

THE NEED FOR WOMEN IN ARBITRATION AND HOW TO IMPLEMENT DIVERSIFICATION OF ARBITRAL APPOINTMENTS

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Introduction

The legal world of the previous millennium was a men's club, but that is no longer the case in the year 2020; or at least it should not be.¹ When Ruth Bader Ginsberg enrolled in Harvard Law School in 1956, she was one of nine women in a class of nearly five hundred men.² Today, women make up over half of all law students in America,³ and that number continues to grow. Gender is not the only demographic that has diversified over time; as time has elapsed and the legal community has implemented active and concrete steps to diversify,⁴ the legal profession has indeed grown to include more people from ethnic minorities, members of the LGBT community, and others who are considered 'diverse'.⁵ In 1884 Macon Bolling

¹ Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041 (2011).

² Ruth Bader Ginsburg, *The Changing Complexion of Harvard Law School*, 27 HARV. WOMEN'S L. J. 303 (2004); The first female law student in the United States, Lemma Barkaloo, was admitted to law school less than a century beforehand, in 1869, Ruth Bader Ginsberg, *Women's Progress at the Bar and On the Bench*, THE FED. L. 50 (2007); See also CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW at 49 (2d ed. 1993).

³ Deborah Rothman, *Gender Diversity in Arbitrator Selection*, DISP. RESOL. MAG. 22 (2012).

⁴ President William J. Clinton, Remarks to the Legal Profession on a new "Call to Action," Washington, D.C., Jul. 20, 1999, available at <http://www.lfoa.org/executivemessage/archiveclinton.html>. In his remarks, Clinton mapped out a two-step plan, calling upon lawyers to "recommit [them]selves to fighting discrimination." and secondly to "set the best possible example to tear down the walls in our hearts and in our habits" (Lawyer's Committee for Civil Rights Under the Law, Mission Statement, available at <http://www.lawyerscomm.org/aboutus/mission.html>).

⁵ Jason P. Nance & Paul E. Madsen, *An Empirical Analysis of Diversity in the Legal Profession*, 47 CONN. L. REV. 271 (2014); See generally AM. BAR. ASS'N, PRESIDENTIAL DIVERSITY INITIATIVE, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS (April 2010); See also Deborah L. Rhode, *Foreword: Diversity in the Legal Profession: A Comparative Perspective*, 83 FORDHAM L. REV. 2241

Allen became the first African American lawyer, though, at the time, African Americans were not typically admitted to law schools.⁶ In 1869, Howard University School of Law opened its doors, becoming the first black law school in America.⁷ That same year, Harvard Law School graduated its first black law student, George Lewis Ruffin.⁸ Following an 1896 ruling from the Supreme Court,⁹ University of North Carolina at Chapel Hill accepted the first four African American law students into a white law school.¹⁰ Today, the American Bar Association reports that 38.75% of all law students are non-white, and come from backgrounds which are classified as 'racially diverse'.¹¹ Studies also show that women comprise 52.49% of law students.¹²

These numbers are slowly transforming the statistics of legal practitioners,¹³ as we see the number of female partners at law firms is growing.¹⁴ In recent years, the number of females in various roles of legal practice has risen to 38%.¹⁵ Although this number still needs

(2015). Other diversity categories include but are not limited to individuals with disabilities and those from lower socioeconomic backgrounds.

⁶ See First African American Lawyers, JUST THE BEGINNING FOUNDATION, <http://www.jtbf.org/index.php?src=gendocs&ref=FirstAfricanAmericanLawyers&category=Inte>.

⁷ Howard University School of Law, <http://law.howard.edu/content/our-history>.

⁸ Clay Jr. Smith, *In Freedom's Birthplace: The Making of George Lewis Ruffin, the First Black Law Graduate of Harvard University*, 39 HOWARD L.J. 201, 209 (1995).

⁹ *Plessy v. Ferguson*, 163 U.S. 537 (1896), in which it was ruled that segregation was permitted only so long as equal facilities were provided for both races.

¹⁰ Charles E. Daye, *African American and Other Minority Law Students and Alumni*, 73 N.C. L. REV. 675, 681 (1995).

¹¹ SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASSOC., STATISTICS, (last visited Mar. 11, 2020).

https://www.americanbar.org/groups/legal_education/resources/statistics/ [hereinafter STATISTICS].

¹² *Id.*

¹³ Helia Garrido Hull, *Diversity in the Legal Profession: Moving from the Rhetoric to Reality*, 4 COLUM. J. RACE & L. 1, 2 (2013); Eric H. Jr. Holder, *The Importance of Diversity in the Legal Profession*, 23 CARDOZO L. REV. 2241 (2002).

¹⁴ Women and Minorities in Law Firms - By Race and Ethnicity, NALP (Jan. 2012), <http://www.nalp.org/women-minoritiesjan2012>; ELIZABETH CHAMBLISS, MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION 5-7 (2000); S. Elizabeth Foster, *The Glass Ceiling in the Legal Profession: Why Do Law Firms Still Have So Few Female Partners?*, 42 UCLA L. REV. 1631, 1636 (1995).

¹⁵ Jennifer Cheeseman Day, *More Than 1 in 3 Lawyers are Women*, The United States Census Bureau, May 8, 2018.

to grow,¹⁶ it is a vast improvement from Ruth Bader Ginsberg's days in the late 1950s as she struggled to find employment as a female lawyer.¹⁷

These numbers of female legal practitioners have improved in the public sector as well, as the number of female judges has been rapidly increasing. In today's federal courts, women make up 34% of all judges,¹⁸ and 33% of the Supreme Court Justices are female. Further progress can – and must still be made, echoing the sentiment of Supreme Court Justice Ruth Bader Ginsberg, “[W]hen I'm sometimes asked when will there be enough [women on The Supreme Court]? And I say when there are nine, people are shocked. But there'd been nine men, and nobody's ever raised a question about that.”¹⁹ Although the current statistics of female judges are from far satisfactory, they are certainly a step in the right direction, and over time female judges will become more commonplace.²⁰

However, as soon as one steps beyond the classic court or law firm setting and into the field of alternative dispute resolution (“ADR”), the increasingly growing numbers seem to vanish, as all hopes of diversity implode. The percentage of females in the field of arbitration is shockingly low. In 1985, when females made up over 30% of lawyers nationwide,²¹ they accounted for less than 10% of all arbitrators.²² A survey conducted by the ABA's Women in Dispute Resolution Committee (“WIDR”) found that by the year 2012 this number had only risen to about 18%.²³

¹⁶ See generally, SARAH E. REDFIELD, *DIVERSITY REALIZED: PUTTING THE WALK WITH THE TALK FOR DIVERSITY IN THE LEGAL PROFESSION* (2009).

¹⁷ Cheeseman Day, *supra* note 15.

¹⁸ According to a study conducted by The American Bench 2019, Forster-Long, LLC. *2019 Representation of United States State Court Women Judges*, NAT'L ASS'N OF WOMEN JUDGES (last visited Mar. 12, 2020) (citing THE AMERICAN BENCH (Forster-Long, LLC, 2019).

¹⁹ Ruth Bader Ginsberg, Associate Justice, Supreme Court of the United States at The Tenth Circuit Bench and Bar Conference in Boulder, Colorado (Sep. 12, 2012).

²⁰ See, e.g., CHAMBLISS, *supra* note 14.

²¹ Stacy Caplow & Shira A. Sheindlin, *Portrait of a Lady: The Women Lawyer in the 1980s*, 35 N.Y.L. SCH. L. REV. 391 (1990).

²² Nicole Buonocore, *Resurrecting A Dead Horse- Arbitrator Certification as a Means to Achieve Diversity*, 76 U. DET. MERCY L. REV. 483 (1999).

²³ Gina Viola Brown & Andrea Kupfer Schneider, *Gender Difference in Dispute Resolution Practice: Report on the ABA Section of Dispute Resolution Practice Snapshot Survey*, 47 AKRON L. REV. 975 (2015).

An arbitrator is also referred to as a neutral due to their role of remaining impartial and acting in a neutral capacity while presiding over the proceeding.²⁴ Presumably, a neutral third party must put aside all personal opinions, biases, and apply their legal expertise and professionalism to the proceeding over which they preside. Seemingly, given that all personal opinions are put aside, gender should not matter when selecting a neutral. What is it about dispute resolution, and arbitration in particular – that lends to such low percentages of female involvement? Why is the field so male-dominant when gender should not be a factor that matters at all?

