

**Old Boys' Networks, Family  
Connections and the English Legal  
Profession**

**By**

**Michael Blackwell**

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**SWEET & MAXWELL**

# Old Boys' Networks, Family Connections and the English Legal Profession<sup>1</sup>

**Michael Blackwell**

*Non-practising solicitor (England and Wales). Doctoral student, Methodology Institute, London School of Economics and Political Science*

☞ Appointments; Barristers; Demography; Diversity; Judges; Queen's Counsel; Solicitors; Women

It is now over 15 years since the following exchange took place in evidence before the Home Affairs Select Committee of the House of Commons:

“Mr Mullin MP: It does seem remarkable to someone who is not a lawyer that only one woman who has ever got in the top thirty or so judges, and she turned out to be the daughter of a High Court judge and the sister of the Lord Chancellor. Do you think any woman who has not got those qualifications could have made it?”

Lord Taylor of Gosforth LCJ: Absolutely.

Mr Mullin MP: Why has not one then?

Lord Taylor of Gosforth LCJ: That particular judge actually came from being a Registrar in the Family Division ... she turned out to be extremely good and was appointed higher on merit. Good heavens, let us not take that away from her. One of the reasons we are very much against increasing the number of women on the Bench simply in order to be able to say ‘Look we have more women on the Bench’ is because we do not want to practise reverse discrimination, because it is unfair to the women who get there on merit. Your saying that one woman has made it to the top because her brother was the Lord Chancellor is very offensive.

Mr Mullin MP: I did not say that at all. I am perfectly prepared for the possibility that she has one of the finest legal minds in the country. I just note she is the only one ever.

Lord Taylor of Gosforth LCJ: I promise that there will be more and they will not all be sisters of the Lord Chancellor!”<sup>2</sup>

This exchange highlights three characteristics that typify the English senior judiciary—that they are overwhelmingly men, that they come from establishment

<sup>1</sup> My thanks to an anonymous reviewer from the journal for their comments on an earlier draft of this paper. This work was supported by the Economic and Social Research Council [grant number ES/H013261/1].

<sup>2</sup> *Hansard*, HC cols 52-II of 1995–1996 Qq 278–280 (June 14, 1995) cited in J. A. G. Griffith, *The Politics of the Judiciary*, 5th edn (Fontana, 1997), p.3.

backgrounds (typically public school and Oxbridge) and that they often have family connections to the legal establishment.

One and a half decades on from Lord Taylor's promise that "there will be more" this paper assesses the extent that these features of the English judiciary have changed over the period.

The homogeneous makeup of the judiciary is generally felt to be an issue of public concern.<sup>3</sup> Brenda Hale has set out three possible justifications for improving diversity. First, equal opportunities, so "all properly qualified and suitable candidates should have a fair crack of the whip and an equal chance of appointment",<sup>4</sup> meaning both that the appointment process is transparent and fair and that the appointment criteria are appropriate. Secondly, to "make a difference"<sup>5</sup> to decision making, both in style and substance. Thirdly, democratic legitimacy because

"it is wrong in principle for that authority to be wielded by such a very unrepresentative selection of the population ... not only mainly male, overwhelmingly white, but also largely the product of a limited range of educational institutions and social backgrounds."<sup>6</sup>

Writing in 2001, Brenda Hale expressed herself "more than a little sceptical" of some arguments that diversity would make a difference to the substance of decision making. More recently, Terence Etherton has argued that "diversity in the composition of the senior judiciary, in terms of diversity of experience, is likely to produce better decision making" and that

"diversity" is best viewed as diversity of experience in life. Such diversity is plainly not restricted to, or synonymous, with gender, ethnicity or sexual orientation. On the other hand, those factors are likely to be an indication of valuable experience which is different to the norm."<sup>7</sup>

To assess the scope for future increases in judicial diversity, this paper contrasts the respective diversity of the pools of solicitors and barristers that future judges are likely to be picked from. Particularly, this paper questions the continued trend to appoint High Court judges almost exclusively from Queen's Counsel. As Brenda Hale has noted (approvingly citing David Pannick):

"to have the ability to argue a position is not necessary to have the qualities required fairly to decide the same issue according to law."<sup>8</sup>

A similar point is made in the recent report on Judicial Appointments of the House of Lords Select Committee on the Constitution.<sup>9</sup> Indeed, both Baroness

<sup>3</sup> Advisory Panel on Judicial Diversity, *The Report of the Advisory Panel on Judicial Diversity 2010* (2010) pp.14–16; House of Lords Select Committee on the Constitution, 25th Report of the Session 2010–2012, *Judicial Appointments* (HL Paper 272), paras 17 and 69–73.

<sup>4</sup> B. Hale, "Equality and the Judiciary: why should we want more women judges?" [2001] P.L. 489, 490.

<sup>5</sup> B. Hale, "Equality and the Judiciary: why should we want more women judges?" [2001] P.L. 489, 496–500.

