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INTERNATIONAL ARBITRATION  
REVIEW

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# Towards Greater Gender and Ethnic Diversity in International Arbitration

Samaa A. F. HARIDI<sup>\*</sup>

## ABSTRACT

*Diversity has long been an area of focus for many professional organizations and in many industries. While slow, the progress has been steady, and the increase in the number of women and ethnic minorities in fields like international arbitration is undeniable.*

*This article examines the question of diversity in international arbitration, and more specifically, in the context of arbitrator appointments. It studies the progress made to-date and offers practical solutions for solving the diversity conundrum in the context of arbitrator appointments.*

Diversity, or the inclusion of individuals of varied racial, ethnic, gender, and social backgrounds, has long been accepted in most circles as a value in itself. Global businesses and educational institutions have led the charge, and the legal sector has made efforts to emulate the diversity of its client base. Law firms and arbitration practices have made concerted—if sometimes slow—efforts to be more inclusive of women and ethnic minorities, and today, some of the world’s top arbitration practices are led by women and minorities.

Many national judiciaries have also striven, often successfully, to ensure that their systems emulate the population they adjudicate. Countries in North America, Europe, and South America have launched “diversity on the bench” campaigns to increase the number of women and minorities represented, and while the numbers in some countries remain low, growth has been commendable. For example, in the United States, about 33% of state and federal court judges are women. In South America, countries like Suriname, El Salvador, Costa Rica, and Colombia have made great strides to increase female participation on the national bench above 30%, with the average women’s judicial representation in Latin America and the Caribbean averaging around 33% according to the UN Progress

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of the World's Women Report in 2012.<sup>1</sup> Europe has been particularly successful at encouraging female participation on the bench, with female representation on the judiciaries of Central and Eastern European countries reaching over 40%. The International Criminal Court should also be commended for its gender and geographic diversity. As of last year, the four main roles on the court are filled by women of diverse ethnic and geographic backgrounds.<sup>2</sup>

Anecdotally, the field of arbitration also seems to have opened its doors to women and minority practitioners, both in the role as counsel and as arbitrators. In fact, over the past twenty-five years, the number of women appointments to arbitral tribunals has increased exponentially. Comparing figures reported by the International Chamber of Commerce Court of International Arbitration ("ICC") in 1990 to estimated figures in commercial cases in 2012, the percent of female arbitrator appointments has increased by a staggering 700%. As a result of this remarkable increase, many representatives of the "old guard" in the field congratulate themselves on the well-achieved equality.

However, a far grimmer picture emerges when looking at the absolute percentage of women and minority candidates' appointments. In 1990, the ICC reported that to date, a mere 0.78% of appointments resulted in the appointment of female arbitrators.<sup>3</sup> The 700% increase reflects the appointment of 6.5% female arbitrators in commercial and investment arbitration today.<sup>4</sup> This means that men represent the vast majority of appointments in both commercial and investment arbitration. Compared with the success of many national campaigns to increase the

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<sup>1</sup> Sital Kalantry, *Women in Robes*, AMERICAS Q. (Summer 2012), available at <http://americasquarterly.org/women-in-robos>.

<sup>2</sup> The court's newly appointed President is Argentinian, the Vice Presidents are Japanese and Kenyan, and Gambian lawyer Fatou Bensouda has long served as the court's Prosecutor.

<sup>3</sup> Lucy Greenwood & C. Mark Baker, *Getting a Better Balance on International Arbitral Tribunals*, 28(4) ARB. INT'L 653, 655, n.9 (2012), available at [http://cpradr.org/Portals/0/Resources/Articles/ARBI%2028-4\\_Lucy%20Greenwood\\_Offprint.pdf](http://cpradr.org/Portals/0/Resources/Articles/ARBI%2028-4_Lucy%20Greenwood_Offprint.pdf).