This Article will look generally into gender-based discrimination, and more specifically into the manifestation of gender-based discrimination in arbitral appointments. By scrutinizing this matter, readers will emerge with a better understanding of the issue and move to affect change in order to resolve the issues. Part I will elucidate the research being conducted in the field of gender studies,²⁵ and connect the findings to arbitration. Part II unpacks the components of the issue of gender-based discrimination in arbitral appointments, namely ‘pale, stale, and male’.²⁶ Part III presents an overview of various diversity plans implemented at two prominent ADR providers, the American Arbitration Association (“AAA”) and the Judicial Arbitration and Mediation Services (“JAMS”). Part IV looks forward to future changes that can be implemented into existing diversity plans in order to further diversification, it also addresses issues that will arise when this change occurs. Part V introduces the author’s own suggestions as to what can be done to combat these emerging issues in order to successfully diversify arbitration. Part VI concludes the paper.

I. Background

Science has proven time and time again that neither men nor women are superior to one another, rather the two genders are

²⁴ Defined as “[O]f a judge, mediator, arbitrator, or actor refraining from taking sides in a dispute; impartial; unbiased.” *Neutral*, BLACK’S LAW DICTIONARY (11th ed. 2019).

²⁵ Most notably cited is the research by Deborah Tannen, but also included is the work of others such as Carrie Menkel-Meadow, Janet Shibley Hyde, and more.

²⁶ Andrew Lawler, *Goldin puts NASA on New Trajectory*, 272 SCIENCE MAG. 800 (1996).

simply different in a multitude of ways.²⁷ Men and women think differently,²⁸ act differently,²⁹ talk differently,³⁰ and even understand things differently from one another.³¹ Further studies have showed that men and women also problem solve differently,³² and even negotiate differently.³³ It is no surprise then, that these differences become apparent in dispute resolution, as many of these abilities are crucial to resolving disputes.³⁴

Carrie Menkel-Meadow argues that women are more likely to compromise in order to reach an agreement,³⁵ even if it requires making concessions and demanding less.³⁶ This does not automatically mean that men are better negotiators; in fact, women have been proven to have stronger advocacy skills, and when asked to negotiate on behalf of someone else, their fear of backlash seems

²⁷ See, e.g., CARYL RIVERS & ROSALIND C. BARNETT, *SAME DIFFERENCE: HOW GENDER MYTHS ARE HURTING OUR RELATIONSHIPS, OUR CHILDREN, AND OUR JOBS* (2004); Janet Shibley Hyde, *The Gender Similarities Hypothesis*, 60 AM. PSYCHOLOGIST 581, 582-86 (2005); Diane F. Halpern, *A Cognitive-Process Taxonomy for Sex Differences in Cognitive Abilities*, 13 (4) CURRENT DIRECTIONS IN PSYCHOL. SCI. 135 (2004).

²⁸ DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* (1990).

²⁹ DEBORAH TANNEN, *TALKING FROM 9 TO 5: WOMEN AND MEN IN THE WORKPLACE: LANGUAGE SEX AND POWER* (1995).

³⁰ Campbell Leaper & T. Evan Smith, *A Meta-Analytic Review of Gender Variations in Children's Language Use: Talkativeness, Affiliative Speech, and Assertive Speech*, 40 DEVELOPMENTAL PSYCHOL. 993-1027 (2004).

³¹ Daniel Voyer, Susan Voyer, & M. P. Bryden, *Magnitude of Sex Differences in Spatial Abilities: A Meta-Analysis and Consideration of Critical Variables*, 117 PSYCHOL. BULL. 250-70 (1995).

³² Janet Shibley Hyde, Elizabeth Fennema, & Susan Lamon, *Gender Differences in Mathematics Performance: A Meta-Analysis*, 107 PSYCHOL. BULL. 139-55 (1990).

³³ Karin Hederos Eriksson & Anna Sandberg, *Gender Differences in Initiation of Negotiation: Does the Gender of the Negotiation Counterpart Matter*, 28 NEGOT. J. 407 (2012).

³⁴ Carrie Menkel-Meadow, *Women in Dispute Resolution: Parties, Lawyers and Dispute Resolvers - What Difference Does Gender Difference Make*, 18 DISP. RESOL. MAG. 4, 5-6 (2012); Deborah Tannen theorizes that women tend to engage in rapport talk whereas men engage in report talk, meaning women seek to build relationships and develop trust while men want to get straight to problem solving. Each of these styles can be beneficial for negotiating. TANNEN, *supra* note 29.

³⁵ LINDA BABCOCK AND SARA LASCHEVER, *WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE* (2003).

³⁶ Deborah M. Kolb, *Too Bad for the Women or Does It Have to Be? Gender and Negotiation Research Over the Past Twenty-Five Years*, 25 NEGOT. J. 515 (2009).

to disappear.³⁷ Eliciting a professional mindset and viewing herself as an advocate can lead a woman to the same successful outcome when negotiating on her own behalf, too.³⁸

These facts demonstrate that that men and women simply operate differently, and stereotypically possess varying skill sets, each of which can be honed for effective dispute resolution skills in a myriad of ways. Stereotypically, women are more aware of others' psychological needs of others and are more patient and sympathetic in their problem-solving approaches,³⁹ these aspects of awareness and attention to the human factor of care is referred to as an ethic of care.⁴⁰

These compassion and understanding related skills make female judges well-suited to family court, for example. This pairing is not because family court is the lowest court, but because these stereotypical attributes allow a woman to exercise her nurturing and sympathetic approach toward the litigants, properly analyze a complex and heart wrenching family case, and appropriately account for the best of all parties involved.⁴¹

This phenomenon repeats itself but is manifested differently in alternative dispute resolution ("ADR"). A good judge is one who has a steady grasp on the law, has sharp analytical skills, and is decisive. The requisite attributes of a good mediator are not necessarily skills that can be taught in law school; rather, they are soft skills that demonstrate strong interpersonal skills,⁴² such as the ability to achieve rapport with parties and build trust.⁴³ A successful neutral must be able to have a relationship with their clients, a judge

³⁷ G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE* (2d rev. ed. 2018) at 19.

³⁸ *Id.*

³⁹ TANNEN, *supra* note 29.

⁴⁰ In her seminal work, Gilligan develops a theory in which she argues that women act based on an ethic of care – emphasizing empathy, benevolence, and compassion; whereas men operate in an ethic of justice, and they make moral choices through a measure of rights of the people involved and chooses the solution that seems to damage the fewest people. CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982).

⁴¹ Susan L. Miller & Shana L. Maier, *Moving Beyond Numbers: What Female Judges Say About Different Judicial Voices*, 29 *J. OF WOMEN, POL. & POL'Y* 527 (2008).

⁴² Helen Collins, *The Most Important Personal Qualities A Mediator Needs*, INSTITUTO DE CERTIFICAÇÃO E FORMAÇÃO DE MEDIADORES LUSÓFONOS (2005).

⁴³ Stephen B. Goldberg and Margaret L. Shaw, *The Secrets of Successful (and Unsuccessful) Mediators Continued: Studies Two and Three*, 23 *NEGOT. J.* 393 (2007).

does not. Based on these stereotypes about women, and in particular, female legal practitioners, one would think that women would make for the ideal candidates for these positions, given their natural inclination toward fostering relationships, building trust, listening, and problem solving.

However, working successfully as a neutral is more complex than building relationships with clients. Some mediation settings, such as divorce mediation, require the ability to maintain peace between disputing parties.⁴⁴ Yet, in more adverse environments, such as a commercial arbitration, the arbitrator must be able to operate in an analytical fashion, much like a judge.⁴⁵ Given the vast range of proceedings included within the greater field of ADR, it is impossible to point to either gender – male or female – as more suitable for the job.⁴⁶ Each proceeding may require a different skill set that is possessed by a different individual of any gender. Some proceedings will be more suited for a male neutral, while others may benefit from a female,⁴⁷ and in the vast majority of proceedings, the gender of the neutral does not matter.⁴⁸

Deborah Tannen conducted years of research on gender studies; her studies show that each gender has a unique style of communication, and an individual who knows how to recognize his

⁴⁴ Daniel Bowling & David Hoffman, *Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on the Mediation*, 16 NEGOT. J. 5 (2000).

⁴⁵ Mauro Rubino-Sammartano, *The Decision-Making Mechanism of the Arbitrator vis-à-vis the Judge*, 25 J. OF INT'L ARB. 167 (2008).

⁴⁶ Menkel-Meadow *supra* note 34.

⁴⁷ Research has proven that male and female mediators are equally effective at reaching settlements, but there are differences in certain settings, such as emotionally charged sessions in which women have proven more successful at maintaining control over a session and reaching a final settlement, David Maxwell, *Gender Differences in Mediation Style and their Impact on Mediator Effectiveness*, 9(4) MEDIATOR Q. 353 (1999).

