.*, *Value Judgments in Arbitratio*n at 215-16 referring to Block, *Decisional Thinking: West Coast Panel Report*, in Decisional Thinking of Arbitrators and Judges, Proceedings of the 33rd Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1981) at 119 (noting Judge Frank's conclusion that facts were not found but rather were processed by the trier and that the reactions of trial judges to testimony were "shot through with subjectivity" and Cardozo's admonition that "We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own.") *See also Value Judgments in Arbitration* at 216 citing Valtin, *Decisional Thinking*, Washington Panel Report ("The way you come out in this case depends on how you go in.")

Moreover, as Holmes and the legal realists who followed observed, individual values and biases generally coincided with the interests of those groups with the most power: *See. e.g.*, Wendy Brown Scott, *Oliver Wendell Holmes on Equality and Adarand*, 47 How. L. J. 59, 62 (2003). Arbitrators have also voiced concerns about the tendency of their unconscious leanings to favor familiar voices and ruling interests in our society.

> Because of substantially different values, experiences, backgrounds, and perspectives, arbitrators as deciders might be blinded to the ways in which they privilege some voices (often the voices of people like them) and stifle others (often people not like them) when listening to testimony, processing the facts, and making judgments.

Value Judgments in Arbitration at 224-25.

Confirmation of Implicit and Cognitive Biases in Decision Making

Social and biological sciences have confirmed the prevalence and impact of social and other values on judicial decision. Studies increasingly provide insight into how the brain receives, interprets and stores information, and the distortions that may result.[8] Scientists have identified various "cognitive shortcuts, or rules of thumb, by which people generate judgments and make decisions without having to consider all the relevant information, relying instead on a limited set of cues that aid their decision making." Eyal Peer & Eyal Gamliel, *Heuristics and Biases in Judicial Decisions*, 49 Court Review 114 (2013)

These "heuristics" together with other cognitive habits or "schemas" are often shaped by social, political and other value biases and thus distort decision making:

> Cognitive science has revealed that many of our patterns of acting and thinking are not governed by reason, but rather are ingrained, unconscious, or triggered by our autonomic nervous system. Decisions based on what we believe to be careful, neutral, and logical reasoning, may actually be guided by unexamined and often unseen frameworks of thinking. … Because much of our thinking occurs on a subconscious level, we are often unaware of the actual causes of our own behavior, thinking, emotions, perceptions, and biases.

Nicole E. Negowetti, *Judicial Decisionmaking, Empathy, and the Limits of Perception ("Judicial Decision-Making")*, 47 Akron L. Rev. 693, 693-94, 694-95 (2014).

The channeling of our imbedded experiences, biases and values to form stereotypes or other beliefs is intrinsic to our brain functioning and is generally not conscious:

> Much bias, however, is not overt. Rather, it results from the way in which our brains operate. Every object is unique in a variety of ways. Yet human beings

[8] Advances in technology have demonstrated that eyewitness evidence previously considered reliable may be flawed. DNA testing has made this same point many times over.

> cannot process an infinite variety of diverse characteristics. Consequently, we classify objects into categories which enable us to process and interpret data. We then perceive members of the same category as being similar to each other and members of different categories as being different from each other.
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> We categorize people for similar reasons and in similar manners as we categorize objects, often stereotyping results. . . . Thus, "stereotypes are unconscious habits of thought that link personal attributes to group membership. Stereotyping is an inevitable concomitant of categorization ...."
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> People may be unaware of, and generally do not focus on, the fact that they engage in stereotyping: ascribing group-level expectations to individual members of those groups. Indeed, stereotyping occurs among people whose beliefs are relatively free of bias or prejudice. Stereotypes, however, "bias [] in predictable ways the perception, interpretation, encoding, retention, and recall of information about other people."

Martin H. Malin & Monica Biernat, *Do Cognitive Biases Infect Adjudication? A Study of Labor Arbitrators*, 11 U. Pa. J. Bus. & Emp. L. 175, 175-76 (2008)

There is no longer much doubt that cognitive schemas, heuristics and individualistic biases lead to erroneous decision-making. *See* Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 Cornell L. Rev. 1, 13-29 (2007) (hypothesizing that judges may make decisions using their intuitive system, which may lead to erroneous or unjust results); Chris Guthrie et al., *Inside the Judicial Mind*, 86 Cornell L. Rev. 777, 784-821 (2001) (using an empirical study to show that judges may use heuristics to make decisions, which may be erroneous). [9]

These mostly unconscious cognitive habits also disguise the very biases which are often the source of the very discrimination Congress intended to eliminate. *See, e.g.,* Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. Personality & Soc. Psychol 5 (1989); Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4. Harv. L. & Pol'y Rev. 149, 154 (2010) ("…empirical evidence from other social science studies show that implicit bias is pervasive in our society.")

