

ARBITRARILY SELECTING BLACK ARBITRATORS

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Calls for increased diversity among arbitrators have surged with the growth of the employer movement, so-called mandatory arbitration, which requires employees to agree to arbitrate employment discrimination matters as a condition of employment. Despite good-faith efforts by neutral service providers, civil rights organizations, bar associations, and employer and employee groups to identify and address the need for more diverse arbitrators in mandatory arbitration, many commentators still lament that this diversity problem reflects negatively on access to justice. With the #MeToo movement's focus in recent years on the lack of a public and transparent resolution for sexual harassment matters, as well as rap music mogul Jay-Z's late 2018 effort to identify more black arbitrator candidates for his commercial arbitration matter, concerns about the lack of diversity among arbitrators have become even more prominent.

However, the core of the problem remains: despite efforts to increase diversity in arbitrator pools, parties still have discretion to select the arbitrator. Businesses (and even, to some extent, employees) have no incentive to select an arbitrator solely because of the arbitrator's diversity profile. Representatives for businesses and employees want to win. They believe that result is best achieved by selecting arbitrators they know. Risk aversion prevents those representatives from selecting unfamiliar black and

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other nonwhite, male arbitrators, despite ongoing diversity efforts to populate arbitrator pools with more of these individuals.

This Article explores how this “win first” dynamic hinders attempts to address arbitrator diversity and suggests a different approach by neutral service providers that mimics the selection of federal judges. This new selection process will involve the creation of a pool of diverse arbitrators with outstanding qualifications. Then, instead of having the parties choose the actual arbitrator, a neutral service provider will select the arbitrator assigned to the parties in a random manner, similar to how federal courts assign judges to cases without party input.

INTRODUCTION

“[A]rbitration procedures, and specifically its roster of neutrals[,] . . . deprive black litigants like Mr. [Shawn] Carter and his companies of the equal protection of the laws, equal access to public accommodations, and mislead consumers into believing that they will receive a fair and impartial adjudication.”¹

This quote, from a November 2018 filing² in New York State court by rap artist and entertainment mogul Shawn C. Carter, also known as Jay-Z, placed a celebrity spotlight on a perennial problem: the lack of black³ arbitrators. With little improvement in arbitrator diversity despite longstanding criticism, the topic received a major visibility boost after Jay-Z raised the issue.⁴ In a

1. Petitioners’ Memorandum of Law in Support of the Order to Show Cause for a Temporary Restraining Order & Preliminary Injunction at 2, *Carter v. Iconix Brand Grp., Inc.*, No. 655894/2018 (N.Y. Sup. Ct. Nov. 28, 2018) [hereinafter *Petitioners’ Memorandum*].

2. Similar language appears in Jay-Z’s petition to stay arbitration. CPLR § 7503(b) Petition to Stay Arbitration at 3, *Carter*, No. 655894/2018 [hereinafter *Petition*].

3. The terms “black” and “African American” are used interchangeably herein. While focusing on “black” arbitrators, this Article recognizes that issues of race are not just subject to the “black/white binary paradigm” and apply to all people of color. See Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CALIF. L. REV. 1213, 1219 (1997) (defining the “Black/White binary paradigm” “as the conception that race in America consists, either exclusively or primarily, of only two constituent racial groups, the Black and the White”). Diversity concerns for dispute resolution professionals, including mediators and arbitrators, extend to underrepresented groups based on gender, disability, LGBTQ, and people of color status. See Benjamin G. Davis & Deborah Masucci, *Diversity Committee: Solving America’s ADR Diversity Issues*, JUST RESOLUTIONS E-NEWS (A.B.A., Chicago, Ill.), May 2015 (identifying these “four underrepresented groups” as the target population for professional diversity enhancement efforts by the American Bar Association’s Section of Dispute Resolution Diversity Committee). In focusing on the example of Jay-Z’s petition, this Article continues to highlight black arbitrator diversity issues consistent with my other work regarding racial prejudice in ADR based on being black. See, e.g., Michael Z. Green, *Reconsidering Prejudice in Alternative Dispute Resolution for Black Worker Matters*, 70 SMU L. REV. 639, 643–61 (2017) (addressing and framing analytical concepts of ADR in the workplace: negotiating while black, mediating while black, and arbitrating while black).

4. See Darlene Ricker, *Jay-Z’s ADR Problems: Mogul’s Case Spotlights Lack of Diverse Arbitrators*, A.B.A. J., May 2019, at 9, 9–10; Jonathan Stempel, *Jay-Z Wins Fight for African-American Arbitrators in Trademark Case*, REUTERS (Jan. 30, 2019, 5:22 PM), <https://www.reuters.com/article/us-people-jayz-lawsuit/jay-z-wins-fight-for-african-american-arbitrators-in-trademark-case-idUSKCN1PO32T> [<https://perma.cc/Z2M6-PY9Q>].

commercial intellectual property lawsuit between Jay-Z's Rocawear fashion company and Iconix Brand Group, Inc.,⁵ Jay-Z challenged the defendants' request to resolve the dispute through arbitration pursuant to the procedures of the American Arbitration Association (AAA). As the parties struggled to agree on a final AAA arbitrator, Jay-Z decided to pose a legal challenge to the lack of black arbitrators on the AAA roster.⁶

Jay-Z argued that, because he could not identify a single black arbitrator among the list of two hundred arbitrators made available to him, he could not resolve this dispute fairly in arbitration.⁷ Before filing, Jay-Z asked AAA to provide a list of arbitrators of color.⁸ According to the court filing, AAA responded to Jay-Z's request by providing him a list of six arbitrators; only three were black and, of these, one was a partner at the firm representing his opponent.⁹ When Jay-Z questioned the list, AAA offered a final list of twelve arbitrators that included the remaining two black arbitrators and informed the parties that if they could not agree on a final arbitrator by a certain deadline, AAA would select the arbitrator for their dispute.¹⁰

Jay-Z requested an injunction to stop the arbitration based on potential equal protection violations of the New York State Constitution, alleging that AAA had engaged in racial discrimination against litigants by failing to provide diverse and representative arbitrators.¹¹ Jay-Z filed similar charges under New York State's human rights and civil rights laws and New York City's Human Rights Law.¹² The petition argued these laws applied to AAA as a place of public accommodation that had failed to provide equal access to litigants of color.¹³ The petition requested ninety days to find suitable arbitrators or a permanent stay of the arbitration as against public policy.¹⁴ Jay-Z also alleged that AAA violated the New York deceptive trade practices law by advertising on its website that it had a commitment to providing arbitrators of diverse backgrounds.¹⁵ According to Jay-Z's petition, this advertising "mis[ed] prospective litigants into believing that . . . [AAA's roster contained] a critical mass of diverse arbitrators," while offering "only three African-American arbitrators to preside over his arbitration."¹⁶

5. See Lauren Berg, *Jay-Z Slams Arbitration Group's Lack of Diversity in IP Row*, LAW360 (Nov. 28, 2018, 9:31 PM), <https://www.law360.com/articles/1105807/jay-z-slams-arbitration-group-s-lack-of-diversity-in-ip-row> [<https://perma.cc/KGT5-V8GW>].

6. See Caroline Simson, *Jay-Z Adds Star Power to Diversity Concerns in Arbitration*, LAW360 (Dec. 14, 2018, 9:40 PM), <https://www.law360.com/articles/1111523/jay-z-adds-star-power-to-diversity-concerns-in-arbitration> [<https://perma.cc/E7CA-LUE8>].

7. Petition, *supra* note 2, at 7.

8. *Id.*

9. *Id.*

10. *Id.* at 7–8.

11. *Id.* at 9 (citing N.Y. CONST. art. I, § 11).

12. *Id.* at 9–10.

13. *Id.*

14. *Id.* at 12.

15. *Id.* at 9–10.

16. *Id.* at 10.

A judge initially granted the motion for a temporary restraining order to allow Jay-Z to work with AAA on the diversity issue.¹⁷ After the court order, AAA: (1) listed “eighteen individuals on . . . AAA’s national Large Complex Case Roster [who] have self-identified as African-American”; (2) expressed “a willingness” to pursue other means of improving diverse representation in the arbitrator selection process, including the use of a three-arbitrator panel; (3) agreed to work with Jay-Z to improve the slate of diverse arbitrators on that panel by considering candidates proposed by Jay-Z; and (4) developed other means to improve the diversity of the panel.¹⁸ AAA also provided a comprehensive profile of information (including a list of all of its arbitrators who had self-identified by race), demonstrating AAA’s efforts to diversify not only the panel in question in the Jay-Z matter but all panels and disputes for which AAA provides arbitrators.¹⁹ After reviewing the additional information, Jay-Z agreed with AAA about its commitment to diversify its roster and withdrew his request to halt the arbitration.²⁰ Eventually, the parties settled the entire lawsuit.²¹

Jay-Z’s attempt to highlight arbitrator diversity was particularly exciting because it allowed everyday individuals without the financial resources to raise such a profound legal argument to have their day in court—and in the court of public opinion. Arguably, a lack of arbitrator diversity poses the greatest concern when individual minority participants, such as employees, face well-heeled and powerful corporate opponents, such as employers.²²

17. See Eriq Gardner, *Jay-Z Wins Bid to Halt Arbitration for Racial Bias*, HOLLYWOOD REP. (Nov. 28, 2018, 4:00 PM), <https://www.hollywoodreporter.com/thr-esq/jay-z-wins-bid-halt-arbitration-racial-bias-1164590> [<https://perma.cc/L8GW-TZX2>].

18. See Letter to Justice Ostrager Withdrawing Motion Sequence 001, Thus Lifting the Stay of Arbitration & Requesting a Status Conference in Ninety (90) Days at 3, *Carter v. Iconix Brand Grp., Inc.*, No. 655894/2018 (N.Y. Sup. Ct. Dec. 9, 2018) (alteration in original).

19. See Rekha Rangachari, *Can’t Knock the Hustle . . . [To Broaden Diversity in Arbitration]*, KLUWER ARB. BLOG (Jan. 15, 2019), <http://arbitrationblog.kluwerarbitration.com/2019/01/15/cant-knock-the-hustle-to-broaden-diversity-in-arbitration/> [<https://perma.cc/X37Q-LQP9>] (describing in detail AAA’s responses to Jay-Z’s lawsuit, with links to AAA’s court filings). In the interest of full disclosure, the list includes this Article’s author, as I am a member of the AAA labor panel. See Exhibit 3, *Carter*, No. 655894/2018. Given that this was a business dispute involving intellectual property, I doubt that I would have been selected or would have agreed to serve as the arbitrator in the Jay-Z dispute, but this broad request from Jay-Z asking for “all arbitrators in the AAA National Roster” demonstrated that he was looking beyond just his own dispute to determine the AAA’s commitment to diversifying its arbitral ranks as a whole. Exhibit 3, *supra*, at 3.

20. See *Judge Halts Arbitration in Jay-Z Suit Because of Racial Bias*, FORBES (Nov. 29, 2018, 5:50 PM), <https://www.forbes.com/sites/legalentertainment/2018/11/29/jay-z-successfully-halts-arbitration-due-to-racial-bias> [<https://perma.cc/WU9Z-UZYR>]; see also Emma Cueto, *Jay-Z Claims Movement in Arbitrator Diversity Request*, LAW360 (Dec. 10, 2018, 7:59 PM), <https://www.law360.com/articles/1109815> [<https://perma.cc/SN5C-KEH2>].

21. See Kori Hale, *Jay-Z’s Roc Nation Gets Iconix Lawsuit Dismissed for \$15 Million*, FORBES (Nov. 24, 2019, 8:00 AM), <https://www.forbes.com/sites/korihale/2019/11/24/jay-z-roc-nation-gets-iconix-lawsuit-dismissed-for-15m> [<https://perma.cc/6KPX-NJNA>].

22. See Sarah Rudolph Cole, *The Lost Promise of Arbitration*, 70 SMU L. REV. 849, 885 (2017). Twenty years ago, this Article’s author joined with others to raise awareness about the lack of arbitrator diversity in situations where diverse claimants were asserting employment discrimination. See Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J.