⁴⁸ When dealing with a sensitive issue such as sexual harassment or divorce, gender may become a relevant factor as the parties may often disagree on the gender of their neutral, as in most cases the [female] victim will identify more with a woman, and the [male] perpetrator will prefer a male, Vivian Berger, *The Mediator's (Female) Gender: Irrelevant, Important, or In-Between?* 30 ALTERNATIVES 83 (Apr. 12, 2001); Statistically, women are more likely to be satisfied with an outcome at the hands of a female mediator, regardless of the nature of the disputed issue, Lisa Blomgren Amsler, et. al., *Dispute System Design and Bias in Dispute Resolution*, 70 SMU L. REV 913, 937 (2017); *See generally*, TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS, DEFENDANTS, PLAINTIFFS AND GENDERED PARTIES (2009).

or her own style will be successful at applying it to his or her professional life.⁴⁹ Therefore, the two genders approach communication-based negotiations differently, but neither is better or worse than the other, this is an important factor to consider. In contrast, Janet Shibley Hyde found that the communication behaviors necessary for effective negotiation are equal between the two sexes.⁵⁰ Her studies revealed evidence that there are more similarities than differences between the two sexes, and that it is the stereotypes heavily ingrained within society that lead people to believe otherwise.⁵¹ Thus, she concludes that the communicative behavioral components of a negotiation are equal between the two sexes.⁵²

These studies indicate that it is impossible to determine that either men or women are objectively better negotiators,⁵³ making a blanket statement as such is too general and neglects to consider the nuances of different negotiations. Each case is so vastly different from the next, and there are so many components and factors involved that it would be impossible to determine whether one gender would be better than the other. The conclusive evidence from Shibley Hyde's studies prove that the two genders are equal, and therefore gender should not be a factor when selecting an arbitrator.

More recent studies indicate that women repeatedly outperform men in negotiations.⁵⁴ This finding proves that women do, in fact, belong in the arena amongst other ADR practitioners. This information further reinforces the question— why is the field of ADR, and for purposes of this paper, specifically arbitration, dominated by men, and why are there so few women practicing in the field?⁵⁵

⁴⁹ TANNEN, *supra* note 29.

⁵⁰ Shibley Hyde et. al., *supra* note 32.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Charles Craver, *The Impact of Gender on Negotiation Performance*, 14 CARDOZO J. OF CONFLICT RES. 339 (2013).

⁵⁴ Wen Shan, Josh Keller & Damien Joseph, *Are Men Better Negotiators Everywhere? A Meta-Analysis of How Gender Differences in Negotiation Performance Vary Across Culture*, 40 J. ORG. BEHAV. 1 (2019); Another study shows that while men and women perform equally, women are more likely to succeed in achieving results in complex, emotionally charged settlements, Blomgren Amsler, et. al., *supra* note 48; For more, see Jennie Huang and Corinne Low, *The Myth of the Male Negotiator: Gender's Effect on Negotiation Strategies and Outcomes*, Technical Report, U. of Pennsylvania (2018).

⁵⁵ Menkel-Meadow *supra* note 34.

II. Lack of Diversity

Despite the aforementioned studies that indicate that women are equally qualified as their male counterparts,⁵⁶ the reality is that women are not chosen to preside over arbitrations with the same frequency as men.⁵⁷ In part, this observed phenomenon is due to the fact that there are fewer female arbitrators to altogether;⁵⁸ this means that statistically women are eliminated from strike lists at a higher rate.⁵⁹ However, even when qualified females are available to arbitrate, when given a choice, parties tend to appoint male arbitrators over women.⁶⁰

In order to properly understand and potentially repair the gender imbalance in arbitration, it is necessary to evaluate who makes it to the rosters of the large ADR providers such as Judicial Arbitration and Mediation Services (“JAMS”) and the American Arbitration Association (“AAA”). An analysis of these institutions’ respective current rosters and demographical makeup reveals lists comprised mostly of middle-aged to elderly males,⁶¹ which is not surprising. It is important to ascertain what causes this differential in gender representation.⁶²

In 1992, NASA scientist Daniel Goldin complained that his industry was too ‘male, pale, and stale’.⁶³ The same phenomenon is true of many other industries as well, including the legal industry, and more specifically, the arbitration community. Time and time again, when parties go through the process to appoint an arbitrator, the old white men get chosen for the job while the young, driven, and talented women [of color] get cast to the side. In order to

⁵⁶ See generally Tannen, *supra* note 28 and Shibley Hyde et. al., *supra* note 32.

⁵⁷ Rothman, *supra* note 3; Caley Turner, *Old White Male: Increasing Gender Diversity in Arbitration Panels*, CPR INSTITUTE (2014).

⁵⁸ See *infra* next paragraph as to why fewer women make it to arbitration rosters to begin with.

⁵⁹ ADR providers often operate with strike lists, providing the parties with a list of computer-generated arbitral candidates based on the parties’ requirements, and then rather than selecting an arbitrator, the parties strike off unfit candidates until an arbitrator is chosen by process of elimination.

⁶⁰ Turner, *supra* note 57.

⁶¹ See *infra* Part III.

⁶² Brown & Kupfer Schneider, *supra* note 23 at 991.

⁶³ Lawler, *supra* note 26.

understand why this occurs, it is essential to break this down into the three separate components: old, white, and male.

1. Old

Gender aside, when appointing an arbitrator, the number one quality that parties seek in a candidate is experience.⁶⁴ Arbitrator rosters are largely under representative of individuals under sixty years old,⁶⁵ because no one is want to hire a fresh law graduate to determine the outcome of a multi-million-dollar deal, or other high-stake or complex negotiations.⁶⁶ Parties seek experienced individuals; those who have presided over many arbitrations and those who are subject matter experts and well-versed in the relevant field.⁶⁷ Appointing an experienced arbitrator also ensures that the party can resolve the dispute sooner, as time is not wasted explaining the field of dispute to the arbitrator.⁶⁸ Nonetheless, it is not sufficient only to be experienced in arbitration; parties also seek individuals with substantial civil law experience and expertise. For this reason, the most attractive candidates as arbitrators are retired judges who have spent many years on the bench resolving legal disputes and creating binding judicial opinions,⁶⁹ as this work prepares a judge to become an excellent arbitrator. Most judges are appointed after years of working as lawyers, and since judges are appointed for

⁶⁴ Charles J. Moxley Jr., *Selecting the Ideal Arbitrator*, 60(3) DISP. RES. MAG. 24 (2005); James J. Palmer, *What to Look for in a Labor Arbitrator*, 32 GP SOLO 50, 51 (2015); *Qualification Criteria for Admittance to the AAA Labor Panel*, AAA, [hereinafter AAA Criteria] https://www.adr.org/sites/default/files/document_repository/Labor_QualificationCriteria_AAAPanel.pdf (last visited Mar. 25, 2020).

⁶⁵ Consider in contrast that only 15.6% of American population is 65 years and older, Kathryn Meyer, *Arbitration: An Old (White) Boys' Club*, PENN STATE ARB. L. R. BLOG (APR. 22, 2019).

⁶⁶ *Id.*; Piotr Nowaczyk, *It is Not Easy to Start Out as an Arbitrator*, Expert Guides, (Sept. 5, 2017) <https://www.expertguides.com/articles/it-is-not-easy-to-start-out-as-an-arbitrator/arrbteyb>.

⁶⁷ Brian Farkas, *Arbitration Law: Theory and Practice Class* (Mar. 19, 2020) (Recording on file with author).

⁶⁸ This is not always the case, as technically speaking parties are entitled to select anyone they please to serve as an arbitrator, regardless of qualification or experience, Elizabeth Shampnoi, *The Arbitrator Selection Process and New Ethical Standards*, 75 THE CPA J. 60 (2005).

⁶⁹ Rothman, *supra* note 3; Arbitrators only become arbitrators after years of experience as attorneys, judges, academics, or in other relevant professions, with most individuals becoming “fully-fledged arbitrators” after reaching age fifty, Meyer *supra* note 65.

life,⁷⁰ it is uncommon to find judges in their younger years stepping down from the bench and then becoming arbitrators. Thus, most of the arbitrators today are older individuals who are transitioning into retirement but not quite ready to leave the profession.

2. White

Once it is established why young arbitrators are uncommon, it is critical to evaluate the next factor in the sequence after age – race. As mentioned previously, the rise in the percentages of students of color attending law school is a relatively recent development. People of color are vastly accepted in the legal community today, previous and current Supreme Court Justices include Thurgood Marshall, and Sonia Sotomayor, respectively. However, this phenomenon of the inclusion of non-white members in the legal community was not always observed.