<sup>4</sup> Both because of the public nature of many investment disputes and the commitment of the International Centre for the Settlement of Investment Disputes ("ICSID") to transparency with regard to arbitrator identities, figures in investment arbitration are relatively accessible. Most estimates indicate that in the current decade, about 6.5% of appointments in investment arbitration go to women arbitrators. See Gus Van Harten, *The (Lack of) Women Arbitrators in Investment Treaty Arbitration* (Columbia FDI Perspectives, Perspectives on Topical Foreign Direct Investment Issues by the Vale Columbia Center on Sustainable International Investment, No. 59 (Feb. 2012)), available at [http://ccsi.columbia.edu/files/2014/01/FDI\\_59.pdf](http://ccsi.columbia.edu/files/2014/01/FDI_59.pdf). Figures in commercial arbitrations, which span hundreds of institutions and are often confidential, are far less reliable. Based upon figures collected from the International Chamber of Commerce, the Stockholm Chamber of Commerce, the London Court of International Arbitration, the Finland Chamber of Commerce, and a survey of 250 international commercial arbitrations conducted by Michael Goldhaber, the total percentage of female appointments in commercial arbitrations range from 4% to 6.5%, with the average falling around 6%. See Greenwood & Baker, *supra* note 3, at 655-56.



number of women on the bench, and even with the slow increase in female promotion at law firms, the field of international arbitration lags far behind.

Of similar concern is the uniform profile of the men appointed to adjudicate 93.5% of arbitrations. Although there are no reliable statistics on minority ethnic and racial participation on arbitral tribunals, the vast majority of arbitrators appointed in investment and commercial cases are Caucasian men of a certain degree of seniority, or as one practitioner jokingly dubbed the pool, “pale, male and stale.” Women, minority ethnicities, and candidates of non-Western geographic origin are blatantly underrepresented, as are younger practitioners.

## 1 WHY DO WE CARE ABOUT DIVERSITY ON ARBITRAL TRIBUNALS?

While there is a strong consensus in the global arbitration community that we ought to strive for greater diversity in the hearing room, many practitioners argue that inclusion is a natural process and that we need simply wait for the ranks of diverse arbitration counsel to trickle into the ranks of arbitrators. However, this trickle-up theory is blind to both the reason why diversity on the tribunal is so important and why it has been so difficult to attain. Diversity is not merely valuable to young people, women, and minorities selfishly desiring to push aside the old guard for their own professional gains; rather diversity on the tribunal is crucial to sustain arbitration as a modern, flexible, and desirable method of dispute resolution.

### 1.1 DIVERSITY STRENGTHENS THE PERCEPTION OF LEGITIMACY

Diversity on the bench campaigns have largely been driven by the premise that the citizens who utilize the national justice system want to see a cross section of society reflected in the judiciary. People have more faith in a legal system that appears to resonate with their perspective.<sup>5</sup> Thus, diversity gives people greater confidence in their legal system and adds to the perception of legitimacy, meaning that litigants are more likely to be satisfied that they have had an opportunity to be heard and more likely to respect the rule of law. The concept of demographic mirroring raises an interesting problem when we consider a global dispute

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<sup>5</sup> *But, c.f.* Greenwood & Baker, *supra* note 3, at 663, n.46 (citing an anonymous comment from OGE MID, which states: “I do not understand the ‘value and benefit of a diverse workforce (over and above any moral dimension)’. I think that it is an easy thing to say, may make us all feel good about ourselves, make us think we are good, decent people, but the reality is that the point of a workforce is to get the job done. If diversity is a qualification for the job, then all well and good. But, if I were undergoing brain surgery, I do not see any additional value in the team being diverse. If I were putting together a baseball team, I see no additional value in diversity.”) (internal quotations omitted).

resolution mechanism like arbitration. Women represent half of the world's population, and racial and ethnic "minorities" actually make up a *majority* of the world's population. Clearly mirroring global demographics in the arbitration world would necessitate massive changes. Perhaps a more apt—or at least more manageable—demographic to mirror would be the demographics of students graduating from law and business schools around the world.

Arbitration occurs pursuant to the voluntary submission to a tribunal, whose authority stems from the agreement of the parties, and which results in a final and binding award. It remains a viable dispute resolution mechanism because its users perceive it as legitimate. Consequently, it is all the more important in arbitration that parties view the tribunal as a cross section of the business world, or a cross section of an idealized business world that is modern, creative, and diverse.

One salient example of emerging user mistrust of the arbitrator profile is the recent debate over two multinational trade partnerships currently negotiated by the United States. Much of the consternation over the Trans-Pacific Partnership ("TPP")—negotiated between the United States and eleven American and Asian counterparts—and the Trans-Atlantic Trade and Investment Partnership ("TTIP")—negotiated between the United States and the European Union—arises not from the regulatory burdens imposed by the trade agreements but from the inclusion of what has become a normal feature in bilateral and investment treaties: an investor-state dispute settlement ("ISDS") mechanism. Leading the charge against the dreaded ISDS mechanism in the United States, Senator Elizabeth Warren authored an op-ed in *The Washington Post*, claiming, among other things, that ISDS does not take place before "independent judges."<sup>6</sup> According to Senator Warren, "highly-paid corporate lawyers would go back and forth between representing corporations one day and sitting in judgment the next . . . ."