"Implicit biases are especially intriguing, and also especially problematic, because they can produce behavior that diverges from a person's avowed or endorsed beliefs or principles." Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 Wash. U. J.L. & Pol'y 71, 91-92 (2010). [10] The natural inclination to consider ourselves fair minded and unbiased acts as a barrier to acknowledging the inevitable distortions that implicit bias creates. Consider the following cautionary tale:

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[9] These studies are cited in 11 U. Pa. J. Bus. & Emp. L. at 210 n 163.

[10] *Citing* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations,* 94 Calif. L. Rev. 945, 951 (2006)

> A federal district court judge explained how his self-confidence in colorblindness was shaken after he received the results of the Implicit Association Test ("IAT") 25 that measures implicit racial bias.
>
> I was eager to take the test. I knew I would "pass" with flying colors. I didn't. Strongly sensing that my test performance must be due to the quackery of this obviously invalid test, I set out to learn as much as I could about both the IAT and what it purported to measure: implicit bias. After much research, I ultimately realized that the problem of implicit bias is a little recognized and even less addressed flaw in our legal system. I have discovered that we unconsciously act on implicit biases even though we abhor them when they come to our attention. Implicit biases cause subtle actions, . . . [b]ut they are also powerful and pervasive enough to affect decisions about whom we employ, whom we leave on juries, and whom we believe. Jurors, lawyers, and judges do not leave behind their implicit biases when they walk through the courthouse doors.

4 Harv. L. & Pol'y Rev. at 150 quoted by *Judicial Decision-Making*, 47 Akron L. Rev. at 696-97.

The threshold problem and challenge of any arbitrator is acknowledging that these implicit biases and cognitive habits:

- Create "a variance, sometimes wide, between implicit and explicit cognition"
- Embody "a discernable, pervasive and strong favoritism for one's own group, as well as for socially valued groups" and
- "[M]ore accurately than explicit [cognition], predict behavior''[11]

In the absence of the filter of collective deliberations and consensus that juries provide, or some other compensating mechanism, the implicit biases of professional arbitrators will go unchecked and be likely to favor employers.

[11] Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 Wash. U. J.L. & Pol'y 71, 88 (2010) citing Kristen A. Lane, Jerry Kang, & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 Ann. Rev L. & Soc. Sci. 427, 431-38 (2007).

Part 2

The Emergence of Labor Arbitration and the Structural Dynamics Supporting its General Acceptance

Notwithstanding the inevitable biases inherent in using an individual decision-maker, for most of the last 75 years arbitration has been almost universally accepted as the means of resolving disputes arising under collective bargaining agreements.

Voluntary labor arbitration of contract disputes in the private sector came of age in the late 1930s.[12] At that time, union density in the industrial sector spurred on by the Wagner Act, shifted the emphasis of many companies from avoiding union representation to establishing an orderly relationship with workers. World War II accelerated this transition and solidified the role of labor arbitration as a means of ensuring labor peace and an orderly self-governance of the collective bargaining relationship. National security considerations dictated uninterrupted production, leading to the imposition of dispute resolution mechanisms: the last of which, and the one with the most long-lasting influence, was the War Labor Board.

The public policy goal of labor arbitration was labor peace; its acceptance was inextricably linked to unionization and collective bargaining.

> Collective bargaining shapes labor arbitration and gives it power. The collective-bargaining relationship itself reflects the strength and purpose of unions. It is only when unions are powerful, well established, and responsive to the needs of their members that labor arbitration works successfully. Without unions and collective bargaining, key aspects of labor arbitration would become meaningless and counterproductive.

Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 Yale L. J. 916, 917 (1979).

Collective bargaining agreements are part of an ongoing relationship regulated by the National Labor Relations Board under the National Labor Relations Act. However, unlike many contracts, even before their expiration, these agreements are continually redefined by the parties thereto. Moreover, many of the conditions of employment in these agreements are reliant on the parties' practices or implicit understandings to explain the application of provisions or to adjust to circumstances not specifically covered. For example, the parties may intentionally decide to rely upon ambiguity rather than lock horns on an issue that may not be material at the moment, leaving its resolution to another day or the next contract negotiation.