It is now well understood why the majority of arbitrators are older, and if one reflects back two generations to when the current elderly arbitrators were young practitioners, most of the lawyers who rose to higher ranks in the field were white. At that time, law schools had begun to accept students of color, but it was not as commonplace as it is today. Even with the few acceptances that were granted, prejudice existed beyond the walls of the academic institutions, and thus people of color experiencing difficulty securing jobs as lawyers and moving upward in the field to more advanced positions.⁷¹

Arbitrators currently serving on rosters at institutions such as JAMS and the AAA have risen through many ranks to reach where they are now, they represent the best of the best from their respective fields. AAA, and many institutions require arbitrators to have at least ten years of senior-level experience, training in dispute resolution, display leadership in their fields, and possess many other competitive criteria.⁷² Of the top lawyers, only a select few become judges, and of those judges, most do not seek out employment as arbitrators upon retirement from the bench. Those who ascend the metaphorical ladder all the way to being hired at top ADR institutions stand out, and since the individuals who stood out at the beginning of their legal careers two generations ago were primarily

⁷⁰ This is referring to federal judges, every state jurisdiction operates differently.

⁷¹ Ellen Waldman, *Mindfulness, Emotions, and Ethics: The Right Stuff?* 10 NEV. L. J. 513, 526 (2010).

⁷² AAA Criteria, *supra* note 64.

white, those are the same individuals who have come of age and become the present-day arbitrators.⁷³ As a result, statistics indicate that the vast majority of candidates for arbitrator rosters are heterosexual, cis-gendered, white men over sixty, and people from any other class will be under represented.⁷⁴

3. Men

Much like people of color, women were not always accepted in the legal profession, and therefore fewer of them are found in previous generations of legal practice. Today, women make up over 50% of those entering the legal profession,⁷⁵ it is prudent to observe what happens in thirty years when the previous generation of lawyers and judges retire and some of them opt to become arbitrators. Will there be an influx of female arbitrators, or will the numbers remain stagnant? Only time will tell, but much like the situation with race, the superstar lawyers of yesteryear became the arbitrators of today, and those individuals were mainly male.

When all of these factors are combined, it is clear that the panels consist of non-diverse individuals due to the norms of lawyers thirty, forty, and fifty years ago, and although society has moved on since, the arbitral panels remain consistent with those expectations that today are no longer in place.⁷⁶ Additionally, the vast majority of those appointed as arbitrators are those who have become partners at their firms or retired from the bench and the number of women and people of color in previous generations that attained those positions is smaller.⁷⁷ Thus, it becomes evident why the vast majority of arbitrators are old white men.⁷⁸ The current

⁷³ David A. Hoffman & Lamont E. Stallworth, *Leveling the Playing Field for Workplace Neutrals: A Proposal for Achieving Racial and Ethnic Diversity*, 63 DISP. RESOL. J. 37 (2008).

⁷⁴ Meyer *supra* note 65.

⁷⁵ STATISTICS, *supra* note 11.

⁷⁶ Volpe, Bush, et al. *Barriers to Participation: Challenges Faced by Members of Underrepresented Racial and Ethnic Groups in Entering, Remaining, and Advancing in the ADR Field*, 35 FORDHAM URB. L.J. 119 (2008); *See also*, CLAUDE STEEL, WHISTLING VIVALDI: AND OTHER CLUES TO HOW STEREOTYPES AFFECT US (2010) which discusses the effects of historically pervasive discrimination and how it contributed to the stereotypes that still exist today.

⁷⁷ Kimberly Smith, JAMS Senior Vice President and Chief Legal and Operating Officer in Paige Smith, *Lack of Arbitrator Diversity Is an Issue of Supply and Demand*, BLOOMBERG LAW (May 15, 2019, 1:04 PM).

⁷⁸ Berwin, Leighton, Paisner, *International Arbitration Survey: Diversity on Arbitral Tribunals, Are We Getting There?* (Jan. 10, 2017),

makeup of arbitrators underscores that it is imperative to change the status quo and allow more women, people of color, and other minorities to enter the field.⁷⁹

III. Increased Diversity

This article is not the first to emphasize the need for change as many articles have preceded this, and many efforts to effect change have been made.⁸⁰ WIDR has long discussed the need to change the neutral selection process in order to increase the number of women serving as arbitrators and ensure fair representation for women and other minorities.⁸¹ The ADR providers themselves have pledged to diversify their panels and introduce more women and people of color to their rosters.⁸² Many laws, regulations, and mechanisms have been implemented to increase diversity and offer incentives for parties who select diverse candidates. The following section will survey some of these and will explore the commitments of both the AAA and JAMS to increase diversity.

As recently as February 2020, legislation has been introduced into the New York Senate to amend the judiciary law to regulate the compilation of data with respect to demographics such as ethnicity, race, gender, gender identity, etc. and submit a report of the findings.⁸³ The rationale for this legislation is that by tracking the data, the judicial bodies will hold themselves more accountable and through this increase awareness of court practices, and in turn, increase diversity within the courts of New York.⁸⁴

In 2018, the Dispute Resolution Section of the American Bar Association (“ABA”) enacted resolution 105⁸⁵ to encourage ADR providers to “expand their rosters with minorities, women, persons

https://www.bclplaw.com/images/content/1/5/v1/150194/FINAL-Arbitration_Survey_Report.pdf.

⁷⁹ Rothman, *supra* note 3; F. Peter Phillips, *Diversity in ADR: More Difficult to Accomplish than First Thought*, 15 DISP. RESOL. MAG. 14, 14-15 (2009).

⁸⁰ Gemma Smyth, *Considering Democracy and ADR: Diversity Based Practice in Public Collaborative Processes*, 19 W.R.L.S.I. 13 (2011).

⁸¹ Deborah Masucci, *From the Chair*, 18 (3) DISP. RESOL. MAG. 1, 2 (2012).

⁸² Principles for ADR Provider Organizations, CPR-Georgetown Commission on Ethics and Standards of Practice in ADR (May 1, 2002).

⁸³ S7703 NY S.B. 27 (NY Feb. 2020), [hereinafter NY Senate Bill].

⁸⁴ *Id.*

⁸⁵ American Bar Association, *A.B.A. Resol. 105*

<https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/105.pdf> (Aug. 6, 2018).

with disabilities, and persons of differing sexual orientations and gender identities”⁸⁶ and to “encourage the selection of diverse neutrals.”⁸⁷ Ten years prior in 2008, the ABA adopted ‘Goal III: Eliminate Bias and Enhance Diversity’.⁸⁸ This Goal split the responsibility for diversity into two - the ADR providers’ rosters, as well as the parties’ selection. The resolution highlighted main issues in achieving parity, and in general, diversity amongst neutrals.⁸⁹

1. AAA

The AAA advertises that 24% of its current arbitration roster consists of women and minorities, and that the figure is constantly rising,⁹⁰ but this was not always the case. The AAA received a major push toward increasing diversity after an upheaval that exposed the lack of diversity to the forefront of the general public’s eye.⁹¹

In 2018, rapper and entrepreneur Shawn Carter (otherwise known as Jay-Z) caused a commotion as he challenged an arbitration agreement by requesting a stay of arbitration on the grounds of violation of public policy at the AAA.⁹² Carter’s Iconix Brand Group entered a \$200 million trademark dispute with another company, and commenced proceedings at the AAA pursuant to the agreement in their contract. Difficulty ensued when it came time to

⁸⁶ *Id.* at 11.

⁸⁷ *Id.*

⁸⁸ *Goal III*, AM. BAR ASSOC. 2008

https://www.americanbar.org/content/dam/aba/events/racial_ethnic_diversity/aba_diversity_plan_may_2011.pdf.

⁸⁹ *An Annual Report on Diversity in Leadership Positions within the American Bar Association, Combined Goal III Report*, 2018 A.B.A. SEC. DISP. RESOL. 2018.

⁹⁰ *Diversity and Inclusion Initiatives*, AMERICAN ARBITRATION ASSOCIATION, <https://www.adr.org/DiversityInitiatives>

⁹¹ Although much had been said about diversity in ADR before that point, it was all within the framework of legal academia. After this incident the mainstream media was aware of the lack of diversity in ADR, too. Many of the sources covering this issue are not articles from law reviews, but rather from tabloids and other pop culture platforms.