Putting aside the various mechanisms to protect against arbitrator bias, and the unimpeachable character of the many well-respected arbitrators who act in investment disputes, Senator Warren's comments demonstrate that even representatives within one of the largest state users of investment arbitration do not believe that the pool of arbitrators is sufficiently representative of society to independently adjudicate investment arbitrations.

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<sup>6</sup> Senator Elizabeth Warren (D-MA), *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST OP-ED (Feb. 25, 2015), available at [http://washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9\\_story.html](http://washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html).

## 1.2 DIVERSITY OFFERS GREATER CONSUMER CHOICE

In addition to fostering legitimacy among users, diversity means an expansion of the arbitrator pool and the inclusion of additional qualified individuals to alleviate the packed and conflicted docket of the “usual suspects” in arbitration. Increasing the size and diversity of the arbitrator pool means increasing competition and thereby efficiency, thus decreasing the potential for conflicts. Furthermore, the idea that thousands of women and minority individuals are attending law schools, studying international law, and entering the field of arbitration, but nonetheless only a few possess the necessary qualifications to arbitrate is simply naïve. Failure to consider diverse candidates means that qualified potential candidates are overlooked for reasons completely unrelated to their credentials. By subscribing to a “pale, male and stale” demographic profile, we miss out on a major group of potentially qualified individuals.

## 1.3 DIVERSITY FOSTERS BETTER ARBITRATORS

However, perhaps the most compelling argument in favor of arbitrator diversity is the general argument for diversity that permeates the business world: adding diverse individuals to a team has been proven to improve the function of the team as a whole. Introducing diverse perspectives has been known to reduce “group think” and increase creativity and productivity in the boardroom.<sup>7</sup> In addition, numerous studies have been conducted to demonstrate that diverse teams in a variety of sectors work not only harder but better than non-diverse teams. For example, in a study led by Professor Katherine Phillips of Columbia Business School, researchers found that diverse teams are more task-oriented and more likely to solve a problem than homogenous teams confronted with the same problem.<sup>8</sup> Participants in the study were presented with a problem and asked to draft an essay in preparation to meeting and collaborating with a partner of either the same or a different political affiliation. Those preparing to meet with a partner of a different political affiliation were more likely to address a greater variety of perspectives in their essays and provide multiple rationales for their proposed solution than individuals preparing to meet with a like-minded partner.<sup>9</sup> The

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<sup>7</sup> McKinsey & Company, *Women Matter: Gender Diversity, A Corporate Performance Driver*, at 12 (2007), available at [http://mckinsey.com/features/women\\_matter](http://mckinsey.com/features/women_matter). The study found that performance increases significantly when at least three women sit on management committees for an average membership of ten people.

<sup>8</sup> *Do Diverse Teams Work Harder – And Better?* (Columbia Business School Research Feature (Dec. 20, 2013)), available at <http://www8.gsb.columbia.edu/ideas-at-work/publication/1617>.

<sup>9</sup> *Id.* (“The researchers found that both Democrats and Republicans wrote considerably less detailed statements when they anticipated meeting with someone of their own political party than when they

researchers were able to correlate the decrease in preparedness with the subjects' concerns about avoiding conflict with a similarly-minded partner.<sup>10</sup> When the subjects actually confronted their partners, the better-prepared heterogeneous partners were more likely to solve the problem than homogenous partners.<sup>11</sup>

Similar increased success of diverse teams has been observed in both the business and academic worlds. A *Harvard Business Review* survey observed that employees at companies with diverse leadership were 45% more likely to report growth in the company's market share and 70% more likely to report that the firm captured a new market.<sup>12</sup> This was largely attributed to the ability of the firms' employees to obtain support and funding from the leadership to implement innovative ideas. In contrast, employees of firms with non-diverse leadership reported a decreased ability to obtain the support of leadership for innovations.<sup>13</sup> In academia, a study by the National Bureau of Economic Research found that papers published by ethnically diverse teams of scientific researchers in multiple locations were more likely to be published in high-impact scientific journals and received more citations than papers published by ethnically homogenous research teams.<sup>14</sup>

Unfortunately, the available numbers on diverse arbitral tribunals—or even simply gender heterogeneous tribunals—are not statistically significant enough to provide for similar psychological studies within arbitration. Nonetheless, arbitrators are presumably subject to the same psychological suggestions as the three aforementioned test groups, so the same reasoning that supports diversity in business and academia supports appointing a diverse tribunal of arbitrators to

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anticipated meeting someone of a different party. This finding was striking partially because the murder mystery task had nothing to do with political perspective, so one might not expect political affiliation to matter at all for this situation.”).