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[12] Determining disputes under an existing agreement is referred to as "rights" arbitration as distinguished from setting the terms of an agreement, often referred to as "interest arbitration." Interest arbitration has a longer history, although is rare now in the private sector. *See generally*, Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Early Years*, 35 U. Fla. L. Rev. 373, 375-386 (1983). Rights arbitration was first legislated in the United States on a large scale by the Railway Labor Act of 1926 for railroads and as amended in 1934 for airlines. Prior to that, rights arbitration existed in some industries (most notably in the clothing industry), but was not widespread.

This defining and redefining of the relationship occurs both formally and informally. Opportunistic and mutually beneficial arrangements are made on the shop floor. Some set precedents; others are simply accommodations that suit the moment and have no bearing on the general terms and conditions. More formal disputes are subject to a grievance procedure. Throughout, the parties discuss the issues and exchange information, attempting all the while to filter and narrow disagreements. The goal is generally to resolve disputes, whether based upon some mutual understanding as to the contractual requirements or simply on some practical basis, to avoid a disruption of the relationship and/or the cost of arbitration. Like in any functional ongoing relationship, such as a good marriage for example, being right is not always dispositive. Prevailing on a technical argument that conflicts with the general perception of the parties' intent may have collateral consequences. The aggrieved party may be less inclined to accommodate unanticipated needs that the contract either prohibits or makes too costly. Moreover, such a victory may weigh heavily in the next round of negotiations.

Arbitration is the terminal step in the grievance process. The arbitrator picks up where the parties left off and resolves the dispute with the same mix of pragmatism, context, and bargained for terms that the parties use to govern their relationship. Labor arbitration is judged not by the result in any particular case but by its legitimacy as a means of maintaining labor peace and facilitating the parties' self-governance.

> Unlike litigants in a court, the parties in a collective labor agreement must continue to live with each other both during the dispute and thereafter. While they are antagonists in some respects, they are also participants in a joint enterprise with mutual problems and mutual interests. The smooth and successful operation of the enterprise is important to the welfare of both. A labor dispute submitted to arbitration is not a controversy as to a past transaction, like they typical law suit in which each litigant desires to win, and, win or lose, to wind up the litigation and have nothing more to do with the matter. A labor dispute submitted to arbitration is a mutual problem which affects the future relations of the parties and the smooth operation of their enterprise. The objective of the parties, notwithstanding their contentions in advocacy, must be, not to win the immediate contentions, but to achieve the best solution of the problem under the circumstances. An apparent victory, if it does not achieve such a solution, may boomerang into an actual defeat. An award which does not solve the problem and with which the parties must nevertheless live, may become an additional irritant rather than a cure.

J. Noble Braden, *Problems in Labor Arbitration*, 13 Mo. L. Rev. 143 at 148 (1948) *quoting* Shulman, *The Role of the Impartial Umpire,* American Management Series No. 82, page 10.

"Collective bargaining shapes labor arbitration and gives it power." The relative parity of the institutional parties to the collective relationship and their power to select the arbitrators is essential to neutralizing any biases out of sync with the parties' expectations. As one commentator put it:

> At the heart of the labor arbitration system is the parties' mutual selection of the arbitrator. Because of such mutual selection, the Supreme Court views labor arbitrators as "indispensable agencies in a continuous collective bargaining process." According to the Court, the collective bargaining agreement "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsman [of the written collective bargaining agreement] cannot wholly anticipate." The arbitrator is called upon to help resolve those disputes that the parties either did not wholly anticipate, or for other reasons have decided to resolve through arbitration. "Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and [] provid[ing] for their solution in a way which will generally accord with the variant needs and desires of the parties."
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> Thus, according to the Court, "[t]he labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment." The parties have bargained for the arbitrator to "bring his informed judgment to bear in order to reach a fair solution of a problem."
>
> Therefore, the arbitrator is selected by and accountable to the parties. The parties' expectations, as perceived by the arbitrator, are the primary constraints on arbitral decision-making. The mutual selection process is self-policing. Arbitrators who defy the parties' expectations do not remain arbitrators for very long.