For arbitration to be considered a successful form of alternative dispute resolution (ADR) in the future workplace, it must shift away from using power imbalances (present in both individual forced or mandatory arbitration and class arbitration waivers)²³ and instead consistently use diverse arbitrators to remove concerns about fairness and transparency.²⁴ Fair employment arbitration processes need a critical mass of diverse arbitrators who more precisely reflect the makeup of the powerless parties attempting to resolve their disputes with large businesses. However, the key challenge presented in pursuing more diversity is recognizing that the parties, especially businesses, choose the arbitrators and must agree to select diverse arbitrators.

Unlike general concerns about improving workplace interactions by promoting diversity, parties select arbitrators with the goal of prevailing in the dispute at issue. For many participants, arbitration represents a fair process with hopefully less costs and a shorter time for resolution when compared to the courts. However, the arbitrator must decide who wins and who loses the dispute. If parties (especially businesses) have their advocates push for a specific arbitrator as a means to promote diversity, then those parties and their advocates will face backlash from corporate investors and higher-level executives for financial and reputational losses incurred if the arbitrator rules against them. This concern suggests that the only resolution to the arbitrator diversity problem is to select arbitrators randomly from a pool that includes a critical mass of diverse arbitrators. The thesis offered here to address arbitrator diversity would require all key stakeholders to agree to a neutral service provider choosing the arbitrator on a random basis after factoring in diversity. Parties would not pick the assigned arbitrator.

This Article proceeds as follows. Part I describes the significance of continuing efforts aimed at achieving diversity in the arbitral ranks and how that diversity has become imperative for disputes where employers insist that employees arbitrate statutory employment discrimination claims.²⁵ Part II

399, 441–42, 441 n.153 (2000) (criticizing the lack of arbitrators of color and citing various sources raising concerns about arbitrator diversity). Even at that time, others were already criticizing the lack of arbitrator diversity in addressing statutory employment discrimination claims. *See, e.g.*, Reginald Alleyne, *Statutory Discrimination Claims: Rights “Waived” and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381, 407–08 (1996) (criticizing the diversity of arbitrators).

23. *See infra* Part I.A.

24. *See* Larry J. Pittman, *Mandatory Arbitration: Due Process and Other Constitutional Concerns*, 39 CAP. U. L. REV. 853, 860 (2011) (discussing the need for diversity in arbitrator pools as “especially important when corporations and other businesses force their consumers and employees to accept adhesion arbitration agreements, which raises serious questions about the voluntariness of the weaker party’s acceptance of the negative implications from non-diverse pools of arbitrators who might be biased against them”).

25. For example, Title VII of the Civil Rights Act of 1964 (“Title VII”) prohibits workplace discrimination on the basis of race, sex, and other protected class characteristics. *See* 42 U.S.C. § 2000e-2(a)(1) (2018). Title VII, as amended, creates major incentives for competent attorneys to help employees bring private lawsuits as part of the enforcement regime. *See* David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985, 990, 1022–23 (2017). The Equal Employment Opportunity Commission (EEOC) is the federal agency

identifies some of the missteps that occur when constituents seek to increase diversity in arbitrator pools without addressing or removing the risk and bias limitations posed by parties ultimately having the power to make the final selection of the arbitrator. Part II also offers a hypothetical that involves a fictional arbitrator selection process to help illustrate the risk aversion and implicit bias dynamics that can arise, especially depending on the experience of the parties or their representatives. Part III proposes a new model for arbitrator selection that emphasizes the importance of having a neutral service provider, rather than the parties, select the arbitrator. Part III also argues that all the key constituents should agree to such a process, modeled after federal court judicial selection, as a way to provide a measurable improvement to the arbitrator diversity problem in workplace disputes. This Article concludes that any concerns regarding racial bias and access to justice stemming from the dearth of black arbitrators can be overcome by letting service providers mimic major digital platforms²⁶ to match a critical mass of diverse arbitrators with parties seeking to resolve workplace discrimination disputes.

I. THE SIGNIFICANCE OF ARBITRATOR DIVERSITY IN EMPLOYMENT DISCRIMINATION CASES

A. *Employment Discrimination Arbitration: A Forced and Unfair Forum?*

Through forced or mandatory arbitration clauses in standard form contracts, employers frustrate employees' access to the courts by requiring employees to arbitrate statutory employment discrimination claims as a condition of employment.²⁷ One of the biggest opportunities and challenges when thinking about arbitrator diversity is its impact on the so-called mandatory arbitration required by powerful businesses, which has the potential to limit recovery, process, and transparency for the powerless in our society—those who Jean Sternlight has called the “little guys.”²⁸ When the U.S. Supreme Court first endorsed this use of arbitration to resolve statutory employment discrimination claims in *Gilmer v. Interstate/Johnson Lane*

charged with enforcement of Title VII. See *Laws Enforced by EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/laws/statutes/index.cfm> [<https://perma.cc/R7DX-239K>] (last visited Apr. 12, 2020); see also Noll, *supra*, at 1014–15 (describing EEOC enforcement authority).

26. See Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133, 185 (2017) (discussing “labor-matching [platform] sites like Mechanical Turk and TaskRabbit and transportation-matching [platform] sites like Uber and Lyft”).

27. See Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155, 156–57, 156 n.7 (2019) (explaining “mandatory arbitration”).

28. See Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 637 (1996) (criticizing mandatory arbitration as a matter of statutory interpretation and as an undesirable public policy that allows big corporate interests to harm the interests of the “little guys,” including employees, consumers, and franchisees).

*Corp.*²⁹ and initiated the barrage of employer-required arbitration that has taken over the employment dispute resolution process, arbitration was considered just another forum.³⁰ Recent studies suggest that employer-required agreements to arbitrate have led to a situation where this mandatory form of arbitration is outdistancing the court system as the most used process to adjudicate worker disputes.³¹ A 2017 empirical study found that 56.2 percent of nonunion private sector employees (approximately 60.1 million people) are now covered by employer-required arbitration agreements.³² In a recent publication comprehensively analyzing that same study, Alex Colvin concluded that “[i]t is the employers with the lowest paid workforces that are most likely to impose mandatory arbitration on their employees.”³³ As a result, the overall fairness of the arbitral forum for low-paid workers registers as a key concern in 2020.

Critics also assert that mandatory arbitration relegates employee claims to a private forum where the decision maker is unlikely to look like the employees and may not appreciate all the unique dynamics of the environment that led them to file their discrimination claims.³⁴ Employees who seek justice in light of an employer’s racial or other discriminatory practices will soon discover the likelihood that the arbitrator, who will decide the matter, will be old, white, and male, which adds further concerns about the fairness of mandatory arbitration.³⁵ The reality is that the arbitrators selected for these cases may tend to look more like the managers or supervisors that the claimants have accused of statutory employment discrimination.³⁶ Jean Sternlight has asserted that, as the entity with the

29. 500 U.S. 20 (1991).

30. *Id.* at 26, 31 (“In these cases we recognized that “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.” (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985))).

31. Alexander J. S. Colvin, *The Metastasis of Mandatory Arbitration*, 94 CHI.-KENT L. REV. 3, 24 (2019).

32. *Id.* at 10; see also Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 689 (2018).

33. See Colvin, *supra* note 31, at 16. Unfortunately, improving arbitrator diversity alone will not address the overall comprehensive concerns of low-wage workers subjected to mandatory arbitration. See Green, *supra* note 3, at 671–74 (suggesting that mandatory arbitration would work better for black workers at all levels if: (1) the roster of neutrals were diverse; (2) unions represented the interests of the workers; (3) employees were provided with legal counsel when the union could not pursue the matter to arbitration; and (4) employees were always allowed to pursue the matter in court rather than in arbitration when important court precedent needed to be set).

34. See Nicole Buonocore, *Resurrecting a Dead Horse—Arbitrator Certification as a Means to Achieve Diversity*, 76 U. DET. MERCY L. REV. 483, 494 (1999) (describing how “the true beneficiaries of the arbitration process, the employees, may begin to question whether a system dominated by white male arbitrators is fair”).

35. See Victoria Pynchon, *Diversity Is Not a Toxic Topic*, ALTERNATIVES TO HIGH COST LITIG., Apr. 2012, at 83, 86–87 (discussing that many ADR users and executives say the market wants an old, white male and probably a retired judge).

36. Terry O’Neill, *Success for #MeToo Means Reopening Courthouse Doors*, LAW360 (Feb. 20, 2018, 11:24 AM), <https://www.law360.com/articles/1011972/success-for-metoo-means-reopening-courthouse-doors> [<https://perma.cc/ZL3S-W5Q7>] (noting that JAMS

bargaining power insists on privatizing the dispute, the law aimed at protecting individual employees subjected to this arbitral regime fails to evolve.³⁷

Mandatory arbitration also poses concerns about access to justice, as the most vulnerable individuals in the workplace cannot pursue their statutory employment discrimination claims in court and may be deterred from obtaining access to workplace justice by the enforcement of both employer-required arbitration and employer bans on class arbitration.³⁸ With the deck stacked against employees in so many ways, especially those who want to join their legal interests in a class action, influential corporate entities—the parties being regulated by the law (including employers)—can use their tremendous bargaining power to make individual employees adhere to what some commentators refer to as a flawed system of arbitration.³⁹

reported that only 22 percent of its panelists were female and only 9 percent were people of color).

37. Sternlight, *supra* note 27, at 157; *see also* Estlund, *supra* note 32, at 679 (referring to how mandatory arbitration “threatens to stunt both the development of the law and public knowledge of how the law is interpreted and applied in important arenas of public policy”); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 *YALE L.J.* 3052, 3056 (2015) (discussing how the Supreme Court’s enforcement of arbitration agreements has started to “impede public awareness of the substantive law, inasmuch as private proceedings frustrate the public’s ability to understand the state of the law, how particular laws are interpreted, and how claims are pursued”).

38. *See The Facts on Forced Arbitration: How Forced Arbitration Harms America’s Workers*, EMP. RTS. ADVOC. INST. FOR L. & POL’Y 1, http://employeeightsadvocacy.org/wp-content/uploads/2019/10/Inst_ForcedArb_FactSheet_LittleGuy_2019.pdf [<https://perma.cc/3MWZ-GN96>] (last visited Apr. 12, 2020); *see also* Ellen E. Deason et al., *ADR and Access to Justice: Current Perspectives*, 33 *OHIO ST. J. ON DISP. RESOL.* 303, 322–23 (2018) (providing my comments and a related discussion of how employees bringing claims based on race can face access to justice concerns when arbitration is required, given that the typical arbitrator is an older white male); Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 *OR. L. REV.* 703, 710–11 (2012) (discussing how courts have endorsed mandatory arbitration and refused to allow class arbitration, preventing individual claims from going forward as a whole); Nancy A. Welsh, *Do You Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation*, 70 *SMU L. REV.* 721, 733–36 (2017) (laying out the components of procedural justice that lead people to “perceive a process as fair or just”). *But see* Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 *CALIF. L. REV.* 1, 9 (2019) (finding that “arbitration has the capacity to facilitate access to justice” because “[c]ases move quickly through the system, and corporations pick up most of the tab”); Cole, *supra* note 22, at 866 (suggesting that “the arbitral process provides the kind of access to justice, together with a fair process, that might well serve both minority disputants and one-shot players alike”); Peter B. Rutledge, *Who Can Be Against Fairness?: The Case Against the Fairness Arbitration Act*, 9 *CARDOZO J. CONFLICT RESOL.* 267, 277–78 (2008) (asserting that “arbitration has in important respects improved access to justice for the average individual” because it has “lowered the cost of dispute resolution, it has delivered superior, or at least comparable, outcomes for individuals, and it has done so at a far faster pace than our sluggish system of civil litigation”).