<sup>10</sup> *Id.* In a second phase of the study, the researchers informed some participants that they should be focused on retaining a good relationship with their partner and other participants that they should focus on the task. Participants primed to focus on their relationship with their partner wrote similar responses to the participants meeting in homogenous teams in phase one of the study, tending to lack in detail and multiplicity of perspective. Ironically, when selecting arbitrators, outside counsel often considers the relationships that will develop within an arbitral tribunal, presuming that arbitrators who generally see eye-to-eye will have a better working relationship. Phillips' study indicates that a certain degree of disconnect will actually spur more thorough analysis.

<sup>11</sup> *Id.* (“The more the team members had individually elaborated in their essays prior to the meeting — the more evidence they'd laid out — the more likely their team was to solve the crime.”).

<sup>12</sup> See Sylvia Ann Hewlett et al., *How Diversity Can Drive Innovation*, HARVARD BUS. REV. (Dec. 2013). The study defined diversity as including at least three inherent diversity traits—e.g., race, ethnicity, gender, and sexual orientation—and at least three acquired diversity traits, or traits acquired through experience with diverse individuals, such as cultural knowledge gained from working abroad or targeting a particular type diverse of consumer.

<sup>13</sup> *Id.* According to the survey, women were 20% less likely, people of color were 24% less likely, and LGBT individuals were 21% less likely to obtain endorsement for their ideas than straight white men at the same firms.

<sup>14</sup> *Diversity in Research*, FREAKONOMICS (Feb. 19, 2014) available at <http://freakonomics.com/2014/02/19/diversity-in-research>.

evaluate a commercial or investment dispute. Diversity is not merely valuable for abstract moral reasons; rather, a diverse tribunal will actually tend to be better prepared, more task-oriented, and more attentive to and receptive of the parties' arguments than a non-diverse tribunal. Just as important, a party with diverse traits appearing before a panel where at least one member shares that trait will be more likely to perceive that its arguments were received and considered. Diversity will not only introduce new individuals with diverse perspectives to the arbitral pool, but appointing a diverse tribunal of arbitrators will actually improve the efficiency and effectiveness of the entire tribunal and increase consumer confidence in the system.

## 2 WHY CAN'T WE SIMPLY WAIT UNTIL THE PROBLEM RESOLVES ITSELF?

Why is it that we are so hard-pressed to obtain a demographic mirroring on arbitral panels? Surely with a 700% improvement in women's participation over the past thirty years, change is on the horizon, and we merely need to wait for it. Certainly, many successful arbitrators, including some women, agree that the passage of time will lead to balanced arbitral tribunals.<sup>15</sup> However, according to Lucy Greenwood, we will be waiting a very long time. She estimates that, at the current rate of improvement, we are due for equal gender representation sometime around 2115.<sup>16</sup> In order to avoid the hundred year wait, we must tackle the deep-seated societal and psychological influences that impact who stays on the path to join the arbitrator pool and who counsel and clients are willing to appoint out of that pool.

### 2.1 PIPELINE LEAK

A great deal of work has been done analyzing why women in particular have difficulty attaining adjudicatory roles or becoming equity partners in large law firms. While such studies of minority candidates have not been done, some of the same factors apply across the gender divide to impede the progress of candidates of diverse ethnic and racial background.

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<sup>15</sup> Michael Goldhaber, *Madame La Présidente - A Woman Who Sits as President of a Major Arbitral Tribunal is a Rare Creature. Why?*, 1(3) TRANSNAT'L DISP. MGMT. 3 (July 2004), available at <http://arbitralwomen.org/files/publication/00072217081344.pdf> (the article mentions that Lucy Reed, a partner at Freshfields Bruckhaus Deringer, stated to be "confident that fair representation would come with time").

<sup>16</sup> Greenwood & Baker, *supra* note 3, at 664, n.53.