⁹² *Carter et. al. v. Iconix Brand Group Inc. et. al.*, New York State Supreme Court, New York County, No. 655894/2018 at 7, [hereinafter Jay-Z Case]. Carter argued that the overwhelmingly white pool of available arbitrators was a violation of New York public policy that could potentially cause irreparable harm to his interests, and that the lack of African American arbitrators deprives black litigants like himself of equal protection of the laws, equal access to public accommodations, and misleads consumers into believing that they will receive a fair and impartial adjudication.

select an arbitrator. The AAA provided a list of more than two hundred neutrals from its ‘large and complex’ roster, but when Carter began reviewing the candidates, he could not identify a single African American arbitrator,⁹³ “After repeated requests to the AAA for diverse arbitrators with expertise in complex commercial law, the AAA was able to provide only three neutrals it identified as African-American: two men—one of whom was a partner at the law firm representing Iconix in this arbitration and thus had a glaringly obvious conflict of interest, and one woman.”⁹⁴

Carter alleged that the failure of the AAA to provide diverse arbitral candidates was a violation of New York’s public policy against discrimination and based on these grounds, Carter motioned for a permanent stay, since it is unfair to compel the arbitration in unfair and discriminatory circumstances.⁹⁵ Ultimately, Carter and the AAA came to a compromise in which they offered him additional arbitrators to choose from, some of whom were African-American.⁹⁶ In addition, the AAA acknowledged its lack of minority arbitrators and expressed willingness to implement other means of improving diverse representation for further arbitrations.⁹⁷ The modified AAA Commitment to Diversity states that The 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.⁹⁸

2. JAMS

As per its website,⁹⁹ JAMS commits itself to being “steadfast in pursuing increased diversity among ADR practitioners” and

⁹³ Brief for Petitioner at 2, *Carter v. Iconix Brand Group, Inc.*, No. 10 (N.Y. Sup. Ct.) 2008 [hereinafter *Carter Brief*]; For the importance of appointing a neutral of the same racial background and why Jay-Z felt this issue was so compelling, see Lorig Charkoudian & Ellen Kabcenell Wayne, *Does It Matter if My Mediator Looks Like Me? The Impact of Racially Matching Participants and Mediators*, 15 DISP. RESOL. MAG. 22 (2009).

⁹⁴ *Carter Brief*, *id.* at 2.

⁹⁵ *Id.* at 6.

⁹⁶ Eriq Gardner, *Jay-Z Scores Diversity Commitment from American Arbitration Association*, *The Hollywood Reporter* (Dec. 10, 2018).

⁹⁷ Darlene Ricker, *Jay-Z’s ADR Problems: Mogul’s Case Spotlights Lack of Diverse Arbitrators*, 105 A.B.A J. 9 (2019).

⁹⁸ *Roster Diversity & Inclusion*, AMERICAN ARBITRATION ASSOCIATION, <https://www.adr.org/RosterDiversity>

⁹⁹ *Diversity at JAMS*, JAMS, <https://www.jamsadr.com/diversity/>

actively seeks to employ female and minority neutrals.¹⁰⁰ The statistics advertised by JAMS show that 45% of all JAMS employees are diverse employees, and 72% of all JAMS employees are female, of which 27% are in senior management positions.¹⁰¹ Additionally, in 2018, JAMS introduced its diversity and inclusion arbitration clause.¹⁰²

*“The parties agree that, wherever practicable, they will seek to appoint a fair representation of diverse arbitrators (considering gender, ethnicity and sexual orientation), and will request administering institutions to include a fair representation of diverse candidates on their rosters and list of potential arbitrator appointees.”*¹⁰³

This clause was inspired by the Equal Representation in Arbitration Pledge,¹⁰⁴ which JAMS joined in 2016. In doing so, JAMS became one of the first American institutions to commit to a diverse and fair list of representative potential arbitrators.¹⁰⁵

The absence of minority neutrals on ADR rosters, panels, and court appointments stems from a system of exclusion and invisibility,¹⁰⁶ and without a conscience motion toward active inclusion and visibility, ADR providers will continue to display a commitment to diversity, though their rosters will stay largely unchanged.¹⁰⁷

¹⁰⁰ Kimberly Taylor, *Model Arbitration Rider Encourages Diversity in Selection of Neutrals*, CORP. COUNS. BUS. J. (Sep. 7, 2018).

¹⁰¹ *Diversity at JAMS*, *supra* note 99.

¹⁰² JAMS Clause Workbook, JAMS 2018

<https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS-ADR-Clauses.pdf>.

¹⁰³ *Id.* at 4.

¹⁰⁴ EQUAL REPRESENTATION IN ARBITRATION

<http://www.arbitrationpledge.com/about-the-pledge> [hereinafter The Pledge].

¹⁰⁵ *General Announcements*, JAMS (May 29, 2018)

<https://www.jamsadr.com/news/2018/jams-introduces-inclusion-rider-promotes-diversity-initiatives-in-adr>.

¹⁰⁶ Floyd D. Weatherspoon, *The Impact of the Growth and Use of ADR Process on Minority Communities, Individual Rights, and Neutrals*, 39 CAP. U. L. REV. 789 (2011).

¹⁰⁷ Victoria Pynchon, *Negotiating Gender: Why So Few Women Neutrals?* NEGOT. L. BLOG (Feb. 28, 2010),

<http://www.negotiationlawblog.com/2010/02/articles/conflict-resolution/negotiating-gender-why-so-few-women-neutrals/>.

IV. Further Change

No solution is perfect, and as one dilemma is combatted, several, new issues arise; every solution brings with it a myriad of new problems to tackle. The ADR providers have established pledges, clauses, and riders in order to address the issue of diversification in the field. However, given the existence of these creative solution, how can they be properly implemented and effectively executed? As this is addressed, a critical new problem arises; that of enforcement.

The ABA created its diversity plan,¹⁰⁸ but what about its implementation? The plan offers six different implementation suggestions, some of which are vague or impractical, and leaves much to be desired. For example, it states:

1. *“That the Association designate the Executive... Each year, that person will develop and secure approval of specific annual implementation steps with a corresponding timeline, budget and assessment procedure.”*¹⁰⁹

This step does not actually go into detail about what the steps will be, but only states that someone is tasked with designing a system annually. Additionally, another step reads:

6. *“That the ABA coordinate a centralized data collection and reporting center for diversity information, combining data from the Goal III reports and national and regional affinity bars, as recommended in the 2010 ABA Presidential “Next Steps” Report (recommendation E.3. for Bar Associations).”*¹¹⁰

This step is reminiscent of the New York Senate Bill, which was introduced recently in February 2020,¹¹¹ as collecting data provides a clearer image of the reality and incentivizes the pursual of continued improvement.

JAMS offers its inclusion rider,¹¹² but how does the institution ensure that it is actually being implemented practically? Since parties have the right to appoint a neutral of their choosing,

¹⁰⁸ Diversity Plan, AM. BAR ASSOC. (May 2011).

https://www.americanbar.org/content/dam/aba/events/racial_ethnic_diversity/aba_diversity_plan_may_2011.pdf.

¹⁰⁹ *Id.* at 4.

¹¹⁰ *Id.* at 7.

¹¹¹ NY Senate Bill *Supra* note 83.

¹¹² JAMS, *supra* note 99; Taylor, *supra* note 100.

JAMS cannot force its clients to choose diverse neutrals, however JAMS strongly encourages diversity wherever possible. Mark Smalls, VP, CMO of JAMS, explains that utilizing a diverse list of candidates available to clients strengthens JAMS' commitment to corporate social responsibility, a value that many of JAMS' clients emphasize and champion.¹¹³

Additionally, JAMS takes great pride in being one of the first ADR providers to take the Equal Representation in Arbitration Pledge,¹¹⁴ and hopes to set example for others that join in the mission to achieve gender parity in arbitration representation.¹¹⁵ JAMS categorizes the lack of women in the field as a supply and demand issue.¹¹⁶ JAMS primarily hires people who have reached senior levels or are retiring from the bench, and statistically, the number of women and people of color reaching that echelon is lower than their white male counterparts.¹¹⁷ JAMS may hire and promote female and minority neutrals, but ultimately it is the parties who select the arbitrator. Therefore, JAMS is limited at the supply end; JAMS make take care to ensure that women and minorities are represented on their rosters, but the clients control the demand. The emerging issue is how to effectively encourage clients to value diversity as a factor in neutral selection without impeding on the selection process.

JAMS arbitration selection is done by the means of a strike list; if the parties have not named a particular arbitrator in their contract, JAMS will provide a list based on the parties' criteria. Each party then strikes off two named candidates and ranks the remaining neutrals in order of preference. The neutral with the highest cumulative ranking is selected to arbitrate. In this regard, JAMS does its part in maintaining diversity by ensuring that the strike list itself contains diverse candidates.¹¹⁸ However, the question remains, if this current protocol is the maximum that JAMS can do to promote diversity, or if perhaps JAMS can take further steps toward diversification.

¹¹³ Mark Smalls, *Making the Case for Greater Diversity in ADR*, JD SUPRA (Oct. 14, 2019).

¹¹⁴ The Pledge, *supra* note 104.

¹¹⁵ Smalls, *supra* note 113.

¹¹⁶ Taylor, *supra* note 100.

¹¹⁷ Smith, *supra* note 77.