39. *See* Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, *N.Y. TIMES* (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> [<https://perma.cc/2UX3-AMZL>] (describing a study of several cases showing that once parties were blocked from going to court as a class, “most people dropped their claims entirely” and discussing quotes from Judge Berle Schiller describing how employees have no bargaining

Further, when important issues of law are resolved in private arbitration, which does not require a public acknowledgement of wrongdoing, the root causes of these issues may still persist.⁴⁰ This can prevent similarly situated employees from uncovering broad discriminatory practices.⁴¹ As a result, employers may be able to privatize the public system of justice provided by an employment discrimination statute for their own personal benefits.⁴² An employer can then use the pressure for repeat business within this private arbitration scheme to select known arbitrators who they hope to induce to rule in their favor.⁴³ As a result, calls for increased diversity in the arbitral ranks have a unique importance to black and other vulnerable employees seeking vindication in arbitration for a workplace discrimination claim.

B. Arbitrator Diversity Should Match Employee Claimant Diversity

AAA Chair of the Council James Jenkins reflected on the need for future efforts to pursue arbitrator diversity in employment discrimination disputes, opining that, “[w]ith more parties choosing to resolve their disputes through arbitration and mediation, ADR service providers need to ensure that such parties are given the option to select from panels of arbitrators and mediators who they believe come from backgrounds and experiences similar to their

power and must face “a distasteful dilemma” of being forced to either “give up certain rights [via arbitration] or give up the job”).

40. See Sternlight, *supra* note 27, at 181, 188–92, 202–04 (describing concerns about the lack of public access to precedential arbitration decisions; the limits on arbitrators that make them unlikely to issue progressive decisions that advance the law; and companies’ use of private arbitration as a tool to hide predatory managers’ misdeeds and silence victimized employees by suppressing public knowledge about the existence of discriminatory actions); see also Richard Delgado, *The Unbearable Lightness of Alternative Dispute Resolution: Critical Thoughts on Fairness and Formality*, 70 SMU L. REV. 611, 630–33 (2017) (arguing that corporations tend to act in their own best interests by maximizing profits and that expecting a company to behave better in arbitration regarding wrongdoing committed against a weaker party is a “fruitless enterprise” because corporations are only willing to pursue systemic changes when their public images are harmed); Imre S. Szalai, *A New Legal Framework for Employee and Consumer Arbitration Agreements*, 19 CARDOZO J. CONFLICT RESOL. 653, 655 (2018) (noting that private arbitration can conceal corporate wrongdoing and harm vulnerable employees).

41. See Silver-Greenberg & Gebeloff, *supra* note 39 (discussing then EEOC Chair Jenny Yang’s comments, which noted that resolution of statutory employment discrimination claims in arbitration “keeps any discussion of discriminatory practices hidden from other workers ‘who might be experiencing the same thing,’” while also reviewing how major court cases brought by black employees against Nike in 2003 and Walgreens in 2005 led to key changes in those companies’ policies).

42. See Glover, *supra* note 37, at 3075–78 (asserting concerns about using arbitration as a mechanism to contract around or “negate substantive law”).

43. See Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a “Privatization of the Justice System,”* N.Y. TIMES (Nov. 1, 2015), <https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> [<https://perma.cc/5FXS-9DFQ>] (describing several cases in which employees proceeded to arbitration after being denied the chance to bring their claims in court, noting concerns about arbitrators with repeat business handling cases involving the same employer after they had returned favorable rulings for that employer in the past, and mentioning an arbitrator who ruled against an employer in an age discrimination suit and was never used again).

own.”⁴⁴ AAA, JAMS,⁴⁵ and other neutral service provider groups like them have the competing objectives of selecting arbitrators on a fair basis and also “satisfy[ing] the parties.”⁴⁶ Providing a diverse pool is not just a nice goal; the arbitration system is intended to provide a fair forum for black workers to vindicate racial discrimination claims pursuant to a statutory scheme.⁴⁷ Failing to diversify the pool of arbitrators sends a “detrimental and hostile” message to all black workers that based on history the process “is comparable to what all-white juries have done.”⁴⁸ Ultimately, if arbitration serves to replicate the legal system by becoming a substitute for the judicial forum (as it has developed under mandatory arbitration), then there must be a slate of arbitrators available who “reflect diverse life experiences which include exposure to the problems posed by the cases, particularly those involving discrimination.”⁴⁹

1. Service Provider Efforts to Improve the Lack of Arbitrator Diversity

Increasing calls for arbitrator diversity in light of Jay-Z’s lawsuit were not lost on the three key neutral service providers handling employment discrimination disputes in the United States: AAA, JAMS, and the International Institute for Conflict Prevention & Resolution (CPR).⁵⁰ AAA and JAMS are the largest dispute resolution service providers in the

44. See James Jenkins, *Arbitrators and Mediators Should Reflect Society’s Diversity*, LAW360 (Jan. 16, 2019, 10:51 AM), <https://www.law360.com/articles/1115452/arbitrators-and-mediators-should-reflect-society-s-diversity> [<https://perma.cc/C8LM-U7TW>]. Others have also focused on the failure of arbitrator diversity to harmonize with the diversity of the participants. See, e.g., Sasha A. Carbone & Jeffrey T. Zaino, *Increasing Diversity Among Arbitrators: A Guideline to What the New Arbitrator Should Be Doing to Achieve This Goal*, N.Y. ST. B. ASS’N J., Jan. 2012, at 33, 33–34 (quoting the criticism of Gwynne Wilcox, who stated that “[t]he majority of arbitrators do not reflect the workers who appear before them and cannot identify with their realities as workers”); Floyd D. Weatherspoon, *The Impact of the Growth and Use of ADR Processes on Minority Communities, Individual Rights, and Neutrals*, 39 CAP. U. L. REV. 789, 801 (2011) (“The lack of diversity in the pool of potential neutrals raises suspicion among minorities who must use the ADR process to resolve their dispute.”).

45. JAMS is a private dispute resolution group; previously, the acronym stood for Judicial Arbitration and Mediation Services, Inc. but, at present, the organization uses only the abbreviated title. *The JAMS Name*, JAMS, <https://www.jamsadr.com/about-the-jams-name/> [<https://perma.cc/GM9V-TTQJ>] (last visited Apr. 12, 2020).

46. William B. Gould IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 EMORY L.J. 609, 656 (2006).

47. Pittman, *supra* note 24, at 864–65, 868, 876–77 (discussing unconscious racial bias exhibited by nondiverse arbitrators and the requirement that arbitration be a neutral forum for an employee to pursue the same substantive rights and theories of statutory liability as is provided by the courts).

48. Green, *supra* note 3, at 661 (quoting Gould, *supra* note 46, at 658).

49. Gould, *supra* note 46, at 688.

50. See Paige Smith, *Lack of Arbitrator Diversity Is an Issue of Supply and Demand*, BLOOMBERG L. (May 15, 2019, 6:04 AM), <https://news.bloomberglaw.com/daily-labor-report/lack-of-arbitrator-diversity-is-an-issue-of-supply-and-demand> [<https://perma.cc/P9VF-6QBM>] (referring to “three primary arbitral entities that resolve employment disputes”).

country.⁵¹ Representatives from AAA, JAMS, and CPR responded to questions about diversity within a week of Jay-Z withdrawing his petition; all reported that they had been engaged in efforts to improve diversity among their panelists “for years” before the Jay-Z matter.⁵²

For example, AAA highlighted its Higginbotham Fellows Program, started in 2009, which provides mentoring and training to diverse dispute resolution professionals, as well as its separate efforts to include diverse speakers in its programs and to build partnerships with national and minority bar associations to find diverse arbitrators.⁵³ JAMS emphasized that it provides a sample diversity and inclusion arbitration clause that parties may incorporate, which states that, “wherever practicable,” the parties will appoint diverse arbitrators.⁵⁴ CPR noted that it created a diversity task force in 2006 and that it includes a “diversity statement” when providing a panel of arbitrators for consideration that asks the parties to select more diverse individual panelists.⁵⁵

Additional information supports the diversity efforts of these three providers. JAMS recently hired its first diversity program manager, Joanne Saint Louis, to lead its diversity and inclusion efforts.⁵⁶ CPR developed a diversity commitment plan in 2013, which encourages corporations and their counsel to pledge their commitment to diversity in the selection of mediators and arbitrators.⁵⁷ In its 2018 annual report,⁵⁸ AAA reported that the proportion of cases in which a woman or minority arbitrator was appointed had reached 27 percent.⁵⁹ The report described the “diversity of the arbitrators who decide the cases” as “[v]ery important to the legitimacy of the process” and opined that “[w]omen and minorities need to be among the arbitrators who actually serve on cases as well as be represented in the pools of expert arbitrators an organization can offer the parties.”⁶⁰

Regarding demographics for all three providers, some diversity numbers were identified in a story in May 2019.⁶¹ CPR’s roster of panelists includes

51. Silver-Greenberg & Corkery, *supra* note 43 (characterizing “[t]he American Arbitration Association and JAMS . . . [as] the country’s two largest arbitration firms”).

52. Simson, *supra* note 6.

53. *Id.*

54. *Id.*

55. *Id.*

56. See Aebra Coe, *ADR Giant Taps Diversity Pro After Jay-Z Beef with Industry*, LAW360 (Oct. 11, 2019, 5:39 PM), <https://www.law360.com/articles/1208708/adr-giant-taps-diversity-pro-after-jay-z-beef-with-industry> [<https://perma.cc/6483-XHPR>].

57. See Maria R. Volpe, *Measuring Diversity in the ADR Field: Some Observations and Challenges Regarding Transparency, Metrics and Empirical Research*, 19 PEPP. DISP. RESOL. L.J. 201, 201 (2019) (describing this pledge); see also David H. Burt & Laura A. Kaster, *Why Bringing Diversity to ADR Is a Necessity*, ACC DOCKET, Oct. 2013, at 41, 41 (describing this pledge).

58. See generally AM. ARBITRATION ASS’N, 2018 ANNUAL REPORT & FINANCIAL STATEMENTS (2019), https://www.adr.org/sites/default/files/document_repository/AAA_2018_Annual_Report_and_Financial_Statements.pdf [<https://perma.cc/5B8U-4PBB>].

59. *Id.* at 6.

60. *Id.*

61. Smith, *supra* note 50.

17 percent women and 13 percent individuals who self-identify as ethnically or racially diverse, with 31 percent of those panelists selected for arbitration being racially diverse; JAMS's roster is 28 percent women; and AAA's roster is 25 percent women and persons of color.⁶² The impact that this lack of diversity in key service provider pools may have on diverse claimants, despite longstanding efforts to improve, has become a major issue. Mandatory arbitration of employment discrimination claims involves vulnerable workers of color and other protected classes; thus, a nondiverse arbitrator pool raises questions about the integrity of the entire dispute resolution process. Additionally, this problem is not limited to domestic arbitration; many commentators have also expressed concerns about arbitrator diversity in the international sphere.⁶³ In fact, international arbitrator diversity concerns have been much more rigorously reviewed than the critiques of domestic arbitration in the United States.⁶⁴

In seeking arbitrators, JAMS narrows the supply side of the pool of potential arbitrators by preferring a nondiverse group: those who rise to the level of partner at a law firm or former or retired judge.⁶⁵ This approach is understandable on one level because JAMS wants “judges or lawyers who have excellent reputations in their [fields].”⁶⁶ However, if only “2 percent of law firm partners are black, 4 percent are Asian, and 2 percent are Hispanic,” finding diverse arbitrators that meet these professional criteria poses an obstacle.⁶⁷ As Sarah Cole points out, it is difficult to find diverse candidates

62. *Id.*

63. See, e.g., Susan D. Franck et al., *The Diversity Challenge: Exploring the “Invisible College” of International Arbitration*, 53 COLUM. J. TRANSNAT'L L. 429, 467–94 (2015) (describing diversity issues in international arbitration); Douglas Pilawa, Note, *Sifting Through the Arbitrators for the Woman, the Minority, the Newcomer*, 51 CASE W. RES. J. INT'L L. 395, 412–29 (2019) (describing critiques of the lack of arbitral diversity in the international arbitration community); Gary L. Benton, *Let's Stop Talking About the Arbitrator Diversity Problem*, KLUWER ARB. BLOG (Jan. 14, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/01/14/post/> [<https://perma.cc/5DXL-PFNP>] (discussing diversity issues in international arbitration); see also Won Kidane, *Does Cultural Diversity Improve or Hinder the Quality of Arbitral Justice?*, KLUWER ARB. BLOG (Mar. 31, 2017), <http://arbitrationblog.kluwerarbitration.com/2017/03/31/does-cultural-diversity-improve-or-hinder-the-quality-of-arbitral-justice/> [<https://perma.cc/WY2Z-N6VG>] (describing how matching Chinese or African witnesses with arbitrators of the same cultural background could help to improve the quality of the arbitration process); Catherine A. Rogers, *The Key to Unlocking the Arbitrator Diversity Paradox?: Arbitrator Intelligence*, KLUWER ARB. BLOG (Dec. 27, 2017), <http://arbitrationblog.kluwerarbitration.com/2017/12/27/on-arbitrators> [<https://perma.cc/45CG-SZ58>] (describing concerns about diversity in arbitration).