<sup>6</sup> B. Hale, "Equality and the Judiciary: why should we want more women judges?" [2001] P.L. 489, 502.

<sup>7</sup> T. Etherton, "Liberty, the archetype and diversity: a philosophy of judging" [2010] P.L. 727, 746–747.

<sup>8</sup> B. Hale, "Equality and the Judiciary: why should we want more women judges?" [2001] P.L. 489, 493 citing D. Pannick, *Judges* (Oxford: Oxford University Press, 1987) p.51.

<sup>9</sup> House of Lords Select Committee on the Constitution, 25th Report of the Session 2010–2012, *Judicial Appointments* (HL Paper 272), para.84.

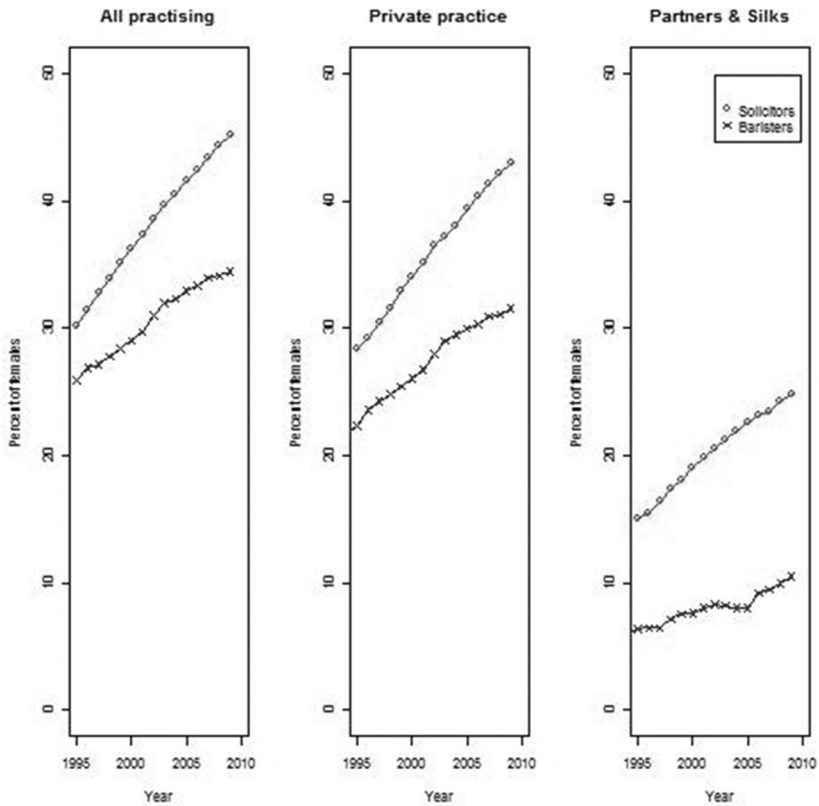
Neuberger's report and the House of Lords' report recommend that more solicitors should be encouraged to apply for judicial office.<sup>10</sup>

This paper uses data from a wide range of sources to examine diversity in the legal profession. The author has created, from the list of judges at the start of each volume of the *Law Reports* a database of all judicial appointments, retirements and promotions in the High Court, Court of Appeal and Supreme Court since 1965. This has been supplemented with educational and other information from *Who's Who*, the *Bar Directory* and, where available, details of parental occupation from admission records of the Inns of Court. A similar data-base has been compiled of all Queen's Counsel appointed since 1965, using the *Times Digital Archive* and the *London Gazette* to identify Queen's Counsel. Where reference is made herein to Queen's Counsel, Queen's Counsel *Honoris Causa* have not been included—such QCs, including Nelson Mandela and Michael Zander, are clearly in a different category to practitioners at the English Bar. Similarly, I do not include QCs who are solicitors. Statistical information of the solicitors and barristers profession more generally has been obtained from compiling the statistics in successive editions of the *Law Society Annual Statistical Report*, as well as the statistics in the *Bar Council Annual Report*. For judges who are no longer with us, some missing data has been obtained from obituaries published in national newspapers. For barristers who are still practising, some missing data has been added from information obtained from their chambers' website. Unless otherwise specified, statistics cited are correct as of January 1, 2011.

## Sex

The first female High Court judge was Dame Elizabeth Lane, appointed in 1965, having been the first woman to be appointed a County Court judge in 1962. The first female member of the Court of Appeal was Lady Butler-Sloss, appointed in 1988. It was only in 2004 that Baroness Hale was appointed as the first female Lord of Appeal in Ordinary. But even after such pioneers fracture the “glass ceiling” the remaining shards restrict passage. This is shown in figure 1, which shows a steady, but very small, increase in the percentage of female High Court judges (from 6 per cent to 15 per cent) and Lord Justices of Appeal (from 3 per cent to 9 per cent) between the time of Lord Taylor's comments in 1995 and today. With the transfer of appellate jurisdiction to the Supreme Court, Brenda Hale is destined to be the only ever female Lord of Appeal in Ordinary, as well as the first and, so far, only ever female Justice of the Supreme Court—but hopefully the first of many. There may, as Lord Taylor promised, be more but there are not many more.