11 U. Pa. J. Bus. & Emp. L. at 179-180. *See also* Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 Hastings L.J. 1187, 1198-99 (1993) ("Parties select arbitrators who they believe will resolve grievances in a manner consistent with [their] expectations. In turn, arbitrators, who want to work again, generally do not disappoint them.").

The imperative that arbitrators channel the mutual interests of both parties legitimizes, and to some extent harnesses, arbitrators' individualistic styles, approaches, and values:

> [The arbitrator] is rather part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement. They are entitled to demand that, at least on balance, his performance be satisfactory to them, and they can readily dispense with him if it is not.

Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1016 (1955). "Mutual selection of the arbitrator by the parties legitimizes the role of arbitral intuition and value judgments in the decision-making process." 11 U. Pa. J. Bus. & Emp. L. at 182.

Part 3

How Labor Arbitration Compares with Mandatory Arbitration of Statutory Claims

Mandatory Arbitration

"'Mandatory Arbitration' describes an arrangement where two parties considered to have unequal bargaining power agree before any dispute to arbitrate claims rather than take them to court." 46 Mich. J.L. Reform at 793. The focus of this paper is such agreements to resolve future employment claims by employees through binding arbitration. Employers unilaterally impose these arbitration agreements as a condition of employment. They may be presented separately or as one of many uniform terms that employees must acknowledge (e.g., that the employment is "at will.") The arbitration provision may cover all employment disputes or a subsection of such disputes.

Employers control the contours of the arbitration process and retain the right to modify them. Employers may set the rules for such issues as the costs of arbitration, arbitrator selection and the procedures which will apply. Alternatively, employers may adopt the rules of a neutral institution such as the American Arbitration Association[13] or JAMS with respect to all or some of these issues.

The Absence of Structural Equality in Mandatory Arbitration and its Effects

As previously discussed, labor arbitration has certain structural characteristics which mitigate the implicit arbitral bias in favor of employers:

- The arbitral function of interpreting the parties' private contractual ongoing relationship forces the arbitrator to conform individual biases to the parties' expectations.
- Both parties are institutional entities who have equal control over the arbitration process and the selection of arbitrators.
- As parties to an ongoing relationship, they are both so-called "repeat players"[14] with neither having an advantage in terms of arbitrator familiarity, nor an advantage in terms of being the only entity to select an arbitrator in future cases.

As summarized by one commentator:

> …. unions and management are similarly situated when participating in labor arbitration because both parties repeatedly arbitrate workplace disputes. For example, the parties exercise control by jointly selecting the arbitrator who they

[13] Under the AAA rules, a list of arbitrators is sent out allowing the parties to list the acceptable arbitrators in order of preference. If there is no match, the AAA can designate an arbitrator from the list. Employment Arbitration Rules and Mediation Procedures, as amended November 1, 2009 (section 12 at page 20).

[14] Repeat player is a descriptive short-hand for the frequency a party uses a particular arbitrator or otherwise uses arbitration generally (and thus is a large customer of those services). *See. e.g.*, Sarah Rudolph Cole, *Incentives and Arbitration: The Case against Enforcement of Executory Arbitration Agreements between Employers and Employees*, 64 UMKC L. Rev. 449, 452-53 (2006) (describing and discussing "repeat player").

> believe can most fairly meet their expectations. Since the parties repeatedly arbitrate, the arbitrator has an incentive--future employment--to perform consistently without favoring one party over the other. Even though the parties collectively determine the scope of the arbitrator's discretion, the arbitrator may issue an award disliked by both parties. The parties can agree to nullify the award and bargain for a different resolution.

Allison Anderson, *Labor and Commercial Arbitration: The Court's Misguided Merger*, 36 B.C. Int'l & Comp. L. Rev. 1237, 1256 (2013).

The structural dynamics of mandatory arbitration do not similarly serve to mitigate the implicit bias of arbitrators. As noted before, labor arbitration requires a conscious effort to transcend individual biases and channel the private and idiosyncratic interests and perspectives of the parties to the collective bargaining agreement. Mandatory arbitration is not so constrained; determining disputes governed by external law gives free rein to the arbitrator's individual biases and cognitive characteristics. This tendency is exacerbated by the employer's disproportionate control and influence over the process of selection of an arbitrator. Just as parties attempt to exercise leverage in jury selection, an employer will choose an arbitrator it perceives as being favorable, using any available leverage or information advantage it may have.