64. Compare Chiara Georgetti, *Is the Truth in the Eyes of the Beholder?: The Perils and Benefits of Empirical Research in International Investment Arbitration*, 12 SANTA CLARA J. INT'L L. 263, 269 (2013) (discussing how the trend of international investment arbitrators being primarily “pale, male, and stale” . . . can be proven empirically”), with Burt & Kaster, *supra* note 57, at 41–42 (finding that a “dramatic absence of diversity in the neutrals selected for [domestic] alternative dispute resolution (ADR) proceedings has flown under the radar” and noting that “participation of racial minorities is not statistically available but is known to be far lower”).

65. Smith, *supra* note 50.

66. *Id.*

67. *Id.*

who were law firm partners or judges.⁶⁸ Statistics from the American Bar Association (ABA) show that, as of 2019, 36 percent of active attorneys are women—a 5.2 percent increase from 2009.⁶⁹ By far, the most represented racial group over that ten-year period has been Caucasian/white, with 85 percent of active attorneys identifying as such in 2019.⁷⁰ Hispanic and African American attorneys were the second-most represented racial group, but each racial group alone only comprised 5 percent of total active attorneys.⁷¹ Since 2009, African American attorneys saw only a 0.3 percent increase in representation.⁷²

Diversity demographics for lawyers who are partners show even worse results. According to the National Association for Law Placement (NALP), “only 18.7 percent of equity partners in law firms are women.”⁷³ NALP data also indicates that racial minorities as a whole “account for only 6.1 percent of law firm equity partners.”⁷⁴ The Federal Judicial Center published three charts depicting the racial composition of new Article III judges from 1940 to 2017.⁷⁵ One chart demonstrates an insignificant increase in African American appointments from 2015 onward and a consistently white majority.⁷⁶ A second chart shows that all thirteen of the new judges appointed in 2017 were white.⁷⁷ The final chart shows that, in 2017, 146 judges in 2017 identified as African American, while 1070 judges identified as white.⁷⁸

2. Implicit Bias Recognition and Training as an Option to Improve Arbitration for Diverse Parties

Given both the lack of judicial diversity and the resemblance between arbitration of statutory legal matters and bench trials, efforts to address concerns about diversity of judges in bench trials could be helpful in addressing similar concerns about diversity of arbitrators.⁷⁹ Melissa Breger

68. *Id.*

69. See 2019 ABA National Lawyer Population Survey, A.B.A. 1, https://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-demographics-2009-2019.pdf [<https://perma.cc/WR3V-8ZJ5>] (last visited Apr. 12, 2020).

70. *Id.*

71. *Id.*

72. *Id.*

73. See Jenkins, *supra* note 44.

74. *Id.*

75. See *Demography of Article III Judges, 1789–2017*, FED. JUD. CTR., <https://www.fjc.gov/history/exhibits/graphs-and-maps/race-and-ethnicity> [<https://perma.cc/YYJ9-UMWW>] (last visited Apr. 12, 2020).

76. *Id.*

77. *Id.*

78. *Id.*

79. See generally Melissa L. Breger, *Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity, and the Bench Trial*, 53 U. RICH. L. REV. 1039 (2019). For further discussion, see Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 MICH. J. RACE & L. 5 (2004) (raising general concerns about the lack of racial diversity within the judiciary).

recently made the case that implicit bias might have severe consequences in bench trials, where the judge is the sole fact finder.⁸⁰ Even well-intentioned judges, when acting as the sole decision maker,⁸¹ may contribute to disparate treatment of individual minority participants by being unable to appreciate the systematic disparate treatment that the minority participant may have experienced at various stages of a dispute.⁸²

Similar to concerns about public confidence and trust in the arbitration process, concerns about transparency in the judicial process have become a prominent rallying cry in the efforts to improve judicial diversity.⁸³ The quest to increase diversity in the judiciary does not suggest that racial identity represents a proxy for how a judge may decide a case or that it would warrant matching judges with participants based on race.⁸⁴ However, one's life experiences can shape how one judges. If the public is to trust the fairness of the legal system, courts should seek to provide sufficient diversity in the judiciary so that monolithic experiences would be outliers and not the norm.⁸⁵

A recent article has suggested a method for dealing with the lack of diversity and implicit bias with respect to jurors by creating a new process for selection.⁸⁶ This new process would prime jurors to think about their implicit biases before trial and give them the opportunity to process the information they receive.⁸⁷ A judge's instruction or court video could raise juror awareness of implicit bias during the voir dire or selection process.⁸⁸ The judge would have the opportunity to encourage the jurors to be aware of their implicit biases, provide a jury instruction to remind jurors about implicit bias concerns during deliberation, and, at the very least, emphasize to the jurors the need to be informed about implicit bias during jury selection or voir dire.⁸⁹ Such training may also be helpful for the arbitrators available for

80. Breger, *supra* note 79, at 1053.

81. One way to address this concern of implicit bias, at least in mediation, is to involve multiple mediators, including some mediators of color. See Carol Izumi, *Implicit Bias and Prejudice in Mediation*, 70 SMU L. REV. 681, 687 (2017).

82. Breger, *supra* note 79, at 1057.

83. *Id.* at 1073.

84. *Id.* at 1077. Notably, requirements that jurors be selected from a cross section of the community and that no juror be barred from service due to race alone exist to further inclusiveness and guarantee due process; they are not based on an assumption that jurors or judges base decisions on race. See Johnson & Fuentes-Rohwer, *supra* note 79, at 23. However, racism in jury selection can still occur through peremptory challenges, in which a party may remove a juror without offering a reason, or by allowing jurors to be removed for cause when their views warrant some fear of impartiality. *Id.*

85. Breger, *supra* note 79, at 1078–79; see also Johnson & Fuentes-Rohwer, *supra* note 79, at 10 (discussing the value of judicial diversity for understanding the distinct “voice of color” that some minorities use to show that they may view the world in a different way).

86. See generally Anona Su, *A Proposal to Properly Address Implicit Bias in the Jury*, 31 HASTINGS WOMEN'S L.J. 79 (2020).

87. *Id.* at 98.

88. *Id.* at 98–99.

89. *Id.* Arbitrators in employment disputes might also be better off if trained on understanding implicit bias. See Nicholas Enrique O'Connor, Note, *The “Insurmountable*

selection in employment discrimination cases; neutral service providers could mark those arbitrators as having been trained to understand, and be thoughtful of, implicit biases.

3. Future Steps to Increase the Diversity Pool

Because of the concerns about having a diverse pool of arbitrators, the service providers will have to address the supply-side issue by removing some of the group restrictions that they have imposed on their candidate pool. For example, parties may need to recognize that successful arbitrators, especially those familiar with workplace disputes, need not be former partners of law firms or retired judges. Instead of focusing on a candidate's former status-based position, it might be helpful for neutral service providers to put a premium on mastery of the subject matter at hand, especially for employment disputes.

Also, a neutral service provider could prioritize finding an arbitrator who has spent a dozen years representing employees or defending employers in employment disputes. If actual field experience in either bringing or defending workplace discrimination claims were the focus, diverse arbitrators would be easier to obtain. This focus would also increase the likelihood that various human resources and labor relations managers, as well as union representatives and civil rights advocates, would be selected for labor matters or become part of the pool of diverse arbitrators eligible for selection in workplace discrimination disputes.⁹⁰

Even nondiverse arbitrators may benefit from training in considering implicit biases when deciding claims of workplace discrimination. Whether

Textual Obstacle": *A Narrow Interpretation of the Federal Arbitration Act*, 32 GEO. J. LEGAL ETHICS 855, 879 (2019).

90. See Jay E. Grenig & Rocco M. Scanza, *The Case for the Non-lawyer Employment Arbitrator*, DISP. RESOL. J., May–July 2009, at 8, 9 (highlighting how the pool of diverse arbitrators would be increased if "minorities from business, government, unions, and academia" who are not lawyers were included); see also Thomas J. Stipanowich, *Living the Dream of ADR: Reflections on Four Decades of the Quiet Revolution in Dispute Resolution*, 18 CARDOZO J. CONFLICT RESOL. 513, 530 (2017) (describing the need for diversity among arbitrators and asserting the value of nonlawyers with expertise in the type of dispute as a source for increased diversity). Unfortunately, many of these individuals cannot serve as arbitrators in an employment discrimination dispute unless they are lawyers. See, e.g., *Qualification Criteria and Responsibilities for Members of the AAA Panel of Employment Arbitrators*, AM. ARB. ASS'N 1, https://www.adr.org/sites/default/files/document_repository/Employment%20Arbitrators%20Qualification%20Criteria.pdf [<https://perma.cc/B9QG-LVHM>] (last visited Apr. 12, 2020) [hereinafter *AAA Employment Arbitrator Qualification Criteria*] (requiring that panelists be attorneys with at least ten years of experience in employment law); see also *Employment & Labor: JAMS Employment Mediation, Arbitration and ADR Services*, JAMS, <https://www.jamsadr.com/employment> [<https://perma.cc/LB2R-CXMP>] (last visited Apr. 12, 2020) (describing how the arbitrators are "retired federal, state trial, and appellate judges and former litigators"). The AAA Labor Panel does not require that the panelists be attorneys but rather only that they have ten years' experience in labor relations and a "judicial temperament." *Qualification Criteria for Admittance to the AAA Labor Panel*, AM. ARB. ASS'N 1, https://www.adr.org/sites/default/files/document_repository/Labor_QualificationsCriteria_AAAPanel.pdf [<https://perma.cc/GYU5-B6AN>] (last visited Apr. 12, 2020).

it involves in-depth training or merely viewing juror instructions developed on the subject, some level of acknowledgement of the issue may be a worthwhile endeavor for neutral service providers. This will also help neutral service providers as they deal with supply-side issues, either in diversifying the pool or helping the nondiverse members of the pool become more aware of unconscious and hidden biases.

II. DISCONNECTS IN ARBITRATOR DIVERSITY: PARTY GATEKEEPER SELECTIONS

A. Risk Aversion: Winning with the Familiar and Not the Diverse

Despite repeated mourning and lamentation from various interested sectors about the dearth of diverse arbitrators who resolve disputes with companies, those seeking to address this complaint have still failed to make any significant changes.⁹¹ Part of this challenge arises from the difficulty of acquiring data to demonstrate the full scope of the problem.⁹² Maria Volpe has catalogued the lack of metrics capturing the diversity of arbitrators.⁹³ Further, Ben Davis and Deborah Masucci have also identified the need for more diversity data from courts and ADR neutral service providers on the use of dispute resolution neutrals.⁹⁴ All of this data retrieval seems aimed at the positive end of discovering just how bad the lack of arbitral diversity is and priming the pump to find and supply many more diverse individuals to be eligible for arbitrator service.

While the diverse arbitrator supply concern is an issue, it pales in comparison to the demand issue regarding diversity in selecting arbitrators.⁹⁵

91. See Estlund, *supra* note 32, at 681, 687 (noting that since “firms have no legal obligation to make their chosen procedures publicly available,” this “has made it impossible to develop an accurate empirical assessment of the shape of mandatory arbitration as a mechanism of dispute resolution and has greatly handicapped efforts to hold firms publicly accountable for the fairness of their dispute resolution procedures” and that there is “little representative data on any aspect of arbitration”); Volpe, *supra* note 57. See generally Samuel Estreicher et al., *Evaluating Employment Arbitration: A Call for Better Empirical Research*, 70 RUTGERS U. L. REV. 375 (2018) (criticizing the lack of empirical data that would help understand more about employment arbitration generally). A more recent and comprehensive study of so-called forced arbitration, compiled from “40,000 arbitrations” filed between January 1, 2010, and December 31, 2016, with four service providers in California attempts to shine some light on the situation. See Chandrasekher & Horton, *supra* note 38, at 26–28.