<sup>10</sup> Advisory Panel on Judicial Diversity, *The Report of the Advisory Panel on Judicial Diversity 2010*, Recommendation 17. House of Lords Select Committee on the Constitution, 25th Report of the Session 2010–12, *Judicial Appointments* (HL Paper 272), paras 120–125.



**Figure 1:** Graphs comparing the percentage of women in the solicitors and barristers branches of the legal profession. From left to right (i) the proportion of those holding practising certificates who are women; (ii) the proportion with practising certificates in private practice who are women and (iii) the percentage of partners in firms of solicitors who are women against the percentage of Queen’s Counsel that are female.<sup>11</sup>

Clearly this small proportion of women does not represent society at large. However, it also fails to represent even the legal profession at large. Figure 2 shows the changing proportions of men and women in the legal profession since 1995. The figure is comprised of three graphs (from left to right) showing the gender divide among all practising solicitors/barristers, among those in private practice and among partners (for solicitors) and Queen’s Counsel (for barristers). In all three graphs we see that among both solicitors and barristers there has been a consistently steady increase in the percentage of women. However not only does the solicitors branch of the profession start off with a greater proportion of women, but also the rate of increase is far higher among solicitors—resulting in an increasing gap between the percentage of female solicitors and barristers. Extrapolating, it would suggest that parity between the sexes in terms of equal

<sup>11</sup> Source: Law Society Annual Statistics and Bar Council Annual Report.

numbers of male and female practising solicitors may be achieved within five years, but it would take 26 years for such parity among practising barristers. This difference between the professions may, at least in part, be explained by the differences in the nature of the work. The *Final Report* of the Working Party on Entry to the Bar, chaired by Lord Neuberger of Abbotsbury, suggests that women may be more likely than men to cease practising at the Bar during the early stages of their career and that

“self-employed practice may present particular obstacles for women... level of income and the uncertainty over future income are significant factors in relation to retention, as is a desire to spend more time with family. Women in particular consider that having children produces an adverse effect on their careers at the Bar ...”<sup>12</sup>

In contrast, since most solicitors are employed on a salary, their income is guaranteed and their future income is predictable, as solicitors’ salaries are normally determined by years of post-qualification experience. Further, as employees they have far greater maternity benefits, which often exceed the statutory minimum—and contrasts favourably with the state maternity allowance available to self-employed barristers (although some chambers do offer additional maternity benefits to their members). Additionally, the availability of non-client facing jobs in law firms, such as professional support lawyers, provide career opportunities for solicitors who desire to work more regular hours and the opportunity for part-time work—and so may be more attractive to those with caring responsibilities. These structural differences between the two branches of the profession may partly explain the slower increase in the proportion of women barristers.

The middle graph shows very similar trends to the first graph, except that the proportion of women is a few per cent less, suggesting that women are somewhat underrepresented in private practice. This may well be because they choose to work in-house or for the Government for many reasons, including a lifestyle which is more compatible with caring responsibilities. This raises the question of whether the traditional practice of only appointing judges from lawyers in private practice (other than the now defunct tradition of appointing former Attorney-Generals to the bench) indirectly discriminates against women and whether there is any justification for it. Indeed Lady Neuberger’s report suggests such applications should be encouraged in respect of those employed in the public sector,<sup>13</sup> but perplexingly fails to consider those employed in-house in the private sector, who may have very valuable commercial experience. Accordingly the changes proposed by the House of Lords’ report, which would make it far easier for CPS and Government Legal Services employees to be appointed to the bench, have significant potential to improve the representation of women in the judiciary if accepted.<sup>14</sup>

<sup>12</sup> Working Party on Entry to the Bar, *Final Report*, (The General Council of the Bar, November 2007), paras 317–318.

<sup>13</sup> Advisory Panel on Judicial Diversity, *The Report of the Advisory Panel on Judicial Diversity 2010*, Recommendations 18–19.

<sup>14</sup> House of Lords Select Committee on the Constitution, 25th Report of the Session 2010–2012, *Judicial Appointments* (HL Paper 272), paras 126–132.

The right-most section of the graph shows similar trends. As may be expected, the proportion of women is smaller than in the first two graphs, at least in part representing the time-lag that it takes to become a partner or Queen's Counsel. Also, the rate of increase among Queen's Counsel is very small indeed—from 6 per cent in 1995 to 11 per cent in 2011. At such a rate of increase there would not be parity between numbers of male and female QCs this century. Traditionally High Court Judges have been appointed from among Queen's Counsel, indeed of the 386 judges appointed to the High Court since 1965 only 31 have not been Queen's Counsel prior to their appointment—of those eight (all men) were junior counsel to the Crown who may not have wanted silk due to the associated loss of lucrative work and 19 (three women) were existing members of the judiciary. Accordingly, if equal representation of women in the senior judiciary is a goal within the working-lifetime of anyone who is a qualified lawyer today, serious consideration needs to be given to appointing High Court judges other than from almost exclusively among Queen's Counsel.