¹¹⁸ *Id.*

When facing diversity issues, the logical solution is to implement affirmative action measures. When a disadvantaged group suffers from discrimination, affirmative action policies negate this harmful discrimination with positive discrimination and aim to level the playing field to ensure that all individuals are granted the same opportunities and treated equally regardless of their background.¹¹⁹ These measures involve preferential treatment, which prima facie seems unfair; but the purpose this serves is to allow these disadvantaged candidates to have the same opportunities that the rest of the privileged majority population enjoys.¹²⁰

Affirmative action has been implemented in fields across the spectrum, ranging from college admissions to employment,¹²¹ including the legal field. Law schools apply affirmative action when accepting students,¹²² and law firms employ affirmative action when hiring and promoting their lawyers.¹²³ This practice of affirmative action should work for ADR providers as well, but it does not. Affirmative action functions by means of preferential treatment given by the company to the minority candidate in need. For example, a law firm that applies affirmative action to its hiring process might promote a female associate to partner sooner than her

¹¹⁹ Affirmative Action, *Oxford Dictionaries*. Oxford University Press. Retrieved 13 February 2014.

¹²⁰ Sharam Kohan, *Discrimination*, HARV. L. BLOG (Nov. 1, 2014) last accessed May 5, 2020 <https://web.archive.org/web/20150518061955/http://blogs.law.harvard.edu/sharamkohan1/affirmative-action/>.

¹²¹ Affirmative action in the workforce was first introduced in an executive order by President Kennedy, pertaining only to government contractors. The order required contractors to “take affirmative action to ensure that applicants are employed, and employees are treated during employment, without regard to their race, creed, color, or natural origin.” Exec. Order No. 10925, 26 Fed. Reg. 1977 (1961).

¹²² There is an argument that affirmative action is taken even prior to the law school applications, as early as the administration of the Law School Admission Test, as studies have proven that minority students score lower than their Caucasian counterparts. The Law School Admission Council has been under a lot of pressure because the test is being called systematically racist. See Mona E. Robbins, *Race and Higher Education: Is the LSAT Systemic of Racial Differences in Education Attainment?* 18 U. PENNSYLVANIA SUMMER PROGRAM FOR UNDERGRADUATE RESEARCH (2017).

¹²³ Donald Nicolson, *Affirmative Action in the Legal Profession*, 33 J. L AND SOCIETY 109 (2006); 380; D.B. Wilkins and G.M. Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 496, 602 (1996).

equal male counterpart because the firm have affirmative action quotas to fill, and the female meets the necessary criteria.¹²⁴ In ADR proceedings, the parties hire the neutral, and even if they do not directly choose their own specific arbitrator directly, the parties maintain control over the criteria by which the arbitrator is selected,¹²⁵ this process complicates the employment of affirmative action in arbitration.. As a unified entity, an ADR provider may implement affirmative action into their process internally, but it cannot enforce that same policy upon individual parties who are not part of the company; parties cannot be forced to comply with the company's commitment to affirmative action if they wish to appoint a specific neutral. Affirmative action works based on percentages, and for many of the parties this one proceeding is one hundred percent of their cases at that ADR provider. Given these figures, it is difficult to picture what an application of affirmative action would look like in that scenario. Furthermore, affirmative action impedes the ADR process itself. An essential component of the ADR process is the appointment of an unbiased and neutral mediator or arbitrator of the parties' choosing. Affirmative action threatens to take that choice away from the parties, rendering the proceeding invalid as it is no longer true to the definition of ADR.

Therefore, if affirmative action is off the table, there must be other solutions ADR providers can implement to further diversity in arbitral appointments and encourage the selection of female neutrals. Clients and lawyers must be encouraged to think more broadly about who they use as neutrals and recognize the importance of diversity.¹²⁶ It should become commonplace and acceptable to embrace diverse panels as the norm and to recognize non-diverse

¹²⁴ In reality men are promoted at a higher rate than women, but this is a hypothetical example to illustrate the failure of implementing affirmative action in ADR. For more on the harsh reality of women in the legal field see Cynthia L. Cooper, *Broken Rungs on the Career Ladder: A New Analysis of Problems Encountered by Women Lawyers in Private Practice*, AM. BAR ASSOC. (Jan. 21, 2020).

¹²⁵ Often instead of nominating a specific neutral, parties will submit required criteria and the ADR provider will provide a list for the parties to choose from, or even select the arbitrator on their behalf. This is especially true when there is a sole arbitrator. In three arbitrator panels, most often the parties will each select one arbitrator, and those two arbitrators will then nominate the third member of the panel. See e.g. Arbitrator Selection, AMERICAN ARBITRATION ASSOCIATION, available at <https://www.adr.org/ArbitratorSelection>.

¹²⁶ Brown & Kupfer Schneider, *supra* note 23 at 995.

panels as though they are deficient.¹²⁷ A panel that does not have the potential to adequately represent the demographical makeup of society does not represent society and it lacks the benefit of diversity of perspectives. In that sense, a non-diverse arbitral panel is an incomplete panel, lacking proper representation of society, of the legal field, and of arbitration.¹²⁸ Creating a ‘new normal’ of diversity will not only promote corporate social responsibility or benefit the cause of diversity for sake of the diverse neutrals, but it will also benefit the parties as it provides a broader collection of minds coming together to determine the outcome of their case. In particular, when considering candidates to appoint to a three arbitrator panels, there should be a presumption that a woman be selected as part of a panel.¹²⁹ Diversity breeds expansion of thought, opinion, experience and exposure; it creates legitimacy by allowing people of all backgrounds into the arena and provides opportunity for broader perspectives to be heard.¹³⁰ Even the most open minded of homogenous male arbitral panels cannot appreciate the concerns of parties from minority backgrounds in the same fashion a minority arbitrator can.¹³¹ Diversity benefits everyone involved but the issue is that the parties involved fail to recognize that. Therefore, parties must be incentivized to choose female arbitrators since they are unlikely to make that choice on their own.

The aforementioned diversity plans are in place in order to aide with this process,¹³² but more often than not these plans are enacted at a theoretical level that fails to translate into practice. Law firms and ADR providers lament the lack of diversity in the field and pledge to improve, yet they routinely ignore the supply of qualified diverse candidates available to them.¹³³ The first step to ensuring the appointment of female arbitrators is hiring the female arbitrators and appointing them to ADR rosters. If women are not

¹²⁷ Gary L. Benton, *Let's Stop Talking about the Arbitrator Diversity Problem*, KLUWER ARB. BLOG (Jan. 14, 2018).

¹²⁸ Panels must have more women and people of color serving on them. *Id.*

¹²⁹ Brown and Kupfer Schneider, *supra* note 23 at 995.

¹³⁰ Candy W. Dale & Anne E. Henderson, *On the Bench and Before the Bar: Diversity as a Core Value*, 62 ADVOC. 19, 21 (2019).

¹³¹ Joshua Karton, *Can I Get A ... Diverse Tribunal?* Kluwer Arb. Blog (Dec. 7, 2018), http://arbitrationblog.kluwerarbitration.com/2018/12/07/can-i-get-a-diverse-tribunal/?doing_wp_cron=1589493171.8950839042663574218750.

¹³² *Supra* Parts III and IV of this paper.

¹³³ Interview with Eldonie Mason, former AAA arbitrator and founder of Mason Firm LLC, on file with author (Apr. 27, 2020).

put forward in the first place it is not possible to decry the lack of women being appointed.¹³⁴

V. What Can We Do?

Many diversification plans remain abstract ideas that fail to be executed in reality due to the many ‘barriers’ that challenge the female would-be arbitrators.¹³⁵ Barriers, such as the barrier of gender stereotyping,¹³⁶ stand between the diversification plans and their execution, according to one study.¹³⁷ Additional barriers that complicate the effective implementation of diversity initiatives include barriers such as ‘informational and professional barriers’, ‘social and institutional barriers’ ‘economic barriers’, lack of mentors, lack of information regarding positions and opportunities, and often, inferior qualification.¹³⁸

Furthermore, despite the acceptance of the ‘other’ into society, individuals with non-traditional backgrounds (often including minority racial and ethnic background) are still viewed as subpar candidates and are therefore selected less often.¹³⁹ Biases and stereotypes play heavily into neutral appointment, often hindering the advancement of a female candidate.¹⁴⁰ Despite progression and advancement in gender roles, society still tends to carry a preconceived notion that females are less capable,¹⁴¹ educated,¹⁴² experienced, or knowledgeable than their male counterparts.¹⁴³ As

¹³⁴ Vanessa Naish, Arbitration Practice Manager, Herbert Smith Freehill, Spring Symposium at the ICLG Commercial Dispute Resolution (Aug. 28, 2018).

¹³⁵ Alice F. Stuhlmacher & Melissa G. Morrisett, *Men and Women as Mediators: Disputant Perceptions*, 19 INT’L J. OF CONFLICT MGMT. 249 (2008).