92. Volpe, *supra* note 57, at 202–03 (“[A]ccessing data to gain clarity about the extent of diversity has been and remains a daunting undertaking.”).

93. *Id.* at 206.

94. Davis & Masucci, *supra* note 3; see also Deborah Rothman, *Gender Diversity in Arbitrator Selection*, DISP. RESOL. MAG., Spring 2012, at 22, 22 (referring to the need to rely on anecdotal information about gender diversity because “no reliable data is accessible” on women in commercial arbitration).

95. See Marvin E. Johnson & Homer C. La Rue, *The Gated Community: Risk Aversion, Race, and the Lack of Diversity in Mediation in the Top Ranks*, DISP. RESOL. MAG., Spring 2009, at 17, 18. As these authors note, “minority neutrals with experience and skills have often been ignored by those wanting to enhance the diversity of the field and have been overlooked by sophisticated ADR users.” *Id.* at 17. However, as long as ADR users’ risk-

Two prominent labor and employment dispute resolution neutrals, Marvin E. Johnson and Homer C. La Rue, noted that, despite diversity efforts aimed at providing additional training to enhance opportunities for entry-level neutrals of color, sophisticated ADR users were still not selecting skilled minority neutrals.⁹⁶ To enhance the access of experienced neutrals of color to ADR clients, Johnson and La Rue formed ACCESS ADR in 2003 with the support of JAMS and the ABA's Section of Dispute Resolution.⁹⁷ Johnson and La Rue viewed the lack of diversity among ADR professionals as a subset of a broader concern regarding the need to diversify the legal profession given that "30 percent of the general population of the United States is made up of persons of color, but only 10 percent of the lawyers fall into that category."⁹⁸ In forming ACCESS ADR, Johnson and La Rue planned on building opportunities for experienced mediators of color to meet corporate ADR users, which would highlight the overall lack of diversity and foster unique engagements between these groups.⁹⁹

Despite the noble aims of ACCESS ADR, Johnson and La Rue eventually found a severe disconnect between the ADR users and their representatives, many of whom were lawyers and referred to as gatekeepers.¹⁰⁰ Risk aversion prevented these representatives from using highly skilled mediators of color, even when these mediators had been identified and relationships had been formed through ACCESS ADR.¹⁰¹ While a desire to continue to pursue "well-known" mediators resulted in some of the failures to select the mediators of color, there was also some evidence that racial and ethnic bias played a role in the selection process.¹⁰² Johnson and La Rue noted that the corporate ADR users resided in a metaphorical gated community to which only the representatives had access; those users never encountered the mediators of color because the users' representatives stopped the mediators at the gated entrance.¹⁰³ Representatives refused to employ minority mediators despite corporate ADR users' statements about the need for

averse representatives continue to employ already "well-known" neutrals and engage in "racial and ethnic bias," access to experienced neutrals of color will be stifled. *Id.* at 20.

96. *Id.* at 17.

97. See Homer C. La Rue & Marvin E. Johnson, *ACCESS ADR: A New Diversity Initiative Launched with the Support of the JAMS Foundation and the ABA*, CORP. COUNS. BUS. J. (May 1, 2004), <https://ccbjournal.com/articles/access-adr-new-diversity-initiative-launched-support-jams-foundation-and-aba> [<https://perma.cc/6CCE-P879>].

98. *Id.* A more recent report found that "minorities comprise 30% of the civilian workforce but [only] 15% of" lawyers and that even fewer are mediators and arbitrators. See Deborah Masucci, *Moving Forward for the Benefit of our Members: Minorities in Dispute Resolution*, JUST RESOLUTIONS E-NEWS (A.B.A., Chicago, Ill.), May 2015.

99. Masucci, *supra* note 98.

100. See Johnson & La Rue, *supra* note 95; see also David A. Hoffman & Lamont E. Stallworth, *Leveling the Playing Field for Workplace Neutrals: A Proposal for Achieving Racial and Ethnic Diversity*, DISP. RESOL. J., Feb.–Apr. 2008, at 37, 41 (referring to outside attorneys that select arbitrators as "gatekeepers," noting that they are disproportionately white, and emphasizing that they "tend to appoint someone like themselves, someone white, a lawyer, and usually male").

101. Johnson & La Rue, *supra* note 95, at 18.

102. *Id.* at 19–20.

103. *Id.* at 19.

diversity in the mediation pool and their familiarity with many of the ACCESS ADR advisory board members who had invited the users to participate in the project.¹⁰⁴ Given that the ACCESS ADR program involved the selection of mediators for “high-stakes and complex cases,”¹⁰⁵ Johnson and La Rue noted that representatives for the ADR users may have adopted a rationale of risk aversion, espoused by one mediator as a justification for nonselection: “when an attorney with a high-value case refers it to mediation, he is ‘never going to be criticized for selecting a well-known mediator.’”¹⁰⁶

In looking at the example from ACCESS ADR, the process of having party representatives choose the arbitrator poses a key impediment to increasing the diversity of arbitrators selected, even if the pool of arbitrators supplied provides tremendous diversity. One might suggest a legal challenge to the enforceability of agreements to arbitrate if the selection process will result in a nondiverse result. The few cases where parties have challenged the lack of diversity of arbitrators by suing the neutral service providers have proven to be unsuccessful, with courts giving very little consideration to the merits when issuing a dismissal.¹⁰⁷ Also, some parties may not consider improving diversity in the pool of arbitrators to be a vital or urgent concern about access to justice but rather merely a nice consideration.¹⁰⁸ Regardless of the diversity of the pool of arbitrators or the actual panel made available, the parties make the ultimate selection.¹⁰⁹ No party will be happy with having chosen a diverse arbitrator if the chosen arbitrator does not rule in favor of

104. *Id.* at 18.

105. *Id.* at 19.

106. Urška Velikonja, *Making Peace and Making Money: Economic Analysis of the Market for Mediators in Private Practice*, 72 ALB. L. REV. 257, 275 (2009) (quoting Email from John Bickerman, Mediator, to Urška Velikonja (Mar. 23, 2008)). Such risk aversion could present a more complex catch-22 for a black attorney or an attorney of color asked to represent her corporate clients’ business and diversity interests and also asked to promote the diversity interests of her race. See Margaret M. Russell, *Beyond “Sellouts” and “Race Cards”*: *Black Attorneys and the Straitjacket of Legal Practice*, 95 MICH. L. REV. 766, 768 (1997) (describing the “double bind that tokenization imposes on minority attorneys,” defined as “the pressure to comport themselves generally as though the legal profession is integrated, colorblind, and even raceless, [and] yet to take on the burdens—gratefully!—of role-modeling and otherwise representing their race on the occasional race commission or diversity committee instituted by their colleagues to manifest concern for the plight of minorities”).

107. See Carrie Menkel-Meadow, *Do the “Haves” Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 47 n.116 (1999) (describing how legal challenges to outside processes for choosing arbitrators that focus upon “attacking the lack of demographic diversity” have failed); Weatherspoon, *supra* note 44, at 801 (noting that the few claims raising legal challenges to the “system of exclusion and invisibility” for diverse neutrals have not received a favorable reception from the courts); see also Green, *supra* note 3, at 659 n.108 (citing *Smith v. American Arbitration Ass’n*, 233 F.3d 502 (7th Cir. 2000) and *Olson v. American Arbitration Ass’n*, 876 F. Supp. 850 (N.D. Tex. 1995) as examples of challenges to the diversity of arbitrator pools that have “fallen on deaf ears” (quoting Michael Z. Green, *An Essay Challenging the Racially Biased Selection of Arbitrators for Employment Discrimination Claims*, 4 J. AM. ARB. 1, 25 (2005))).

108. See Rogers, *supra* note 63 (discussing how there is a “disconnect” between “arbitral institutions” being nudged to increase the diversity of their panels and being successful in doing so and the “willingness of parties” to pursue appointment of more diverse arbitrators).

109. See Smith, *supra* note 50 (“[T]he final choice is made by the parties.”).

that party.¹¹⁰ Winning is the name of the game in arbitration. When selecting an arbitrator, the parties are concerned with who wins and who loses, not with promoting diversity.

As Johnson and La Rue explained, parties have no incentive to choose a diverse arbitrator over a familiar, tried-and-true choice in a high-stakes arbitration.¹¹¹ Because an arbitrator decides how a dispute will be resolved, the stakes and risks in choosing an arbitrator can be even higher than in choosing, for instance, a mediator, who merely facilitates the dispute's resolution pursuant to the parties' agreement.¹¹² Deviating from the familiar can breed contempt if the result is a loss. Catherine Rogers has referred to the conflict of pursuing both diversity and victory as a "diversity paradox."¹¹³ The solution to this "paradox," according to Rogers, is to "close the gap between the altruism that animates abstract concerns about diversity, and the strategic pragmatism that dominates arbitrator selection in individual cases."¹¹⁴ Unfortunately, to close this gap, parties must decide that the diversity objective is just as important in arbitrator selection as prevailing in the dispute.

Because the parties make the final choice about the arbitrator, concerns of bias—both overt and unconscious—may also play a role in that selection. As an example, imagine that a black female charges her employer with discrimination, and the matter must go to arbitration for final resolution; if there is virtually no chance that the pool of potential arbitrators called upon will include a black woman, this suggests the deck has been stacked against the claimant.¹¹⁵ This is not to say that a white male could not make a fair resolution of the black female claimant's charge in a particular instance.¹¹⁶

110. See Pilawa, *supra* note 63, at 417 & n.141 (describing the response of an anonymous commentator to a survey on international arbitration as expressing that "the desirability of promoting diversity is the last feature on anyone's mind" (quoting Lucy Greenwood & C. Mark Baker, *Getting a Better Balance on International Arbitration Tribunals*, 28 J. LONDON CT. INT'L ARB. 653, 661 n.42 (2012))).

111. See generally Johnson & La Rue, *supra* note 95.

112. See Green, *supra* note 3, at 656 ("[M]ediators should be selected based upon their ability to facilitate negotiation of the dispute at issue."); *id.* at 666 (describing a typical arbitration process of using AAA to provide a list of arbitrators who are "qualified to decide employment discrimination cases").

113. See Pilawa, *supra* note 63, at 418; Rogers, *supra* note 63.

114. Pilawa, *supra* note 63, at 418 (quoting Rogers, *supra* note 63).

115. See Caley E. Turner, "Old, White, and Male": Increasing Gender Diversity in Arbitration Panels 12 (Summer 2014) (unpublished manuscript), https://www.cpradr.org/news-publications/articles/2015-03-03--old-white-and-male-increasing-gender-diversity-in-arbitration-panels/_res/id=Attachments/index=0/Old_White_and_Male_Increasing_Gender_Diversity.pdf [<https://perma.cc/R4EC-8CWP>] (describing concerns about the appearance of impropriety where "a young Latino woman [was] forced to arbitrate an employment discrimination case against her boss, a white male, in front of a panel of three white male arbitrators").

116. See Pilawa, *supra* note 63, at 429 ("[I]t is not the *arbitrator's* culture that matters. It is more the arbitrator's ability to understand the cultural significance of certain facts."); see also Pittman, *supra* note 24, at 860, 863–64 (finding that "[w]hen a disproportionate number of all arbitrators are conservative, white men, it is only reasonable that minority and female plaintiffs will be concerned about the fairness and quality of arbitration awards" and noting

However, the claimant may perceive the systematic effort to erect barriers as indicative of an unjust dispute resolution process. Any dispute system infected with systematic bias deters the pursuit of justice.