	Men	Women
Eligible applicants	316 (87%)	47 (13%)
Shortlisting	112 (82%)	24 (18%)
Selections made	46 (82%)	10 (18%)

	Barrister	Solicitor	Judge	Other
Eligible applicants	218 (60%)	25 (7%)	105 (29%)	15 (4%)
Shortlisting	106 (78%)	1 (1%)	25 (18%)	4 (3%)
Selections made	46 (82%)	0 (nil)	8 (14%)	2 (4%)

**Table 1: Statistics for the 2006–7, 2008 and 2010 High Court appointment exercises.**<sup>15</sup>

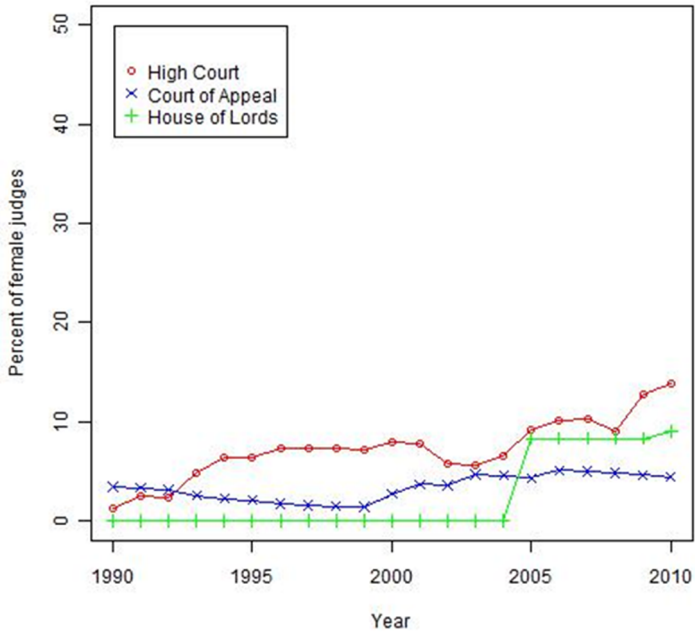
But are things changing? Some insight may be gained by examining the statistics for the 2006–2007, 2008 and 2010 High Court appointment exercises—being the only such appointment exercises since the establishment of the Judicial Appointments Commission. The pooled results are set out in Table 1. Here we see that the proportion of women appointed (18 per cent) is in fact in excess of the proportion who apply (13 per cent). However, the proportion who apply is low—roughly in line with the proportion who are silks during this period.

Further, from these statistics we see that the proportion of solicitors applying who are not existing judges is tiny (7 per cent) and that none in fact have been appointed. This does not take account that some of the unidentified “other” or existing judges categories are solicitors.<sup>16</sup> From analysing the *Who's Who* entries of judges appointed to the High Court since 2006 it appears that two have practised as solicitors, of whom one only practised as a solicitor in New South Wales,

<sup>15</sup> Source: JAC website.

<sup>16</sup> The JAC statistics are unfortunately inconsistent in their format between appointment rounds. For the 2008 appointments “Salaried Judicial Post Holder” is broken down into categories of former solicitor (1 appointment) former barrister (1 appointment) and former multiple backgrounds (nil appointments). However the statistics for the 2010 and 2006–2007 appointments processes use, respectively, the category of “Judicial office holder” and “Salaried Judicial Post Holder” which is not broken down according to previous professional background.

Australia and subsequently was called to the English Bar. So only 2 per cent of the High Court appointments since 2006 have at some time been English solicitors—which is fairly trivial when one compares the 115,475 solicitors with practising certificates in 2009 to the 15,270 barristers with practising certificates.



**Figure 2: Percentage of female judges in the High Court, Court of Appeal and House of Lords between 1990 and 2010.<sup>17</sup>**