On the one hand, commentators cite a supply-side dilemma, termed “pipeline leak,” whereby the large number of female and minority candidates in the talent pool during law school gradually exit Big Law at various stages along the career pipeline, leaving only a small number of diverse candidates at the most senior levels to enter the arbitrator pool.<sup>17</sup> In order to join an institution’s roster of arbitrators or be appointed *ad hoc* by a party and its external counsel, an individual must assemble an impressive and targeted resume, typically attaining a senior status at a major law firm and garnering name recognition among colleagues in the field. However, women and minority lawyers tend to encounter difficulties reaching the heights of the legal profession in the same quantities that they enter the legal profession.

Women have long comprised between 45-50% of law students in the United States;<sup>18</sup> however, women currently make up only about 20% of partners at large U.S. law firms and only about 17% of equity partners.<sup>19</sup> The problem is even more pronounced for racial and ethnic minority candidates, with some firms not reporting any minority partners at all. Whereas minority students account for approximately 25.5% of law school graduates,<sup>20</sup> minorities account for only 7.33% of partners at major law firms.<sup>21</sup> Female minorities suffer particularly from pipeline leak, representing less than 2% of equity partners in U.S. law firms compared with roughly 6% minority male equity partners.

Women partners are even less represented in arbitration practices than in the general practice of law, comprising only 11% of partners in the top arbitration practices in the world.<sup>22</sup> The absence of female and minority partners in senior

<sup>17</sup> *Id.* at 653, 654; Irene Ten Cate, *Binders Full of Women . . . Arbitrators?*, INTLAWGRRLS (Nov. 2, 2012), available at <http://intlawgrrls.com/2012/11/bindings-full-of-women-arbitrators.html>.

<sup>18</sup> According to the National Association of Women Lawyers, women have comprised more than 40% of law school graduates since mid-1980. See Stephanie A. Scharf et al., Report of the Eighth Annual NAWL National Survey on Retention and Promotion of Women in Law Firms, at 4 (Feb. 2014). Currently, most law schools estimate that between 45-50% of graduates are women. See American Bar Association, *A Current Glance at Women in the Law*, at 4 (July 2014).

<sup>19</sup> See National Association for Legal Placements, *Diversity Numbers at Law Firms Eke Out Small Gains - Numbers for Women Associates Edge Up After Four Years of Decline* (Feb. 2015), available at [http://nalp.org/lawfirmdiversity\\_feb2015](http://nalp.org/lawfirmdiversity_feb2015) (identifying 20% female partners at U.S. law firms) [hereinafter NALP Report]; Scharf, *supra* note 18 (identifying 17% equity partners at U.S. law firms). The discrepancy between the NALP and NAWL reports is based upon the consideration by NALP of firms that did not want to differentiate between equity and non-equity partners, causing the data collected to skew in favor of women and minorities.

<sup>20</sup> American Bar Association, ABA Approved Total JD and Minority Degrees Awarded (1984-2013). While minority graduation from law schools has grown over the past twenty years, the percentages still demonstrate a high rate of attrition between law school graduation percentages since 1984 and law firm partnership percentages in 2015.

<sup>21</sup> NALP Report, *supra* note 19. NALP defines minorities as “Black/African-American, Hispanic, Native American, Asian, Native Hawaiian/Pacific Islander, and multi-racial.”

<sup>22</sup> Karl-Heinz Böckstiegel, *Commercial and Investment Arbitration: How Different Are They Today? - The Lalive Lecture 2012*, 28(4) ARB. INT’L 577, 657, n.23 (2012), available at [http://globalarbitrationreview.com/cdn/files/gar/articles/Karl\\_Boeckstiegel\\_Lalive\\_Lecture\\_12\\_11\\_8\\_Arbi\\_proof.pdf](http://globalarbitrationreview.com/cdn/files/gar/articles/Karl_Boeckstiegel_Lalive_Lecture_12_11_8_Arbi_proof.pdf).

positions, both in international arbitration and in other legal practices that feed into arbitrator pools like mergers and acquisitions, energy, and construction, exacerbates the pipeline leak. Diverse candidates have a more difficult time identifying mentors and role models to emulate in the arbitration field. Many commentators cite demanding travel schedules, the twenty-four hour culture of Big Law, and in particular international arbitration as contributors to pipeline leak.<sup>23</sup> Lack of female mentors who have “made it” in arbitration can lead women lawyers in particular to believe that the travel and time commitments really do make it impossible—or at least impracticable—for women who want families to succeed in the field.