B. Gatekeeper Effect: A Hypothetical

To illustrate the double bind placed on decision makers when they represent clients in arbitration but are also asked to support a diversity objective in selecting an arbitrator, this section offers the following hypothetical.¹¹⁷ This hypothetical derives from my own experiences and observations as an employment discrimination attorney, law professor, scholar, and arbitrator. The hypothetical also relates to stories I have been told when teaching or presenting the subject of diversity in the arbitrator selection process for employment discrimination cases.

Sheila Payne, an African American female and electrical engineer, worked for Highly Positioned Company (“the Company”). Payne believed she had been subjected to racial harassment and insults along with comments of a sexual nature by her supervisor, Bob Defending. Defending is a fifty-year-old white man. Payne complained pursuant to the Company’s harassment policy procedures. A brief investigation occurred, and the Company reprimanded Defending and told him to cease making comments of a sexual or racial nature. Payne continued to work for Defending, who continued to subject her to racial and sexual comments. She then filed an Equal Employment Opportunity Commission (EEOC) charge. The Company responded with a position statement to the EEOC asserting as its defense that Payne failed to utilize its harassment procedures. Payne filed a claim of employment discrimination in court after obtaining a right-to-sue letter.¹¹⁸ Payne has struggled to find an attorney.

The Company’s outside counsel filed an appearance and a motion to compel arbitration. Payne had signed some forms several years ago when she was first employed that said she “agrees to arbitrate any and all disputes with her employer subject to the rules of Highly, Hardy, and Hubris (‘Triple H’) Arbitration Services.” Payne obtained a lawyer, who told her that she must select a third-party neutral arbitrator to decide her case. Payne’s lawyer went to the Triple H website and saw that its rules provide for a panel of seven names to be given to the parties; each party strikes one name from the

how unconscious bias might result in a nondiverse arbitrator injecting inappropriate racial stereotypes into a decision).

117. Offering a hypothetical can give a framework, as in this case, to see how discrimination might occur within the thesis asserted. *See, e.g.*, Laura T. Kessler, *Employment Discrimination and the Domino Effect*, 44 FLA. ST. U. L. REV. 1041, 1060–65 (2017) (discussing a hypothetical).

118. *See* 42 U.S.C. § 2000e-5(f)(1) (2018) (describing how employees must file timely a charge of employment discrimination with the EEOC before receiving a right-to-sue letter, which allows the employee to file a lawsuit in court within ninety days); *see also* 29 C.F.R. § 1601.28 (2019).

panel until a final selection is made.¹¹⁹ The Company's outside counsel unsuccessfully requested that Triple H provide a panel of arbitrators composed only of members of the National Association of Seriously Esteemed Arbitrators (NASEA).

NASEA members must have written at least one hundred arbitration awards and must be full-time neutrals not currently practicing law for either employers or employees. NASEA's membership consists of less than 5 percent women and less than 2 percent African American members. Triple H responded with a panel of seven individuals who were not all NASEA members. The Company's outside counsel agreed to meet with Payne and her lawyer to strike members from the list and agreed to go first, saying this would leave the final strike for Payne.

The Triple H panel provided some minor biographical information about each member of the panel, including self-identified race and gender.¹²⁰ The panel members and the parties' selection process follows:

- Janet King, an African American, longtime civil rights activist, a former EEOC attorney, the daughter of a famous civil rights leader in the 1960s, and an arbitrator for ten years. Company's first strike.
- Paul Angst, a well-known, white, male arbitrator who has handled hundreds of cases, former president of NASEA, and an arbitrator for nearly fifty years. Payne's first strike.
- Darnell Mason, a well-known, African American professor who has taught undergraduate labor and industrial relations at State University for the last fifteen years while also serving as a part-time arbitrator. Company's second strike.
- Howard Hefty, another well-known, longtime, white, male arbitrator and also a labor and employment law professor at Prestigious University Law School for the last thirty years. Payne's second strike.
- Jane Starmore, a former National Labor Relations Board attorney, who has been an arbitrator for the last ten years. Company's third strike.
- Harry Heckster, a former human resources manager for a major food company, NASEA member, and an arbitrator for twenty-five years. Payne's third strike.
- William Worthy, a fifty-year-old white male, the same age and race as Defending. Worthy worked previously in the public sector

119. This is the typical procedure for selecting an arbitrator. *See* AM. ARBITRATION ASS'N, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES 15 (2009), https://www.adr.org/sites/default/files/EmploymentRules_Web_2.pdf [<https://perma.cc/7QWB-32H6>] (providing that the parties in a AAA employment dispute may receive a list of arbitrators and "strike names objected to" and submit the list "with remaining names in order of preference").

120. For the purposes of this hypothetical, we can assume that this self-reported information is accurate.

for a state agency on labor and employee relations matters before becoming a full-time labor and employment arbitrator, a position he has held for the last fifteen years.

Worthy has now become the selected arbitrator. But let us return to the selection process. Payne struck Angst, Hefty, and Heckster. Do they have anything in common? They are all men. We know that Angst and Hefty are white. Angst, Hefty, and Heckster are very experienced and long-time arbitrators. On the other side, the Company struck King, Mason, and Starmore. What do they have in common? King and Mason are black. Starmore and King are women. King and Starmore have worked for federal agencies. Mason is an undergraduate professor and the only panelist who is clearly a part-time arbitrator. Who are the lawyers in the group? King, Starmore, and Hefty. From the information Triple H has provided, it is uncertain whether others on the panel are current or former lawyers, judges, or partners at law firms.

Assume Payne's attorney has never had an arbitration with any of the panelists.¹²¹ The Company's attorney, on the other hand, has tried arbitration cases with King, Angst, Hefty, Heckster, and Worthy as arbitrators.

Payne probably does not have any legal basis to challenge the selection.¹²² Would Payne lack of a legal basis to challenge if these were peremptory challenges for jurors in court?¹²³ The arbitrator panel Payne received appeared to be somewhat diverse; the seven listed panelists included three women and two African Americans. Moreover, what if the Company's attorney struck King first because, in a prior arbitration, she rejected the attorney's arguments and ruled against his client in a high-stakes

121. This highlights the difficulty for plaintiffs in employment arbitration when they are not repeat players and the employer is a repeat player. See Chandrasekher & Horton, *supra* note 38, at 35, 40 (discussing how repeat-player status doubly harms employees, who experience worse arbitration results both when their employers are high-level repeat players and when the employers are represented by repeat-player attorneys). Although the hypothetical identifies an employment lawyer willing to represent Payne, it suggests the attorney is not a repeat player in employment arbitration. Given how negative employment arbitration results tend to be for employees, having an attorney provides some assistance. *Id.* at 57 (noting that "pro se plaintiffs struggle mightily" in "AAA and JAMS employment cases"). However, it is better if the attorney is also a repeat player because employees receive added benefits when they have repeat-player plaintiffs' lawyers. *Id.* at 58.

122. I acknowledged in 2005 that successful legal challenges to the selection of the arbitrator based on race were unlikely. See Michael Z. Green, *An Essay Challenging the Racially Biased Selection of Arbitrators for Employment Discrimination Claims*, 4 J. AM. ARB. 1, 42 (2005). However, I suggested that a party might explore using 42 U.S.C. § 1981, which prohibits discrimination based on race in the making and enforcement of agreements. *Id.* at 45–49.

123. Federal courts require jurors to be selected from a fair cross section of the community. 28 U.S.C. § 1861 (2018). Peremptory challenges of a juror based on race violate the Equal Protection Clause of the Constitution. See *Batson v. Kentucky*, 476 U.S. 79, 98–99 (1986). *Batson* extends to peremptory challenges of a juror based on race in a civil matter. See *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 614 (1991). See generally Sara Rudolph Cole & E. Gary Spitko, *Arbitration and the Batson Principle*, 38 GA. L. REV. 1145 (2004) (describing the regulation of discriminatory selection of jurors based on race and arguing for similar regulation of nonconsensual discriminatory selection of arbitrators).

employment discrimination case? What if the Company's attorney struck Mason and Starmore because he did not know them? Would those not be legitimate reasons to strike? And, accordingly, would the Company's attorney not be acting in the best interest of his client? What if Payne perceived the strikes by the Company's attorney to be based on race and gender? What if the Company's attorney perceived Payne's strikes to be based on race, gender, and age?

When Worthy became the selected arbitrator, did race, gender, or age play a role? If Mason had been included on ten separate panels in the last year but was never selected—that is, if he repeatedly made it through the supply side but was never hired on the demand side—does that affect concerns about diversifying arbitral ranks?

Nothing suggests that Worthy may not be an excellent choice as the selected arbitrator for this dispute. However, assume that, after the arbitration hearing occurred and the parties submitted briefs on the matter, Worthy found in favor of the Company. Worthy dismissed Payne's complaint under the rationale that she did not complain after Defending was initially reprimanded.¹²⁴ She failed to put the Company on notice that the harassment continued.

Payne had repeatedly and unsuccessfully argued to Worthy that her initial complaint should have been enough. Notwithstanding her complaint, she continued to work directly for Defending and continued to be subjected to his racist and sexist behavior. Payne also argued that, as an African American, female engineer, she was in a unique position, as this field employs very few women or African Americans.¹²⁵ She knew if she continued to complain, it would support stereotypical notions about women and minorities in the field as being technically unsound, always too

124. Essentially, this raises the question of whether the Company had sufficient facts to establish the Supreme Court's *Faragher-Ellerth* affirmative defense. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). Generally, an employer may avoid liability if it can prove the two elements of the *Faragher-Ellerth* affirmative defense: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. Did Payne act reasonably in not reporting the alleged misdeeds of her supervisor a second time after her first report did not result in sufficient corrective action? *See, e.g., EEOC v. Mgmt. Hosp. of Racine, Inc.*, 666 F.3d 422, 437 (7th Cir. 2012) (finding that a reasonable juror would need to decide if the failure to contact a supervisor with an additional complaint was reasonable when, after the first complaint, the supervisor failed to adequately address the issue and the employee received harsher treatment).

125. *See Adedamola Agboola, Study: Black Women Engineers Lack Role Models and Experience Increased Bias in the Workplace*, BLACK ENTERPRISE (Apr. 5, 2018), <https://www.blackenterprise.com/study-black-women-engineers-lack-role-models-and-experience-increased-bias-in-the-workplace/> [<https://perma.cc/3HEZ-L2P7>] (describing how "[l]ess than 4% of engineering bachelor's degrees are awarded to African American, Hispanic, and Native American women" and how all the African American women studied experienced gendered racism leading to isolation and unfair treatment).

emotional or angry, and unable to really handle the challenges of the job.¹²⁶ Worthy rejected Payne's arguments and dismissed her discrimination claims.

This hypothetical highlights why this area is ripe with opportunity for black ADR professionals. Employers must realize that the integrity of their mandatory arbitration processes depends upon the availability and use of minority arbitrators. Black workers need the perception and the reality that diverse arbitrators have not been excluded on the basis of race or gender. After this experience, might Payne believe that the arbitration process—and, in particular, the arbitrator selection process—had been stacked against her? Could Payne also reasonably believe the Company's outside counsel prevented the selection of any panelist with the background to possibly appreciate or understand her arguments a little better? No matter how diverse the arbitrator panels become, that result fails to remove the dilemma faced by the parties' representatives when selecting the arbitrator.

Attorneys for the Company operate as the gatekeepers. If risk-averse reliance on known arbitrators helps their clients prevail, then the gatekeepers may end up keeping out more diverse arbitrators. If the Company had agreed to select Mason to promote diversity by giving a diverse arbitrator an opportunity and the Company lost, this would not be a good situation for the gatekeeper. As a result, this Article argues that the neutral service provider should simply pick the arbitrator. If King had been randomly or arbitrarily selected by the neutral service provider as the arbitrator for this dispute, the Company's gatekeeper would not be deemed at fault after the fact for that selection, regardless of the final result. Instead, in having prior experience with King as an arbitrator, the Company's attorney could best inform his client of the strengths and weaknesses of pursuing certain arguments in an arbitration conducted by King. A neutrally provided selection would represent a win-win result in addressing arbitrator diversity, while also tackling the selection dilemma posed by risk aversion, as well as any hidden or direct biases that may not be remedied in any other way.