## Education

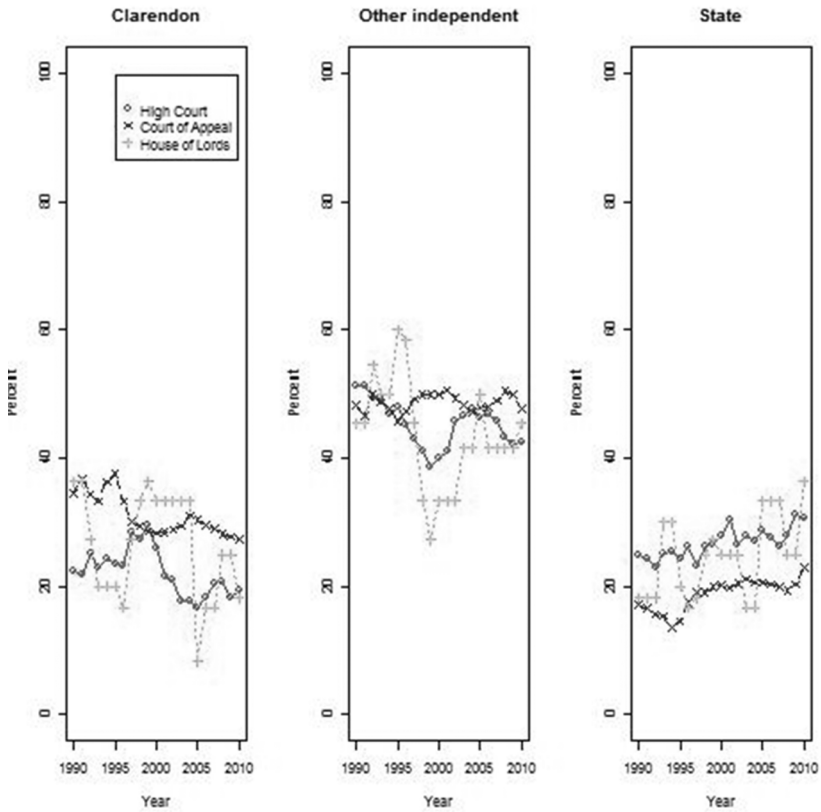
Both in terms of secondary and university education the judiciary come from a very narrow background. Figure 3 shows the secondary schooling of judges sitting since 1995, broken down by court. It can be seen that the lines representing the House of Lords<sup>18</sup> are more volatile due to its smaller membership. Schools attended are categorised as the nine schools which were the subject of the Clarendon commission of 1861 (Charterhouse, Eton, Harrow, Merchant Taylors', Rugby, St Paul's, Shrewsbury, Westminster and Winchester),<sup>19</sup> other fee paying schools and state schools. Schools have been classified according to what they would have been when the judges attended then, rather than what they are today.

<sup>17</sup> Source: Members of the Courts taken from the list at the front of the Law Reports.

<sup>18</sup> References herein to the House of Lords should be read as also including the new Supreme Court.

<sup>19</sup> J. A. G. Griffith, *The Politics of the Judiciary*, 5th edn (Fontana, 1997), p. 18.





**Figure 3: Graphs comparing the percentage of judges in the High Court, Court of Appeal and House of Lords educated in the nine Clarendon schools, other independent schools and at state schools between 1990 and 2010.**

Whilst the list of Clarendon schools is clear, the list of other independent or fee paying schools requires somewhat more subtle classification, due to the past existence of direct grant grammar schools, which accepted fee paying students (between 75 per cent and 40 per cent of enrolled students)<sup>20</sup> as well as students whose fees were paid by the state. In 1968, the secondary school population attending direct grant grammar schools was about half the size of those attending ordinary grammar schools.<sup>21</sup> Among QCs appointed since 1965, 9 per cent of them attended direct grant grammar schools and 19 per cent of them attended other state schools—among those QCs who have become judges the figures are 10 per cent and 15 per cent, the increased proportion of direct grant schools may partly reflect the that these judges will be more likely to have been educated prior to 1975 when direct grant status was abolished. In the analysis that follows, direct grant grammar

<sup>20</sup> A. Sampson, *The new anatomy of Britain* (London: Hodder and Stoughton, 1971), p.140.

<sup>21</sup> 8.1% of all 12 year olds attended direct grant grammar schools and 16.2% of all 12 year olds attended ordinary grammar schools. The statistics for 17 year olds are respectively 4.1% and 8.8%: A. Sampson, *The new anatomy of Britain* (London: Hodder and Stoughton, 1971), p.129.

schools have been included as state schools. It is acknowledged that this will be likely to over represent the proportion educated other than at the expense of the state and further acknowledged that direct grant grammar schools were:

“predominantly middle-class institutions ... [where] three out of four children come from the homes of white-collar workers ... [and] only one out of thirteen comes from a semi-skilled or unskilled worker’s family.”<sup>22</sup>

This approach avoids accusations of over-stating the case which, even as presented below, shows the judiciary to come from a much narrower educational background than the British population in general. Similar issues arise with voluntary aided schools which subsequently became independent—but that classification is less critical as less than 1 per cent of the QCs appointed since 1965 attended them. For the same reasons as direct grant schools, voluntary aided schools have been classified as state schools.

Some unfamiliar with the British class system may query the relevance of a classification of schools from 1861 to today. Among High Court and Court of Appeal judges and Lords of Appeal in Ordinary who sat since 1965 and for whom it has been possible to identify their schooling (96 per cent of them), eight of the nine schools that educated the most such judges are Clarendon Schools, Marlborough and Oundle (joint ninth) replacing Merchant Taylors. Among QCs appointed since 1965 for whom it has been possible to identify their schooling (79 per cent of them), seven of the nine schools that educated the most QCs are Clarendon schools—Marlborough and Downside (respectively eighth and ninth) replacing Merchant Taylors’ and Shrewsbury. Accordingly, like Emperor Napoleon III’s classification of wines for the 1855 Exposition Universelle de Paris, the category of Clarendon schools is still of relevance.