This power has a coercive effect on arbitrators. Unlike jurors and judges, arbitrators have an economic interest in being selected and are dependent upon those with the power to use their services in the future. The parties' use of the power of selection to advance their interests is widespread in the labor arbitration context. Parties routinely not only attempt to seek out arbitrators who will be most receptive to their view, but to punish arbitrators based upon their performance by refusing to use them in the future. [15]

Unlike in labor arbitration in which both parties have the same influence, the employer enjoys a superior advantage in mandatory arbitration. There, the employers determine the selection process and are more likely to be repeat players in that process. As such, the employer has a greater influence than an individual employee over an arbitrator's future selection. In this context, even though punitive damages were designed to be part of the statutory remedial scheme "an arbitrator with a reputation for awarding high damages to plaintiffs will not likely be chosen by employers for future arbitrations." Mark L. Adams, *Compulsory Arbitration of Discrimination Claims and the Civil Rights Act of 1991: Encouraged or Proscribed?* 44 Wayne L. Rev. 1619, 1622, 1674-75 (1999).

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[15] As Julius Getman observed:

> The parties devote considerable effort to selecting an arbitrator whom they think will be most favorable to them. Companies keep lists of arbitrators, which contain performance evaluations and remarks by other lawyers and company representatives. Unions have a less formal but frequently no less intense method of evaluation.

88 Yale L. J. at 929 n54.

The potential for this influence to affect the third party administrators which the employer chose to administer the arbitration process is also a concern, particularly with large companies which provide substantial business and fees:

> … arbitration providers such as the American Arbitration Association (AAA) and National Arbitration Forum (NAF) compete with one another to act as arbitrators for companies. Because companies - rather than consumers or employees - are the ones drafting the agreements, and because these contracts may specify an arbitration provider, arbitration providers have an incentive to skew their proceedings in favor of the company drafting the agreement. They may do so either because they seek more business from a company or simply because, over time, arbitration providers and businesses may form informal and friendly relationships.

Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 Yale L.J. 2346, 2356-57 (2012). [16]

That the repeat player influence in mandatory arbitration compounds the general inherent pro-employer bias of arbitrators has been documented. "[E]mployers who are repeat players fare better in arbitration than employers who only arbitrate once." Janna Giesbrecht-McKee, *The Fairness Problem: Mandatory Arbitration in Employment Contracts*, 50 Willamette L. Rev. 259, 269-271 (2014). *See also* Alexander J. S. Colvin, & Mark David Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 ILR Review, 1019, 1023-25 (2015); Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Process*, 8 J. Empirical Legal Stud. 1, 15-16, 21 (2011).

Overall, the natural biases of the relatively homogeneous arbitral pool, either with or without the influences of the employer's disproportionate leverage in the arbitrator selection, has resulted in less favorable outcomes in arbitration. The disparity is greatest in discrimination cases involving the lower paid employees.[17] These less favorable outcomes have consequences beyond the individual claimants. The potential range of success in arbitration affects the willingness and size of settlements. Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 Berkeley J. Emp. & Lab. L. 71, 81 (2014). Although there are other factors affecting settlement, the likelihood of success combined with the risk of losing and

[16] This dynamic influences the composition of the arbitration panels provided by the institutions which are named in arbitration procedures. *See* description of such an occurrence in Nancy A. Welsh, *Funding Justice: What Is "(Im)Partial Enough" in a World of Embedded Neutrals?* 52 Ariz. L. Rev. 395, 437-38 (2010). (An arbitrator was removed after issuing an award against the company under a mandatory arbitration scheme covering consumer claims). *See also* a general discussion of the economic incentives as they affect third party vendors of arbitration panels. David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 Notre Dame L. Rev. 1247, 1311-12.

[17] Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 Berkeley J. Emp. & Lab. L. 71 (2014) (litigation outcomes more favorable to employees than arbitration); Alexander J.S. Colvin & Kelly Pike, *Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System has Developed?*, 29 Ohio St. J. on Disp. Resol. 59, 77, 82-83 (surveying a sample of cases in which the only punitive damage awards were in favor of employers and critiquing studies that arbitration outcomes are not lower); *see generally* 84 Notre Dame L. Rev. at 1297 n.140, 1308, 1319-21 (2009) (analyzing most of the surveys including some which purportedly support the opposite result).

costs of defending are most often the primary motivation for seeking a compromise. From the employer's perspective, mandatory arbitration lowers its transaction costs, increases its chance of success, and, in the event of an adverse award, reduces the likely range of damages. Under these circumstances, common sense dictates that the parties' perception of a reasonable settlement will be less than would be the case in court before a jury.