III. ARBITRARY AND RANDOM ARBITRATOR SELECTION BY SERVICE PROVIDERS

AAA's mission and vision statement embraces "a shared commitment to a diverse Roster of Arbitrators."¹²⁷ In line with that commitment, "AAA has the ability in its algorithms to provide arbitrator lists to parties that comprise at least 20% diverse panelists where party qualifications are met."¹²⁸ To

126. Concerns about an employer's use of stereotypes can chill certain actions by employees of color, which is sometimes referred to as "stereotype threat." See Green, *supra* note 3, at 651–52 (discussing the stereotype threat construct and how it can explain certain behavior of workers who have been subjected to or are concerned about stereotypical thinking).

127. See *Roster Diversity & Inclusion*, AM. ARB. ASS'N, <https://adr.org/RosterDiversity> [<https://perma.cc/8HN5-DGAU>] (last visited Apr. 12, 2020).

128. *Id.*; see also Jenkins, *supra* note 44 (providing commentary from the AAA council chair who advocated for more diversity in ADR to match society's diversity and explaining that AAA has "recently created and implemented an innovative software tool in our system

address the party selection problem, a neutral provider could go one step further with the algorithm and select the arbitrator after the initial 20 percent diverse panel is created. This final selection could be determined through a random selection after the first step of the algorithm has created the diverse panel. The suggestion that neutral service providers should decide who the arbitrator will be is not a new concept; Sarah Cole mentioned the idea in 2017.¹²⁹ Cole referred to consumer arbitration rules that allow AAA to determine the arbitrator without party selection for claims of \$10,000 or less.¹³⁰ Cole acknowledged that the \$10,000 threshold was low and that AAA did not have similar rules allowing it to select the arbitrator for matters above that amount or for any other matters, including employment disputes.¹³¹ According to Cole, if AAA and other service providers took the approach of selecting the arbitrator, then their efforts to increase the diversity of their panels would improve the diversity of arbitrators selected to resolve the parties' disputes.¹³²

Unfortunately, as Cole noted, the parties could opt out of this arbitrator appointment rule even if it was extended to employment disputes with a much higher monetary threshold.¹³³ However, most parties do not spend much time spelling out the details of how they will select an arbitrator in their agreements. Parties tend to rely on the procedures of neutral service providers to do the heavy lifting of screening potential arbitrators by agreeing that the rules of AAA, JAMS, CPR, or some other neutral service provider will apply.¹³⁴

To make arbitrator selection by the neutral service provider more of a default rule, this Article asserts that it should become an agreed-upon standard adopted by the "Employment Due Process Protocol" (the "Protocol").¹³⁵ The Protocol is a joint agreement developed in 1995 by a task force that included key stakeholders and neutral service providers and it was aimed at encouraging the use of mediation and arbitration in employment disputes, while establishing key procedural safeguards.¹³⁶ Both AAA and JAMS joined the Protocol and have issued important rules aimed at making the use of their arbitration procedures fair.¹³⁷ Both of these neutral service providers have also adopted rules to cap fees, provide for comprehensive

which alerts our staff if at least 20 percent of the potential arbitrators on any given list are not diverse from racial or gender perspectives").

129. Cole, *supra* note 22, at 885–86 (noting that AAA is authorized to appoint the arbitrator in cases of consumer arbitration claims of \$10,000 or less).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 885 n.176 (describing the AAA process).

135. See Christopher A. Barreca et al., *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, NAT'L ACAD. ARBITRATORS (May 9, 1995), <https://naarb.org/due-process-protocol/> [<https://perma.cc/4QTG-JVAD>].

136. *Id.*

137. See Chandrasekher & Horton, *supra* note 38, at 15.

discovery, and allow both parties to participate fairly and equally in the selection of the arbitrator.¹³⁸

The section of the Protocol on panel selection states:

Upon request of the parties, the designating agency should utilize a list procedure such as that of the AAA or select a panel composed of an odd number of mediators and arbitrators from its roster or pool. The panel cards for such individuals should be submitted to the parties for their perusal prior to alternate striking of the names on the list, resulting in the designation of the remaining mediator and/or arbitrator.

The selection process could empower the designating agency to appoint a mediator and/or arbitrator if the striking procedure is unacceptable or unsuccessful. As noted above, subject to the consent of the parties, the designating agency should provide the names of the parties and their representatives in recent cases decided by the listed arbitrators.¹³⁹

This Article suggests a friendly amendment to the above section, which would replace the quoted language with the following:

Upon request of the parties, the designating agency shall appoint a mediator and/or arbitrator. All appointed mediators or arbitrators will come from the designated agency's roster of neutrals with requisite skills and background to act as the neutral in the dispute. The designated agency shall take affirmative measures to keep a roster of diverse members on its employment mediator and arbitrator panels. Each appointment of a mediator or arbitrator shall be made randomly after ensuring requisite concerns about diversity have been factored into the pool from which the final selection is made. Upon selection by the agency of the arbitrator, the parties may seek recusal of the arbitrator based upon any conflict of interest or bias pursuant to the same standards as provided in the Model Code of Judicial Conduct.

Once the parties choose to use one of the key neutral service providers who are parties to this new Protocol, failing to allow the provider to select the arbitrator for an employment dispute would constitute a violation of the Protocol. As a result, the parties would not be able to use the key neutral service providers to merely provide the parties with a panel. This new provision allows the parties to seek recusal of the arbitrator selected if there is bias or a conflict of interest subject to the same standards articulated in the Model Code of Judicial Conduct.¹⁴⁰ If recusal is appropriate, the neutral service provider would select another arbitrator through the same initial

138. *Id.*

139. *Employment Due Process Protocol*, AM. ARB. ASS'N 4, https://www.adr.org/sites/default/files/document_repository/Employment%20Due%20Process%20Protocol_0.pdf [<https://perma.cc/V47H-SWNF>] (last visited Apr. 12, 2020).

140. See Dennis Rendelman, *When Must a Judge Recuse Over a Personal Relationship?: ABA Issues Ethics Guidance*, A.B.A. J. (Sept. 5, 2019), <http://www.abajournal.com/web/article/judges-personal-relationships-formal-opinion-488> [<https://perma.cc/U6PJ-WV35>] (discussing judicial recusal standards under the Model Code of Judicial Conduct); see also Leslie Abramson, *Specifying Grounds for Judicial Disqualification in Federal Courts*, 72 NEB. L. REV. 1046, 1051–76 (1993) (describing the standards for judicial recusal).

diversity step and then randomly select an arbitrator in the second step of the algorithm.

This process would also resemble the way federal court judges are randomly assigned to cases. As mentioned earlier, diversity in the judiciary has been a concern for some time.¹⁴¹ This is particularly true in state courts, where the appointment process has resulted in “class-based exclusivity or racial or gender homogeneity.”¹⁴² In the federal court system, however, judges are assigned randomly to a case.¹⁴³ Generally, federal court judges have been assigned to cases in an effort to provide neutrality and prevent the probability of unfairness and the violation of due process.¹⁴⁴ Current practices regarding actual case and panel assignment in the federal courts vary, but generally courts try to eschew outcome-oriented bias by some use of random or blind case assignments and panel selections.¹⁴⁵ This assignment occurs through an electronic system managed by a clerk—“an automated case assignment module.”¹⁴⁶ To start the process of assigning a judge, “the clerk creates electronic ‘decks,’ each of which corresponds to a different category of cases, as specified by the court’s case assignment procedures.”¹⁴⁷ Depending on the judge’s probability of selection and ability to handle the kind of case at issue, the clerk allocates “a certain number of ‘cards’ in each deck.”¹⁴⁸ While not completely random, given the application of some procedures before the random selection, the final assignment “is chosen by a blind draw rather than being assigned by hand.”¹⁴⁹ Most importantly, the parties to the lawsuit do not have a way of knowing who the judge will be in their case until the clerk assigns the judge.

One might question whether employer groups would want to give up their right to select the arbitrator merely to improve the diversity of arbitrators selected to handle employment disputes. Although some may view selection of the arbitrator by the neutral service as an infringement on party autonomy, as it removes arbitrator selection from the parties’ purview, the reality is that

141. Burt & Kaster, *supra* note 57, at 42–43, 46 n.3 (describing a study of racial and gender diversity among judges).

142. *Id.*

143. See Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1, 47–48 (2009).

144. See J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037, 1100–01 (2000).

145. As an example, the United States District Court for the Northern District of Texas uses certain randomization in court assignments. See Special Order No. 3-334 (N.D. Tex. Sept. 18, 2019). Most cases, at least in the Dallas division, are assigned “by random draw” at a distribution of 10 percent of civil cases and 12.5 percent of criminal cases to each district judge who is not a senior judge. *Id.* The Fort Worth division of the same federal district court has a similar random assignment process with a distribution of 30 percent for civil cases and 40 percent for criminal cases for each district judge who is not a senior judge. See Special Order No. 3-336 (N.D. Tex. Dec. 26, 2019).

146. Alex Botoman, Note, *Divisional Judge-Shopping*, 49 COLUM. HUM. RTS. L. REV. 297, 311 (2018).

147. *Id.*

148. *Id.*

149. *Id.*

employers and employees rarely choose an arbitrator on their own. The parties rely on neutral service providers such as AAA and JAMS to vet those who may be qualified to be selected as the arbitrator. These matters do not involve repeat-player disputes, such as those between a union and an employer, where the parties might agree on a permanent arbitrator or umpire and bypass the use of a neutral service provider. As a result, the parties have already given up much of their autonomy to neutral service providers. Smaller employers, with low-wage employees who are more likely to be subject to mandatory arbitration agreements without a broader commitment to arbitrator diversity, will appreciate the transaction costs eliminated when neutral service providers find and select arbitrators. These smaller businesses cannot risk investing time and money in deciding to become outliers by seeking arbitrators not committed to the new Protocol.¹⁵⁰ Giving the neutral service provider the final call is still a significant step. But it follows from all the steps the parties have already taken in allowing neutral service providers to develop pools and find diverse arbitrators.

Some parties may still believe that party autonomy should be adhered to; those parties can choose to find an arbitrator through some other process and without service providers who choose to follow the amended Protocol. However, the parties who choose another method for arbitrator selection will be outliers and subject to public pressure and backlash.¹⁵¹ Social movements and bad publicity have started to play a role in driving corporate employer behavior, regardless of whether there is a legal obligation. As an example, in 2014, after “a flurry of negative press,” General Mills reversed its policy of requiring any consumer who downloaded an online coupon for one of its products to agree to mandatory arbitration of future claims and abdicate the right to participate in a class action.¹⁵²

Within the last two years, as the #MeToo movement has propelled more women to come forward to identify objectionable behavior by powerful persons in their workforces, employers have responded with more transparency, fewer private settlements, and fewer nondisclosure agreements.¹⁵³ The #MeToo movement has also changed other aspects of

150. See E. Gary Spitko, *Exempting High-Level Employees and Small Employers from Legislation Invalidating Predispute Employment Arbitration Agreements*, 43 U.C. DAVIS L. REV. 591, 648–49 (2009) (describing how smaller businesses are more risk averse and less likely to be repeat players in arbitration given the costs of litigating disputes).

151. See Kathleen McCullough, Note, *Mandatory Arbitration and Sexual Harassment Claims: #MeToo- and Times Up-Inspired Action Against the Federal Arbitration Act*, 87 FORDHAM L. REV. 2653, 2683–85 (2019) (describing how social pressure and bad publicity led several companies to voluntarily decide to end their mandatory arbitration agreements for sexual harassment disputes and how some businesses, including Google and Airbnb, ended the use of mandatory arbitration agreements for all employee disputes).

152. See Mark Guarino, *General Mills Drops Arbitration Clause, but Such Contracts Are “Pervasive,”* CHRISTIAN SCI. MONITOR (Apr. 21, 2014), <https://www.csmonitor.com/Business/2014/0421/General-Mills-drops-arbitration-clause-but-such-contracts-are-pervasive> [<https://perma.cc/HD4C-XW6P>].