For female judges there is no similar dominance of a few schools. The 21 female judges in the dataset, in respect of whom information on their secondary education is available, attended 19 different schools. Two schools (St Paul’s Girls’ and Wycombe Abbey) each educated two judges and the remaining 17 schools only educated one judge each.

The proportion of High Court and Court of Appeal judges educated in the state sector remains consistently under 32 per cent for the entire period—despite the fact that, now and historically, at least 93 per cent of the British population have been educated in the state sector.<sup>23</sup> Remarkably, the proportion of Court of Appeal judges from the nine Clarendon schools is consistently greater than the proportion educated in the state sector. This is in spite of the fact that in 1970 there were 6,226 pupils attending Clarendon schools<sup>24</sup> and 3,553,000 attending state funded secondary schools.<sup>25</sup> In terms of representation in the High Court, those educated in the state sector do somewhat better, often out-numbering those educated at Clarendon schools. Interestingly, in a recent empirical study it has been argued that the greater promotion rate of “elite judges” from the High Court to the Court of Appeal can

<sup>22</sup> D. Donnison, *Report on Independent Day Schools and Direct Grant Grammar Schools* (Public Schools Commission, 1970), para.115 cited in A. Sampson, *The new anatomy of Britain* (London: Hodder and Stoughton, 1971), p.141.

<sup>23</sup> Office for National Statistics, *Social trends 40* (London: Office for National Statistics, 2010), p.29.

<sup>24</sup> Calculated with data from A. Sampson, *The new anatomy of Britain* (London: Hodder and Stoughton, 1971), p.133.

<sup>25</sup> Office for National Statistics, *Social trends 40* (London: Office for National Statistics, 2010), p.29.

be explained by better performance in the High Court by the elite judges, with various citation measures used as a proxy for performance.<sup>26</sup> Finally, we note that there appears to be no trend in the changes over the period, except, maybe, a slight decline in the percentage educated in Clarendon schools and a slight rise in the proportion educated in the state sector.

These figures are in stark contrast even to QCs appointed since 1965—16 per cent of whom attended a Clarendon school and 37 per cent attended other independent schools.

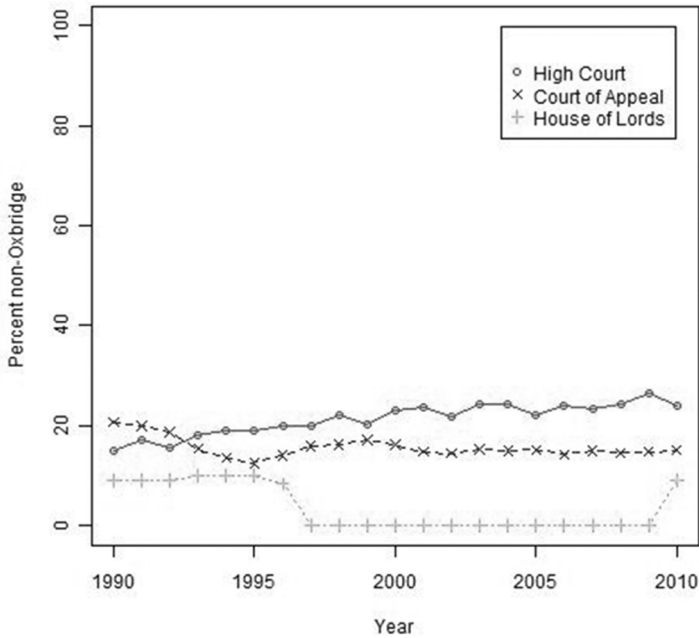
Figure 4 shows the proportion of judges in the High Court, Court of Appeal and of Lords of Appeal in Ordinary who were not educated at Oxford or Cambridge universities. For the High Court and Court of Appeal this stays fairly constant at around 20 per cent—but, for most of the period, there was not a single Lord of Appeal in Ordinary who was not an Oxbridge graduate. In contrast, 34 per cent of QCs appointed since 1965 on who we have information as to which universities they attended (96 per cent of them) are not Oxbridge graduates. It is less easy to pinpoint the educational backgrounds of a comparable group of solicitors. I have not attempted to do so regarding schooling. I note, however, the report of the Sutton Trust, which identifies that in 1988 68 per cent of partners in 3 of the 5 Magic Circle firms attended state maintained schools and this decreased to 55 per cent in 2004.<sup>27</sup> From the websites of the 3 of the 5 Magic Circle firms<sup>28</sup> that detail the university education of their partners, 45 per cent of London based partners who provide this information (87 per cent) are not Oxbridge graduates. The figures for trainees at Magic Circle law firms reflect even more favourably on the comparative diversity of the solicitors' profession—62 per cent of Magic Circle trainees in the two-year period since September 2008 have not been Oxbridge graduates.<sup>29</sup> Again, it appears that solicitors come from a more diverse background than comparable barristers, so appointment of more solicitors to the High Court bench could improve the educational diversity of the judiciary.