## 2.2 PIPELINE PLUG

On the other side of the coin is a dearth of demand for diverse arbitrators, what Lucy Greenwood termed “pipeline plug.” Even after diverse candidates make it through the pipeline and enter the ranks of senior partners within arbitration groups and/or acquire the qualifications to be listed on institutional rosters, they struggle to be appointed as regularly as their non-diverse male counterparts. The appointment system in international arbitration is likely the leading contributor to pipeline plug because it allows for the operation of numerous conscious and subconscious biases and for the substitution of proxies like repeat appointments in lieu of observed quality.

Although some institutions maintain a list of arbitrators and will provide a selection of candidates upon request, most arbitrators are appointed based upon the familiarity of the appointing party’s outside counsel with the arbitrator candidate. This means that public visibility through listing on institutional rosters, as well as publication of academic writings and speaking engagements, is fundamental to obtaining work as an arbitrator. Particularly in commercial arbitration, where awards tend to be confidential and there is no way to evaluate how an arbitrator actually performs during a proceeding, outside counsel substitute repeat appointments as a proxy for quality. This results in a bit of a catch-22 for young or diverse practitioners trying to break into the arbitrator pool. It also is somewhat counter-productive from an efficiency standpoint, as the arbitrators with the most repeat appointments get quite busy, which can result in delays and protracted proceedings for parties too focused on appointing one of the “usual suspects” to inquire properly into availability.

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<sup>23</sup> See, e.g., Deborah Rothman, *Gender Diversity in Arbitrator Selection*, DISP. RESOL. MAG., at 24 (Spring 2012), (discussing time and travel commitments in light of the “double burden,” the tendency for both child-bearing and child-rearing responsibilities to fall more heavily upon women than men, even in households where both parents work).

The appointment process also permits subconscious bias to influence who becomes an arbitrator. For example, many acknowledge the existence of an “old boys club,” and the tendency of outside counsel is to appoint arbitrators who are similar to them.<sup>24</sup> If the makeup of the top arbitration teams is 89% male, it is hardly surprising that male arbitrators are predominantly selected.

Even more problematic than these conscious biases are the implicit biases that impact outside counsel’s selection processes regardless of gender or ethnicity. Researchers at Yale recently duplicated the now famous gendered resume study, wherein the researchers send professors identical resumes from job applicants, half designated with a female name and half with a male name.<sup>25</sup> As in previous iterations of the study, both male and female professors were less willing to hire the same candidate if the resume had a female name. Specifically, the professors consistently ranked the female applicant lower in competence and hireability and expressed a decreased willingness to mentor the female student as compared to the male student with the same exact resume.

Professors from business schools at NYU Stern, University of Pennsylvania Wharton School, and Columbia Business School expanded the study last year to also account for minority status, circulating identical emails from a prospective graduate student, assigned one of ten different ethnically-coded names for each gender.<sup>26</sup> The emails requested information and guidance on the professors’ respective PhD programs. The results demonstrated that the same implicit bias applies to ethnicity as to gender; for example, of the candidates targeting business school professors, 87% of white males received a response from the professors, whereas only 62% of females and minorities combined received a response. Moreover, the bias did not change across ethnically or gender diverse professors or

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<sup>24</sup> See *id.* (suggesting that because primarily senior male attorneys select arbitrators, they primarily appoint senior male attorneys as arbitrators). The same National Bureau of Economic Research study that demonstrated that ethnically diverse scientific research teams correlated with articles that were more prestigious and had a greater impact on scientific discovery also found that given the choice, scientists were more inclined to form ethnically homogenous groups. *Diversity in Research*, *supra* note 14. In addition, much has been made in literature on diversity in arbitration of William Tetley, Q.C.’s description of his fortuitous first appointment as an arbitrator. See Lucy Greenwood, *Unblocking the Pipeline: Achieving Greater Gender Diversity on International Arbitration Tribunals*, INT’L L. NEWS, at 1 (“[I]n 1982, he was approached by two acquaintances to act as a chair of an ICC arbitration tribunal. He ‘rushed to the McGill Law Library to ask what the ICC was.’ He ‘got the Rules, read them in the taxi driving back and found them to be brief, concise and the epitome’ of common sense.’ His appointment as chair of a major international arbitration tribunal was confirmed.”).

<sup>25</sup> See Corinne A. Moss-Racusin et al., *Science Faculty’s Subtle Gender Biases Favor Male Students*, 109 PNAS 16474 (Oct. 9, 2012) (displaying responses graphically on page 16475).