¹³⁶ Louis Gray, *Professional Careers for Women in the Field of Industrial Relations*, (1986) (unpublished paper, NYSSILR, Cornell University) at 21.

¹³⁷ The Barriers Research Study conducted at the John Jay College of Criminal Justice in the City of New York; See Volpe, Bush, et al, *supra* note 76.

¹³⁸ *Id.*

¹³⁹ Note that most arbitrators have ‘elite backgrounds... male’, Malcolm Langford, Daniel Behn and Runar Hilleren Lie, *The Revolving Door in International Investment Arbitration* 20 J. INT’L ECONOMIC L. 301-02 (2017).

¹⁴⁰ Rothman, *supra* note 3 at 25.

¹⁴¹ Amanda B. Diekmann, et. al., *Dynamic Stereotypes of Power: Perceived Change and Stability in Gender Hierarchies*, 50 SEX ROLES 201 (2004).

¹⁴² TOMAS CHAMORRO-PREMUZIC, WHY DO SO MANY INCOMPETENT MEN BECOME LEADERS? AND HOW TO FIX IT (2019).

¹⁴³ VIRGINIA VALIAN, WHY SO SLOW? THE ADVANCEMENT OF WOMEN 7, 314 (1997).

result, a large percentage of female arbitrators are still reporting experiences of bias during arbitrations.¹⁴⁴ These instances of bias include the common phenomenon of women being mistaken as secretaries,¹⁴⁵ and intentionally being addressed by male pronouns.¹⁴⁶

Time and time again, these factors lead to the end result that women are appointed to arbitrations at a much lower rate than men.¹⁴⁷ The first step to women being selected more regularly by parties is appointing them to rosters; otherwise it is no surprise that parties opt for men, since women are not available to them.¹⁴⁸ However, even when ADR providers do have women listed on their rosters, these women are less likely to be selected by parties. The ADR providers may still keep these female arbitrators on their rosters for token diversity, but the reality is that they are not being appointed to arbitrate,¹⁴⁹ and retaining them as candidates on their rosters results in the ADR providers incurring the cost without reaping benefit for doing so.

The solution to combat these issues would be to implement incentives for parties to select the female arbitrators. Doing so would provide the female arbitrators with more experience so they are more likely to be chosen again and would simultaneously assist

¹⁴⁴ David Samuels, *Network Effects 2* GLOBAL ARB. REV. 9 (2007).

¹⁴⁵ Eldonie Mason, founder of Mason Firm LLC recounts that in her time as an arbitrator for the AAA, she walked into a room with four male arbitrators who all thought she was a secretary, when in fact, she was a fellow arbitrator, Eldonie Mason, *supra* note 133; This phenomenon of assuming that women are secretaries instead of entertaining the notion that women may have positions of power is not unique to arbitration. People make judgements about others' roles based on perceived likelihood, resulting in many cases of mistaken professional identity. For more on this, see Rosabeth Moss Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82(5) AM. J. OF SOCIOLOGY 965, 980 (1977).

¹⁴⁶ Dalma Demeter and Patricia L. Easteal, *Gender and International Commercial Arbitrators: Contributions to Sex Discrimination in Appointments*, 4 TRANSNAT'L DISP. MGMT. 2 (2015).

¹⁴⁷ Based on data collected by Dispute Resolution Data, *Gender Diversity in International Arbitration - the Elusive 50/50 Balance*, DISPUTE RESOLUTION DATA (2017), available at http://www.disputeresolutiondata.com/gender_diversity_in_international_arbitration.

¹⁴⁸ Naish, *supra* note 134.

¹⁴⁹ Jed Melnick, Introduction to Alternative Dispute Resolution Class with Ellen Waldman, (Nov. 11, 2019).

in breaking the cycle of excluding diverse arbitrators¹⁵⁰. However, it is not simple to instate incentives into a neutral arbitration proceeding without weighing in favor of either party, or without interfering with the arbitration process itself.

In order for the arbitration process to be impartial from its inception, it is important that the parties feel free and safe in their arbitral appointment. As such, a diverse range of arbitrators must be available for the parties to choose from,¹⁵¹ as parties often seek a neutral who can mirror their experiences and make sure they feel heard.¹⁵² Appointing a relatable neutral is a vital component to many parties in order to guarantee impartiality, especially when that party itself is from a minority which is commonly discriminated against.¹⁵³ If the party is female, for example, she may feel more confident than a female neutral could “fully understand and effectively resolve disputes between individuals whose lives are not reflective of the traditional white male experience.”¹⁵⁴ In the Jay-Z case, Carter felt challenged by the lack of diversity on the roster list provided to him by the AAA¹⁵⁵ Carter believed that the absence of African-American arbitrators had the potential to cause him “irreparable harm”,¹⁵⁶ which could in turn prevent him from having a fair hearing and put the legitimacy of the entire arbitration into question.¹⁵⁷

Arbitration, by definition, allows the parties choice of arbitrator(s),¹⁵⁸ who must be independent and impartial.¹⁵⁹ As such,

¹⁵⁰ Masucci, *supra* note 81.

¹⁵¹ Meyer, *supra* note 65.

¹⁵² See Charkoudian & Kabcenell Wayne, *supra* note 93.

¹⁵³ Lorig Charkoudian & Ellen Kabcenell Wayne, *Fairness, Understanding, and Satisfaction: Impact of Mediator and Participant Race and Gender on Participants' Perception of Mediation*, 28(1) CONFLICT RESOL. QUARTERLY, 23 (2010).

¹⁵⁴ Turner, *supra* note 58 at 2, 4.

¹⁵⁵ Jay-Z Case, *supra* note 92.

¹⁵⁶ Carter Brief, *supra* note 93.

¹⁵⁷ Meyer, *supra* note 65; Dale & Henderson, *supra* note 130.

¹⁵⁸ This is one of the key characteristics which define arbitration and set it apart from other adjudicative methods, IAN R. MACNEIL, AMERICAN ARBITRATION LAW 7 (1992); See also ČECH, ONDŘEJ, A PARTY'S RIGHT TO APPOINT AN ARBITRATOR AND ITS LIMITS: ISSUE CONFLICT IN INTERNATIONAL ARBITRATION in CZECH YEARBOOK OF ARBITRATION: RIGHTS AND DUTIES OF PARTIES IN ARBITRATION, VI, at 23-42 (2016).

¹⁵⁹ MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (2008).

the parties must be free to select the arbitrator of their choosing, based on qualities they deem as important. Since an intervention into the parties' selection may result in a biased arbitrator and an unfair result, ADR providers maintain great care to offer a variety of suitable candidates to the parties, and then gracefully step out of the picture until a selection is made and the process can proceed. Diversifying the panels from which parties appoint their neutral will allow underrepresented parties to have their voices heard.¹⁶⁰ Parties themselves should choose female and other diverse neutrals where possible and appropriate, but ADR providers interfering in the selection process may delegitimize the entire process of arbitration and make way for a party to motion to vacate the entire arbitration on these grounds. For this reason, it is crucial the ADR providers create a mechanism through which to incentivize the selection of diverse candidates without impeding on the impartiality of the proceeding. Incentives such as a financial gain, faster awards, or others can be used so long as done in a way that is fair to all parties and results in a proper arbitration process.

ADR providers could require parties with multiple proceedings occurring simultaneously to nominate diverse neutrals for an allocated percentage of their overall appointed neutrals. For example, a large corporation with an arbitration clause in its employee contracts might frequently use the services provided at any ADR provider as employee disputes often arise. If such a company were to have nine or ten ongoing arbitrations, the ADR provider could require the company to appoint a diverse arbitrator, such as a woman for 25% of their arbitrations.¹⁶¹

Following the notion that non-diverse panels are defective or incomplete, all levels of those involved in an ADR proceeding could take strides to guaranteeing diversity, the responsibility is not placed solely on the ADR provider, but the parties cannot be held accountable for the lack of diversity within the options provided by the institution.¹⁶² The division of responsibilities to ensure a

¹⁶⁰ Meyer, *supra* note 65.

¹⁶¹ These numbers are arbitrary, proper calculations beyond the scope of this paper are required in order to determine a threshold for quantity of proceedings to implement this requirement, as well as what the percentages would be set at. Is a company with two ongoing proceedings bound by this rule, or does it need to be a more significant quantity?