The diminished likelihood of success also limits the availability of legal representation. Plaintiffs' attorneys usually take cases on some form of contingency with the expectation of an appropriate fee award if successful. Jean R. Sternlight, *Disarming Employees: How American Employers are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 Brooklyn L. Rev. 1309, 1332-34 (2015) ("given the economics of how plaintiff-side employment attorneys are compensated, when employers impose mandatory arbitration clauses they may make it more difficult for employees to secure legal representation").[18] The economic model for most plaintiff-side employment lawyers requires a high degree of selectivity in the cases they take. If most of the compensation they receive is contingent, a practice reliant on such cases can ill afford to have an abundance of cases that will either bring no return or a return not commensurate with the time put in the case. This is compounded by the reality that plaintiff-side employment lawyers initially have to shoulder some of the costs of the litigation, even though the client will be ultimately responsible for these costs.

The most committed plaintiff-side lawyer must be realistic about the stable of cases in his or her practice. The failure to accurately gage the right balance is an expressway to economic ruin. Some of the factors that are part of the triage assessment of what cases to take are:

- The strength of the evidence and the extent to which its availability requires discovery
- The amount of compensatory damages
- The potential for punitive damages
- Whether the case goes to a jury, judge or arbitrator

Not surprisingly, according to surveys of plaintiff side lawyers, the arbitration forum is a significant negative factor in the assessment of whether to take a case.[19] In addition to the reduced potential for success both on liability and damages, the inherent biases of arbitrators affect not only their deliberation on the merits, but their views on the degree of discovery necessary. The absence of meaningful judicial review also precludes an appeal from unfairness that would otherwise be reviewable in litigation.

The inescapable conclusion is that mandatory arbitration has not lived up to its promise:

[18] The expectation that arbitration would encourage the filing of claims has not occurred. Rather, for whatever reason, there has been a marked decrease in claims where mandatory arbitration is in effect. 80 Brooklyn L. Rev. at 1312; *see also* 84 Notre Dame L. Rev. at 1318-1325.

[19] *See, e.g.*, Alexander J.S. Colvin & Mark D. Gough, *Comparing Mandatory Arbitration and Litigation: Access, Process, and Outcomes*, 12-14 (2014) (Final report to Sponsor: The Robert L. Habush Endowment of the American Association for Justice). Retrieved May 15, 2016 from Cornell University, ILR School site: http://digitalcommons.ilr.cornell.edu/reports/60

> Our overall conclusion based on our examination of the operation of the system is that [claims] are not being brought because employment arbitration is not providing an accessible, economically viable forum for bringing most employment claims.

29 Ohio St. J. on Disp. Resol. at 83.

Unlike labor arbitration's success as an alternative to labor strife, mandatory arbitration has not proven itself to be the neutral substitute for jury trials that the Supreme Court intended:

> Mandatory arbitration's endorsement by the U.S. Supreme Court was premised on the idea that it simply involved an alternative set of procedures for enforcing the same set of substantive rights. We have demonstrated how the outcomes of efforts to enforce substantive employment rights in fact vary widely depending on who the decision makers are and what the institutional context is. Justice in mandatory arbitration is not blind if parties are able to gain an advantage from selecting an arbitrator with desirable characteristics and especially if there are gains from doing repeat business with the same arbitrator.

68 ILR Review at 1040.

Part 4

Leveling the Playing Field

As the preceding discussion suggests, the validity of arbitration is contextual; it should be evaluated through the prism of the power dynamics of the parties and the underlying public policy issues involved. Labor arbitration resolves disputes in a privately ordered relationship between two institutional parties; the public policy goal is the maintenance of labor peace through that process. However, mandatory arbitration of statutory employment obligations involves an entirely different context as well as disparately situated parties. As expressed by the Supreme Court, the touchstone of mandatory arbitration is that a "prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, [and that] the statute will continue to serve both its remedial and deterrent function." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) quoted in in *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 28 (1991).

This paper focuses on the inherent biases of individual decision makers and the compounding disparity in arbitrator selection as flaws in mandatory arbitration. To address those deficiencies this papers makes three proposals which may move mandatory arbitration closer to being a neutral forum.

1. Compensating for the loss of jury trials by minimizing, through the training and certification of arbitrators, the individual biases and cognitive habits which tend to distort outcomes.