<sup>26</sup> Dolly Chugh et al., *Professors Are Prejudiced, Too*, N.Y. TIMES, SR14 (May 11, 2014); see generally, Katherine Milkman, Modupe Akinola & Dolly Chugh, *What Happens Before? A Field Experiment Exploring How Pay and Representation Differentially Shape Bias on the Pathway Into Organizations*, J. APPLIED PSYCHOLOGY (Apr. 13, 2015), available at <http://dx.doi.org/10.1037/apl0000022> (advance online publication).



fields: diverse faculty members or faculty in diverse disciplines like criminal justice were no more likely to respond to diverse candidates. Private universities and disciplines associated with the highest paid professions exhibited the greatest bias in favor of white males.

Consequently, even those women and minorities who manage to remain in the pipeline face a difficult challenge, combatting not only against outright prejudice but also much more insidious implicit bias. Lucy Greenwood identified some of the more insidious implications of these biases for arbitration in her article in *Arbitration International*, highlighting instances in which contributors on OGE MID subconsciously equate diversity with reduced quality.<sup>27</sup> This line of thinking goes hand-in-hand with the very valid observation that outside counsel's duty is to appoint an arbitrator in the best interests of the client, not necessarily in the best interests of diversity. Appointing an unqualified arbitrator simply because he or she is diverse would be ethically deficient. However, similarly appointing an unqualified arbitrator simply because he is a white male of a certain age would also be ethically deficient. The problem is recognizing our subconscious tendency to equate the pale, male and stale profile with quality and qualification and to actively fight that tendency.

### 3 SOLUTIONS

The factors that prevent women and other diverse candidates from successfully infiltrating the arbitrator pool and obtaining appointments in large numbers are deep-seated and occur at every stage of the pipeline to success. After all, if diversity among adjudicators was easy to achieve, national governments would not have needed such a concerted effort to diversify national judiciaries, even to the often limited extent. In the decentralized world of arbitration, there is no one national government to enforce diversity of the arbitrator pool. Instead, at each stage of the career pipeline, every practitioner must take the initiative to combat the factors that lead diverse candidates to leave the arbitration profession and/or experience obstacles that their white male counterparts need not contend with.

As the most common entrance to the arbitrator pipeline, change needs to begin in law schools. While nearly half of law school graduates are women, law school faculty, the source of students' early mentors who help them determine whether a field like arbitration presents a viable career path, is still heavily male, with limited racial and ethnic diversity. Law schools should make an effort to

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<sup>27</sup> See, e.g., Greenwood & Baker, *supra* note 3, at 653, 662 n.45 ("We are not being asked to make a statement . . . we are asked to pick the best person for the job.") (internal quotations omitted).

ensure that diverse students have the same mentoring opportunities that white male students enjoy.<sup>28</sup>

In addition, law firms have a responsibility to combat the extremely high rate of attrition of female and minority talent, as associates become more senior within the law firm. This means not only ensuring continued mentorship of women and minority candidates, but also implementing policies that place women and men who opt to have families on equal footing with one another. Specifically:

- Counsel in arbitration should make an effort to find and propose qualified female and ethnically diverse candidates; young associates responsible for pulling arbitrator lists should be making the effort to find and promote diverse candidates who their partners might not necessarily know about or think of off the top of their heads. Young people must lead the charge for their own generation.
- Arbitrators should keep an eye out for young and diverse talent and propose diverse candidates when tasked with proposing chairpersons. This also benefits the arbitrators because they will get a young, energetic chairperson who is dedicated to running the arbitration well in the interest of making a good impression and increasing the amount of times they are selected.
- Women who are successful in the field have the responsibility to serve as mentors. They should promote deserving women and minorities, and recognize when female and minority candidates go above and beyond the call of duty and fill the ranks.
- Institutions should propose gender neutral lists (not just one “token” woman) and err on the side of diversity in lists. They should also keep gender, ethnicity, and geographical statistics, as well as make diversity a currency that improves the institution’s stature—market the institution on its diversity. Businesses that seek to increase their diversity may want to select a diverse provider.

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<sup>28</sup> The Milkman, Akinola, & Chugh study conclusively disproved the theory that women and minority students enjoy increased mentorship, based upon their diversity. Across genders, ethnicities, and disciplines, professors surveyed in the study were more likely to respond and mentor white male students than women or minority students.