153. See Joan C. Williams & Suzanne Lebsack, *Now What?*, HARV. BUS. REV. (Jan. 2018), <https://hbr.org/cover-story/2018/01/now-what> [<https://perma.cc/GFJ5-D359>] (discussing the implications of #MeToo for the workplace).

corporate behavior, pushing companies to no longer seek to enforce arbitration agreements.¹⁵⁴ Many high-profile companies such as Google and Facebook, as well as a number of key law firms,¹⁵⁵ have eliminated arbitration clauses and other policies that may lead to private resolutions.¹⁵⁶ Negative publicity induced other companies, including Microsoft, Uber, Lyft, Airbnb, and eBay, to stop using arbitration for workplace sexual misconduct.¹⁵⁷ At this stage, businesses agreeing to abandon their arbitration policies tend to be large companies and big law firms uniquely concerned about negative publicity “due to the image they seek to project and the talent they wish to attract.”¹⁵⁸ These businesses also tend to be the kinds of entities, espousing the value of diversity, that this Article aims to reach.¹⁵⁹ If they

154. See, e.g., Matthew Weaver et al., *Google Walkout: Global Protests After Sexual Misconduct Allegations*, GUARDIAN (Nov. 1, 2018), <https://www.theguardian.com/technology/2018/nov/01/google-walkout-global-protests-employees-sexual-harassment-scandals> [<https://perma.cc/P8MT-RPWU>] (describing job walkouts at Google, inspired by the #MeToo movement, over the company’s arbitration and harassment policies and its response to employee protests).

155. See Chris Villani, *After Kirkland, Sidley Arbitration Flip, Group Eyes DLA Piper*, LAW360 (Nov. 28, 2018), <https://www.law360.com/articles/1105619> [<https://perma.cc/J5YV-2U3X>]. Many of these firms have also removed arbitration provisions from staff contracts. See Karen Sloan, *Kirkland & Ellis Backs Off Mandatory Arbitration for Staffers*, LAW.COM (Dec. 7, 2018), <https://www.law.com/americanlawyer/2018/12/07/kirkland-ellis-backs-off-mandatory-arbitration-for-staffers/> [<https://perma.cc/RR3Q-WPZ9>]. Much of the social movement to get law firms to end the use of mandatory arbitration agreements began as a response to law student protests related to the #MeToo movement. See Stephanie Ward, *Parity to the People*, A.B.A. J., Oct. 2019, at 26, 27 (describing the People’s Parity Project, made up of a group of law school students from Harvard, Georgetown, and Yale, which identified law firms that use mandatory arbitration clauses and used social media and other forms of public pressure, including seeking law school on-campus interviewing bans, to convince those firms to stop using arbitration for sexual harassment and gender discrimination claims).

156. See Braden Campbell, *Employers May Follow Tech Titans’ Lead on Arbitration*, LAW360 (Nov. 16, 2018), <https://www.law360.com/employment/articles/1102846/> [<https://perma.cc/U7G8-2TCW>].

157. See Marion Crain & Ken Matheny, *Sexual Harassment and Solidarity*, 87 GEO. WASH. L. REV. 56, 62 (2019).

158. See Anna M. Hersenberg & Molly O’Casey, *When the Techs Go Marching In: An Industry Updates Its Sexual Harassment Dispute Resolution Policy*, ALTERNATIVES TO HIGH COST LITIG., Feb. 2019, at 18, 27 (suggesting that the backlash inspired by #MeToo that convinced tech companies and law firms to drop their mandatory arbitration policies might be unique to those industries given their susceptibility to public pressure).

159. See Emily Gold Waldman, *The Preferred Preferences in Employment Discrimination Law*, 97 N.C. L. REV. 91, 143–45 (2018) (discussing how diversity is good business for large law firms, as large corporate clients including Facebook, MetLife, Microsoft, Hewlett Packard, and Shell require diversity in the makeup of their legal representation); see also Richard Feloni & Matt Turner, *Walmart, IBM, Pepsico and 172 Other U.S. Companies Pledge to Promote Diversity*, INC. (June 12, 2017), <https://www.inc.com/business-insider/walmart-pepsico-ibm-diversity-ceo-action-diversity-inclusion.html> [<https://perma.cc/C9RF-72MN>] (identifying senior executives from 175 of the top U.S. businesses pledging their organizations to diversity goals). Although businesses with low-wage workers may be more likely to subject their employees to mandatory arbitration, see Colvin, *supra* note 31, at 16, this Article focuses on businesses that already actively espouse the value of diversity (whether they have more low-wage workers or not) even though their gatekeepers may not select diverse arbitrators. Those employers should be sensitive to criticism of their diversity motives and any resulting public backlash if they have already invested in making their commitments to diversity public.

tend to break from the ranks of the new Protocol, the negative publicity should make them rethink that position.¹⁶⁰

As this Article has attempted to highlight, a key difficulty for corporate entities committed to addressing arbitrator diversity arises when an individual legal representative faces the ultimate decision of arbitrator selection. The legal representative must give the client the best guidance on how to prevail in the matter. At that point, lofty notions about leveraging and appreciating diversity take a back seat as risk aversion and possible racial bias, either open or unconscious, can lead to a focus on selecting known arbitrators. This Article's suggestion that the neutral service provider should select the arbitrator randomly, just as a federal court would assign a judge, takes the pressure off the legal representative. Ultimately, if the neutral service provider selects the arbitrator, the employer's attorney cannot be blamed for making a poor arbitrator selection if the employer loses. The tendency to pick a familiar and reliable arbitrator is thereby removed from the selection process.

Instead, the most important selection criteria will be qualifications involving experience in the types of disputes at issue and sufficient expertise as an arbitrator. For example, AAA's panel of employment arbitrators lists the following qualification criteria that panelists must meet or exceed:

- Attorneys with a minimum of 10 years experience in employment law with fifty (50) percent of your practice devoted to this field, retired judges, or academics teaching employment law.
- Educational degree(s) and/or professional license(s) appropriate to your field of expertise.
- Honors, awards and citations indicating leadership in your field.
- Training or experience in arbitration and/or other forms of dispute resolution.
- Membership in a professional association(s).
- Other relevant experience or accomplishments (e.g. published articles).¹⁶¹

As another example, CPR's specialty employment panel application asks the following questions, with certain prefilled answers provided: (1) "What percentage of your law practice or business *for the last 10 years* has been employment-related?"; (2) "Have you had significant employment practice in the *last 10 years* representing or working with the following"? (listing "Management," "Non-executive employees," "Executives," and "Other (describe)" as prefilled answers); (3) "Have you had significant employment practice in the *last 10 years* devoted to the following dispute processes"? (listing "Litigation," "Dispute Management (in house)," "Arbitration

160. See McCullough, *supra* note 151, at 2688–89 (suggesting that "social pressure on corporations should not be underestimated" as a tool to address any unfairness with arbitration given that a number of companies have changed their policies in light of criticism of mandatory arbitration).

161. *AAA Employment Arbitrator Qualification Criteria*, *supra* note 90.

(Neutral or Representative),” “Mediation (Neutral or Representative),” “EEOC or other agency,” and “Other (describe)” as prefilled answers); and (4) “Please provide a brief description of your employment case experience as a neutral.”¹⁶²

After these basic qualifications are met, the neutral service provider can use algorithms that factor in diversity while randomly and arbitrarily selecting the arbitrator to be assigned. Given that all the stakeholders identified seemed to be concerned about diversity, this new selection process offers a means to achieve more diverse arbitrator selection. Neutral service providers should step up and make the last call in selecting the arbitrator. The neutral provider’s selection of the arbitrator can help provide a meaningful response to the long-standing arbitrator diversity concern.¹⁶³

CONCLUSION

Given his public celebrity status, Jay-Z’s inquiry into the lack of black arbitrators sparked a national conversation about the lack of diversity among arbitrators.¹⁶⁴ As one commentator noted, Jay-Z’s “star power” placed “a 10,000-watt spotlight on a long-standing issue.”¹⁶⁵ As a result, those banging the drum on behalf of the movement to enhance arbitrator diversity had “someone with a huge audience and a lot of money at stake to propel the issue into the headlines.”¹⁶⁶ Kimberly Taylor, chief legal and operating officer of JAMS, agreed: “Personally, I thought that if anybody had a voice to highlight this issue it would be Jay-Z. It’s something we’ve been talking about for a long time . . . and I thought that his particular viewpoint would be something that’s helpful to the conversation.”¹⁶⁷

Neutral service providers’ efforts to diversify their rosters, provide networking opportunities, and encourage users to consider diversity when making selections seem admirable. However, these diversity efforts “do not seem sufficient to overcome the major obstacle facing any prospective arbitrator on a roster—being selected.”¹⁶⁸ Hence, Jay-Z’s inquiry represented a real and valid concern. In the employment setting, no one

162. See *Panelist Application*, INT’L INST. FOR CONFLICT PREVENTION & RESOL. 10, <https://www.cpradr.org/neutrals/New-Neutral-Application-Form> [<https://perma.cc/EB2R-MFBZ>] (last visited Apr. 12, 2020); see also *Become a Neutral*, INT’L INST. CONFLICT PREVENTION & RESOL., <https://www.cpradr.org/neutrals/become-a-neutral> [<https://perma.cc/AZQ9-P97N>] (last visited Apr. 12, 2020).

163. See Pilawa, *supra* note 63, at 418 (highlighting the importance of arbitral institutions taking the lead in making changes regarding arbitral diversity).

164. Helen Holmes, *Jay-Z Halting His \$204M Lawsuit Over a Lack of Black Arbitrators Could Be Historic*, OBSERVER (Nov. 29, 2018, 3:35 PM), <https://observer.com/2018/11/jay-z-halts-lawsuit-black-arbitrators-historic/> [<https://perma.cc/KP7Y-4JX4>] (suggesting that Jay-Z’s involvement might be historic, while recognizing that “when arbitration agreements coerce black employees into a private dispute resolution system where employers may apply racial stereotypes with little regulation, it raises concern about the integrity of that system” (quoting Green, *supra* note 122, at 4)).

165. Simson, *supra* note 6.

166. See Ricker, *supra* note 4, at 9.

167. Simson, *supra* note 6.

168. Cole, *supra* note 22, at 883.

would accept a hiring process that would result in repeatedly picking a single, racially stratified group: older white men. Yet everyone accepts that this is a likely consequence of the arbitrator selection process given the current lack of diversity when seeking to employ an arbitrator.

This Article proposes that service providers, all invested in the fairness of their efforts to offer arbitrators in a manner that provides justice and does not perpetuate systemic discrimination, should be given a greater role in the final selection of the arbitrator. With certain diversity goals in place, these service providers can select an arbitrator who is both more than qualified and diverse. One of the ongoing flaws in the efforts aimed at increasing arbitrator diversity is that current approaches continue to ignore the risk aversion exhibited by the representatives selecting the arbitrators. No representative is going to take the risk of selecting an arbitrator to resolve an important dispute for a client solely because that arbitrator is diverse. That representative is going to select the arbitrator with whom he or she has the most familiarity, rather than risk be second-guessed by the client if the arbitrator does not decide in the client's favor. Unless the process of arbitrator selection is changed, this risk-aversion principle will continue to present a stifling concern for those seeking to increase arbitrator diversity, regardless of how much the pool of diverse arbitrators is expanded.

This Article offers a new solution for all those who really want to increase diversity among arbitrators and especially for those handling employment discrimination disputes. Parties can require certain arbitrator qualifications that focus on experience with employment dispute resolution and are not limited to membership in elitist groups (former judges or partners at major law firms). With those qualifications in mind and a new and updated Protocol, with the three key service providers and other key constituents such as national and local bar associations in agreement, the dispute resolution service providers can use an algorithm to maximize diversity and then randomly and arbitrarily select the arbitrator.

The final selection decision will not be placed at the feet of the risk-averse representative who is concerned about being second-guessed when losing in arbitration. By taking into account key qualifications and initial diversity through a two-step algorithm, service providers can select and appoint diverse arbitrators. This process resembles what happens in federal court when parties file a lawsuit and the court provides the parties with an assigned judge. This process of random and arbitrary selection provides a winning response to the long-standing concern about arbitrator diversity that Jay-Z fortunately shined a light on.