2. Eliminating the disparity in the arbitrator selection process, and the resulting influence such disparity has on arbitration outcomes, by having a designation process from panels of trained arbitrators.
3. Avoiding error and inconsistency in the enforcement of the public statutory mandates by establishing uniform legal standards, leaving to the arbitrator the role of fact finder.

Training and Certification of Arbitrators

Arbitration will not be a neutral replacement for jury trials unless a substantial commitment is made to mitigating the implicit biases that distort outcomes. This issue is particularly important precisely because of the lack of acknowledgement and understanding of these biases and habits.[20] If arbitrators are going to provide the diversity of judgment of a jury, they must be trained to understand their own biases and shortcomings. This training is essential not only to understand one's own perspective and analytical processes, but also to be more sensitive about the manner in which these implicit biases are manifested in the workplace. Given our knowledge about implicit bias and its pervasiveness, a sincere belief in the absence of discriminatory animus or motive does not by itself demonstrate the absence of the same.

Commentators often use the word "empathy" to describe the essential ability to gage perspectives outside their experience or own biases fairly. Judge Jack Weinstein lists empathy as a necessary ingredient in a judge's portfolio.[21] Social scientists also use this term to connote the ability to evaluate interactions.

> The way to guard against the risk of personal subjective judgments is not to deny the limits of one's starting point, but to acknowledge them, and to then seek to glimpse the points of view of others. This at least protects against self-delusion about the impact of personal perspective; it may also afford insights broadening the judge's understanding of the problem at issue. Increasing the self-consciousness of the judge in the act of judgment may also enlarge the judge's ability to understand other human beings. This means attending to the parties and those likely to be in their situations in the future.

Judicial Decision-Making at 723-24; *see also* Martha Minow, *Justice Engendered*, 101 Harv. L. Rev. 10 (1987) and Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 Cardozo L. Rev. 37, 52 (1988) ("Taking the perspective of another involves both a cognitive effort to see the world from the vantage point of someone else and a willingness to try to understand what she feels about what she sees from that vantage point.").

[20] As Federal District Court Judge Mark W. Bennett wrote in discussing addressing implicit bias: "First, we need to recognize that implicit bias is both real and pervasive in our legal system. Without this recognition, solutions are impossible." 4 Harv. L. & Pol'y Rev. at 170.

[21] Jack B. Weinstein, *The Role of Judges in a Government of, by and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 Cardozo L. Rev. 1, 25-33 (2008).

Evaluating and training with respect to biases and cognitive distortions is becoming increasingly available. This should be a minimum requirement for arbitrators enforcing employment discrimination statutes.[22] Arbitrators should be trained to view cases from a diversity of perspectives and understand when their unconscious biases are taking them astray. Employers should welcome such training and certification as it provides quality assurance for pledges of non-discrimination.

The EEOC or other agencies should assemble programs using the myriad of outside resources to train, certify, and monitor arbitrators. There are also areas of discrimination law which require particular factual expertise, such as disability accommodation, where training and education standards should be a prerequisite for deciding such disputes. The process must be an ongoing one since the embedded processes have been developed over a lifetime.

Experts have recommended that one method of fostering continuing transcendence of individualistic biases is explaining in detail the reasoning and logic underlying conclusions. Doing so necessarily raises awareness of analysis predicated on implicit biases or cognitive habits, rather than on thoughtful scrutiny. Although an imperfect equivalent for jury deliberations, the internal deliberations of a conscientious arbitrator may provide a mechanism for challenging assumptions based upon implicit biases or cognitive illusions.[23]

The Designation of Arbitrators

Essential to labor arbitration is the relative parity of the institutional parties in the selection of the arbitrators and as repeat players. As the labor arbitration experience has shown (and as apparently is the case in mandatory arbitration), parties and their representatives exercise their power to select arbitrators based upon their past history or other individual inclinations.

"If, as commentators have argued, arbitral independence from the parties is essential to the integrity of the process, then it would follow that protection against reprisal by the losing side should be afforded to the arbitrator." 88 Yale L. J. at 927-28. The disparity of power in the mandatory arbitration context requires some modification of the method of selection of arbitrators.