<sup>26</sup> J. Blanes i Vidal and C. Leaver, "Are tenured judges insulated from political pressure?" (2011) 95 *Journal of Public Economics* 570.

<sup>27</sup> Sutton Trust, *The Educational Background of the UK's top solicitors, barristers and judges*, (London: Sutton Trust, 2005), p.8.

<sup>28</sup> Allen & Overy LLP, Clifford Chance LLP and Linklaters LLP. Websites accessed December 2010.

<sup>29</sup> F. Heine, "Oxbridge graduates make up 38% of all magic circle trainees" *Legal Week*, March 24, 2010.



**Figure 4: Percentage of judges in the High Court, Court of Appeal and House of Lords between 1990 and 2010 who did not study at either Oxford or Cambridge.**

## Family

Reflecting on Lady Butler Sloss’s appointment to the High Court, Lord Hailsham recalls in his memoirs:

“The vacancy was for a High Court judge to sit in the Family Division. There had been a long and somewhat divided discussion with the Heads of Division. Many candidates were discussed, but no name was agreed, and my own preferred candidate was unanimously rejected by the other participants. Eventually I said: ‘Gentleman, as we do not seem to have reached agreement, have you any further suggestions to make?’ The then President, Sir George Baker, spoke up. ‘Why do you not appoint a registrar?’ he asked. It had never been done before.

‘A good idea’, said I. ‘Have you any particular registrar in mind?’

‘Yes,’ said he. ‘Mrs Butler Sloss.’ There was a chorus of approval from my colleagues.

‘Well, then,’ said I ‘so be it. Mrs Butler Sloss will be appointed.’

A timid voice from the end of the table then intervened. ‘I think you ought to know, Lord Chancellor,’ said the civil servant present, ‘that she is the sister of the new Attorney-General.’

I had known Elizabeth Havers as well as her brother and her father quite well. But until that moment I had no idea of her married name.

If she is otherwise suitable,' said I, 'is that a bar to appointment?'"<sup>30</sup>

The answer is clearly no. But one wonders whether, but for the visibility due to family connections, Mrs Butler Sloss (as she then was) would have come to the attention of the Heads of Division. Commenting on her own appointment, Brenda Hale reflects

"the crucial factor is visibility, being seen or being known (assuming, of course, that the impression is favourable) ... How else can we explain my own appointment? ... Why was I chosen rather than any number of other academics who are at least as well qualified as I? The obvious answer is visibility—earlier on the Council of Tribunals and later at the Law Commission."<sup>31</sup>

Father's occupation	QCs	Judges
Other professional	128 (20.51%)	22 (21.57%)
Law	109 (17.47%)	22 (21.57%)
Company director	98 (15.71%)	14 (13.73%)
Trade	82 (13.14%)	9 (8.82%)
Manager	36 (5.77%)	6 (5.88%)
Engineer	35 (5.61%)	4 (3.92%)
Education	32 (5.13%)	9 (8.82%)
Government	32 (5.13%)	4 (3.92%)
Armed forces	26 (4.17%)	3 (2.94%)
Religion	20 (3.21%)	4 (3.92%)
Agriculture	12 (1.92%)	3 (2.94%)
Police	5 (0.8%)	1 (0.98%)
Politics	4 (0.64%)	0 (nil)
Entertainment	3 (0.48%)	1 (0.98%)
Baronet	2 (0.32%)	0 (nil)
Total	624 (100%)	102 (100%)

**Table 2: Father's occupation by occupational category for QCs appointed since 1965 of whom we know their father's occupation from their Inn's admission register, together with an identical breakdown for those who became High Court judges.**

Some insight may be gained from analysis of the QCs appointed since 1965 of whom we know their father's occupation from their Inn's admission register. These are for students admitted to Lincoln's Inn prior to 1973 and students admitted to Middle Temple prior to 1975. Table 2 below shows the breakdown of these barristers' father's occupation by occupational category and an identical breakdown for those who became High Court judges. Table 3 shows a more detailed analysis,

<sup>30</sup> Q. Hogg (Baron Hailsham), *A sparrow's flight: the memoirs of Lord Hailsham of Marylebone* (London: Collins, 1990), pp.427–428.

<sup>31</sup> B. Hale, "Equality and the Judiciary: why should we want more women judges?" [2001] P.L. 489, 492.

breaking these categories down to sub-categories and listing the numbers in each. The categories and sub-categories were devised by the author, and try to stay as close to the wording used in the admissions register whilst grouping similar entries together.

From table 2 it is evident that QCs and judges overwhelmingly come from well-to-do establishment backgrounds. 46 per cent of QCs and 61 per cent of those who became judges have fathers from the exclusively professional occupational groups of education, law, religion and other professional occupations. A further 21 per cent of QCs and 20 per cent of judges have fathers who were either managers or company directors—high status and high pay occupations.