¹⁶² As was the case in the Jay-Z controversy, AAA did not provide the names of diverse candidates, if Carter had not made a big deal of the issue, he would have to reluctantly select a name from the list of white men he was provided with or

standard of diversity as suggested by Gary Benton is as follows:¹⁶³ At the lowest level of duty lie the parties; parties must be informed that appointing a non-diverse panel will constitute in labeling their panel ‘defective’.¹⁶⁴ The institutions are also held accountable, as it is the role of the ADR provider to promote a standard of diversity and inclusion to the parties.¹⁶⁵ ADR providers should acknowledge that they will publicly label panels as defective when this is the case.¹⁶⁶ The institution must also lead by example and adhere to this standard on its own; when the institution makes its own institutional appointments it must ensure to hire women and other diverse practitioners.¹⁶⁷ Finally, arbitrators must take upon themselves the responsibility and obligation to ensure the application of a standard of diversity. Arbitrators, especially non-diverse arbitrators,¹⁶⁸ must support this standard and make appointments that ensure women

the new list the AAA offered him in their compromise. Another client may not cause an uproar as Carter did, so even if such a client cared about diversity, they would be limited to the options provided by the institution. Dorsey & Whitney LLP *Jay-Z Has 99 Problems, and... Lack of Diversity is One*, JD SUPRA, (Jan. 23, 2020) <https://www.jdsupra.com/legalnews/jay-z-has-99-problems-and-lack-of-92312/>.

¹⁶³ Benton, *supra* note 127.

¹⁶⁴ *Id.*; While applying social pressure does not guarantee improved diversity, the application of pressure has been used to coax compliance throughout history in formal legal settings and otherwise, *see generally* RIIKKA KOULU, LAW, TECHNOLOGY AND DISPUTE RESOLUTION: THE PRIVATISATION OF COERCION (2018); Additionally, social sanctions have proven successful in other areas of law such as the issue of get (religious divorce decree) refusal in Jewish divorce as one radical example. For more on the power of social sanctions applied to a male refusing to give his wife a get, *see* Yehiel S. Kaplan, *Enforcement of Divorce Judgments in Jewish Courts in Israel: The Interaction Between Religious and Constitutional Law*, 4 MIDDLE EAST L. AND GOVERNANCE 1, 19 (2012). Social pressure means a lot to both corporations and individuals, and the fear of being publicly labeled as ‘defective’ may be enough of a deterrent to avoid ending up in a situation that would result in this label, Ksenia Polonskaya, *Diversity in the Investor-State Arbitration: Intersectionality Must be a Part of the Conversation*, 19 MELBOURNE J. INT'L LAW 259, 289 (2018).

¹⁶⁵ Benton, *id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ The burden is not only placed upon the female neutrals themselves, while elderly white men cannot change that about themselves, they can and must still promote and help the cause of diversity wherever possible. When a male arbitrator is appointed as an arbitrator, he still has the ability to seek out diverse colleagues to work with him.

and other diverse neutrals are included and appointed to arbitral panels.¹⁶⁹

One additional step that JAMS or any other ADR provider could take to ensure diverse representation would be a specific institution of affirmative action, that poses significantly less of a problematic stance than proper affirmative action,¹⁷⁰ as it will only apply to three arbitrator panels, generally reserved for the most expensive and complex of cases.¹⁷¹ Parties opt to appoint three arbitrators in high-stake cases in effort to ensure greater neutrality and a more balanced award than a sole arbitrator can provide.¹⁷² A study conducted by the School of International Arbitration found that three-arbitrator panels also afforded a greater diversity of professional background and experience to the case, which serves to improve the outcome of the case.¹⁷³ Diversity is already proven to be beneficial in this regard, as three arbitrator panels make for diversity in professional experience, This protocol ought to be applied to diversity of backgrounds, as well, not only diversity of industry knowledge.

Therefore, in three arbitrator panels, ADR providers could guarantee diversity by reserving one of the three spots for a diverse arbitrator, whether based on gender, race, or another demographic criterion.¹⁷⁴ By doing so, ADR providers ensure that diverse arbitrators are appointed in complex, high profile cases. The positive effect of this is multifold –

1. It normalizes the presence of diverse neutrals in proceedings. If parties come to accept and be familiar with their presence, slowly, over time the bias against diverse neutrals will slightly fade, and parties may even opt to choose the same arbitrator for a future [one arbitrator] arbitration.

¹⁶⁹ Benton, *supra* note 127.

¹⁷⁰ For the many issues that rise in the clash between affirmative action and ADR neutrals *see* the end of Part IV to this paper, *supra* page 23.

¹⁷¹ White & Case and Queen Mary University School of London, *2010 International Arbitration Survey: Choices in International Arbitration* at 25 (2010).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ “Clients and lawyers could be encouraged to think more broadly about who they use as neutrals. Particularly in three arbitrator panels, when considering equally qualified candidates, there should be a presumption that a woman be selected as part of a panel.” Brown & Kupfer Schneider, *supra* note 23 at 995.

2. The diverse neutral gains experience and improves their reputation.

3. ADR providers can flaunt their increased commitment to diversity, bolstering their undertaking of corporate social responsibility, and showing higher real-life diversity figures.¹⁷⁵

Applying this method would not, however, work with sole arbitrators as it leads back to the affirmative action problem.¹⁷⁶ The main concern present in applying any incentive to the neutral selection process is, as mentioned, the potential of interference with the process of arbitration and rendering the procedure invalid. If a party has reason to believe that the arbitrator acted in a manner that was less than one hundred percent impartial there may be grounds to vacate the arbitration award, undermining the entire process of arbitration. ADR institutions must find means of promoting their diverse neutrals without impeding on the entire process. This issue is not a simple one to combat, and this paper does not serve as an all-in-one remedy for the problems; it does not intend to provide resolutions for the issues discussed, rather, its purpose has been to raise the concern and discuss the magnitude of the issue so that others can work on the solutions needed so desperately to facilitate gender inclusion in the field of arbitration. If all the actors playing a role in the field of ADR came together to promote diversity, greatness can be achieved.¹⁷⁷

¹⁷⁵ Corporations have developed a need to attract a diverse workforce in order to secure a fairer society and more sustainable future, this is known as corporate social responsibility (“CSR”). Diversity has broadened further to encompass both equality and inclusion. This makes merely ‘token’ diversity unacceptable and law firms and other corporations have developed the need for authentic diversity amongst their employees. In addition, clients often seek corporations committed to CSR and diversity, and so the corporations publicize how diverse their staff is, hoping to attract more clients. Totum Partners, *Diversity and CSR: Why Law Firms Are Committing to Change*, TOTUM PARTNERS BLOG (Nov. 19, 2015). <https://www.totumpartners.com/insights/diversity-and-csr>.

¹⁷⁶ Refer to the end of Part IV to this paper, *supra* page 23 for more on the issues present in the implementation of affirmative action into the neutral selection process.

¹⁷⁷ Noah J. Hanft, *Making Diversity Happen in ADR: No More Lip Service*, N.Y.L.J. (Mar. 20, 2017).

VI. Conclusion

The issue of the lack of gender diversity exists *de facto*, its existence need not be established as it has become accepted as a fact that women are disadvantaged when contrasted with their male counterparts. Rather, the task at hand is to tackle this existing issue in a manner that is just and fair to all involved in the arbitration process parties, diverse candidates, and non-diverse candidates. There must be a way to diversify the field of ADR without inflaming the debates that undermine many well-intentioned efforts in the past.¹⁷⁸ As a community, those involved in ADR should practice scrutinizing arbitrator appointments and make notice when diversity *is* happening, and where it is not.¹⁷⁹ Those who take steps to increase diversity must be applauded, and ADR institutions should provide opportunities for diversity wherever possible. One successful example of a means through which to allow for increased diversity is by offering mentoring,¹⁸⁰ both to diverse practitioners who may have fewer role models in the field, and to all incoming students and [future] practitioners to help eliminate traditional perspectives that may not encourage diversity.¹⁸¹

The makeup of ADR rosters must mirror the gender demographic of the American population at large and of the legal field,¹⁸² and it is the responsibility of the ADR providers to work together with the larger ADR community toward achieving this parity and accomplishing this goal. Therefore, ADR providers must find their place in the balance of aiding the process and incentivizing the correct candidates without interfering in the process, causing vacated arbitrations. Instead, the focus must be to move toward implementing a proper diversification plan that leads to real results.

¹⁷⁸ Holder, *supra* note 13 in regard to the problems that arise with the implementation of affirmative action as well as the general tension when discussing various classifications of minority groups.

¹⁷⁹ Scrutiny and calling out the lack of diversity are the first two of a three step process toward diversity implemented by Vanessa Naish, global arbitration practice manager at Herbert Smith Freehill. Angela Bilbow, *Beyond the Pale, Stale, and Male*, COMMERCIAL DISPUTE RESOLUTION coverage of the Spring Symposium at the ICLG Commercial Dispute Resolution (Aug. 28, 2018).

¹⁸⁰ *Id.* Mentoring is the third and final step in Naish's approach.

¹⁸¹ Garrido Hull, *supra* note 13.

¹⁸² Meyer, *supra* note 65.