One possible solution is to borrow from the assignment of judges or use some other random process. Random selection or a form of rotation from panels of trained professionals would eliminate the repeat player effect and otherwise promote the independence of the

[22] The AAA sets minimum qualifications for their employment dispute panels. The AAA lists expertise in employment law. AAA Rules at Section 12 page 20. That qualification is less important than the ability to provide a neutral unbiased assessment of whether discrimination has occurred. After all, in jury trials, the governing principles are routinely summarized in the jury instructions with the admonition to follow them.

[23] *See,e.g.*, Rebecca K. Lee, *Judging Judges: Empathy as the Litmus Test for Impartiality*, 82 U. Cin. L. Rev. 145, 201-202 (2013) ("As a result, judges should be required to write a full written opinion when rendering a decision on the merits of a case. In their written decisions, judges should show how they considered all sides to the dispute, and aim for objectivity by demonstrating how they engaged in a process of conscious empathizing with those who have less power and are less like them--those who tend to be more easily dismissed.").

arbitrator. This is not a novel idea. *See, e.g.*, rules for designating interest arbitrators under the New Jersey Public Employment Relations Commission rules.

Uniformity in Enforcing Public Imperatives

As one commentator summarized the difference between labor arbitration and mandatory arbitration:

> While contractual rights are created, defined and can be modified by the private parties who are subject to arbitration, statutory rights are created, defined and are subject to modification only by Congress and the courts, thus suggesting the necessity of a public, rather than private, process to enforce those statutory rights. In the collective bargaining context, an arbitrator serves as an agent or "alter ego" for the parties to the agreement, but an arbitrator who resolves a statutory claim pursuant to a compulsory arbitration agreement acts as a private judge. In contrast to a judge, however, an arbitrator is privately rather than publicly chosen, and is not publicly accountable due to the limited review and private nature of the arbitration.

44 Wayne L. Rev. at 1663-64.[24]

The danger of arbitrators failing to comprehend the governing rules, or imbuing them with their own individualistic values, may be mitigated by providing uniform standards.[25] Every Federal Circuit has standard jury instructions. Similar and more explicit standards could be promulgated for use by arbitrators. Agencies empowered to enforce a particular statute would seem to be the most appropriate body to design these guidelines. Those agencies would amend the guidelines to conform to changes in the law or its interpretation.

The advantages of having such guidelines include

- Creating greater uniformity in the application of the law
- Reducing the potential for a mistake of law
- Eliminating legal wrangling over the applicable legal principles, which in turn
    - Minimizes disparities in the quality of representation as well as decreases the barriers to pro se litigants
    - Reduces the length and cost of the proceedings by focusing on the factual presentation.
- Focusing arbitrators on the fact-finding function with the result that judicial deference to arbitration is more in line with the judicial review of jury awards

[24] *See also* Roberto L. Corrada, *Claiming Private Law for the Left: Exploring Gilmer's Impact and Legacy*, 73 Denv. U.L. Rev. 1051, 1061-62 (1996) (highlighting the problems of private entities interpreting public policy)

[25] For an alternative solution *see* Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 Hastings L.J. 1187, 1240 (1993) (suggesting de novo judicial review of the arbitral legal conclusions).

- Requiring explicit detailed reasons for the factual findings, thereby increasing the awareness of implicit bias, as discussed above.

Nothing will replace the advantage a jury provides to the average plaintiff. However, for mandatory arbitration to become a neutral alternative, these proposals or some equivalents are required.

CONCLUSION

Mandatory arbitration has substantially diminished the efficacy of the 1991 Amendments intended to address the continuing presence of discrimination. As a matter of social policy, the legislation exempting discrimination claims from mandatory arbitration is justified. There is something perverse about a system that delegates the enforcement of discrimination laws to private individuals, selected and paid for by the alleged offenders, when those individuals unconsciously share some or all of the implicit biases that may underlie the very discrimination they are to judge.[26]

Nonetheless, returning these claims to the litigation process is not necessarily a panacea. The judicial impatience with the flood of discrimination and wage and hour cases has resulted in an increasing jurisprudential narrowing of the right to a trial. An efficient and fast alternative, at least on a theoretical level, definitely has advantages. But that system cannot be dictated by employers.

The suggestions we make mirror to some extent the systemic solutions to discrimination in general – education, familiarity and acceptance of other perspectives, and equality for all. When employers approach mandatory arbitration in discrimination cases with the same trepidation that they would approach a jury trial, progress will have been made.

[26] 84 Notre Dame L. Rev. at 1340-41 (Mandatory arbitration is fundamentally unfair).