From table 3 it is evident that, where the fathers of QCs come from occupational groups that could possibly include members of lower socio-economic groups they rarely do. For example, among fathers of QCs working in agriculture, only one of the QCs' fathers is described as an "agricultural worker" rather than a "landowner" or "farmer"—and that particular QC did not become a judge. Similarly, for the armed forces, in all cases where it is possible to discern the QC's father's rank from the description in the admission register, the QCs' fathers are all commissioned officers—despite the fact that "Other Ranks" have always made up the vast majority of the armed forces. In fact even among officers, the ranks are skewed towards the very highest ranks—the list of QCs' fathers containing an Air Marshal, a Major General and an Air Commodore. Similarly too with the police, we see no children of PCs and sergeants becoming QCs—they are all children of high ranking officers.

<b>Father's occupation</b>	<b>QCs</b>	<b>Judges</b>
Agriculture	Farmer (10), landowner (1), agricultural worker (1)	Farmer (3)
Armed forces	Air Marshal (1), Major General (1), Air Commodore (1), Captain (RN) (2), Commander (RN) (2), Lieut-Commander (RN) (2), Wing Commander (1), officer of unspecified rank (12), Indian Army (1), Royal Navy, now serving in MoD (1), Administration Branch: RAF (1), Aircraft Serviceman (1)	Captain (RN) (1), officer of unspecified rank (2)
Baronet	Baronet (2)	—
Company director	Company director (62), managing director (9), other (26)	Company director (8), managing director (2), company secretary to CWS (1), director, Institute for Research into Jewish Affairs (1), draper: company director (1), fashion store director (1)
Education	School teacher (17), headmaster (5), professor (4), reader (2), head of a university college (1), senior lecturer (1), preparatory school teacher (1), nursing tutor (1)	School teacher (4), headmaster (1), professor (2), reader (2)
Engineer	Engineer (10), electrical engineer (4), chartered engineer (3), civil engineer (2), marine engineer (2), other engineer (14)	Engineer (1), electrical engineer (1), gas engineer (1), architect and civil engineer (Air Ministry) (1)

Father's occupation	QCs	Judges
Entertainment	Actor (1), concert violinist (1), head wine butler (1)	Concert violinist (1)
Government	Civil servant (8), local government officer (4), colonial service (3), HM Inspector of Factories (2), other (15)	Civil servant (2), colonial service (1), HM Inspector of Factories (1)
Law	Solicitor (51), barrister (37), judge (15), solicitors' clerk (4), Director of Public Prosecutions (1), official shorthand writer (1), overseas lawyer (1)	Solicitor (7), barrister (9), judge (5), solicitors' clerk (1)
Manager	Various descriptions (36)	Business manager (1), Departmental manager: Ilford Ltd (1), Group Merchandise Coordinator: House of Fraser Ltd (1), National Coal Board officer (1), oil company executive (1), supervisor: Cable and Wireless (1)
Other professional	Medicine (53), finance (45), architect (6), scientist (5), journalist (3), surveyor (2), other (14)	Medicine (9), finance (9), architect (1), surveyor (2), clerk (1)
Police	Chief Constable (1), Superintendent (1), Chief Inspector (1), Inspector (2)	Superintendent (1)
Politics	MP (2) author & politician (1), political agent (1)	—
Religion	Clerk in Holy Orders (8), clergyman (2), Methodist minister (2), minister of religion (2), Presbyterian minister (2), priest (1), rabbi (1) canon & provost (1), bishop (1)	Clerk in holy orders (4)
Trade	Merchant (4), jeweller (4), businessman (3), tailor (3), salesman (2), company representative (2), building contractor (2), other (62)	Jeweller (1), bookseller (1), draper (1), fire loss adjuster (1), mantle manufacturer (1), merchant navy officer (1), publisher (1), textile manufacturer (1), woollen manufacturer (1)

**Table 3: Father's occupation by occupational sub-category for QCs appointed since 1965 of whom we know their father's occupation from their Inn's admission register, together with a breakdown for those who became High Court judges. These sub-categories are ordered by frequency for QCs, other than for the armed forces and police where they are ordered by rank.**

The category "trade" has been used to create a category for the many varied business activities that do not fit in the other categories. Sixty-two QCs fall within the "other" subcategory within trade, each having a different description. For the QCs who become judges I have not used this "other" subcategory, but have instead detailed each entry (as has been done for company director, manager and other professional). Arguably, this category could appropriately be described as businessmen—looking at the full list of "other" occupations among QCs only a handful stand out as from occupations associated with lower socio-economic groups, such as taxi drivers and transport drivers.

Some caution is required in making judgments based on the information provided by the admissions register. It is only available for two Inns and in respect of what is now an older generation of judges and QCs. We also only have information in respect of father's occupation—knowledge of uncles', godfather's or, perhaps, even mother's occupation may well show even more connections to the legal establishment. Also, it only provides information of father's occupation at the time of admission.

A review of judicial obituaries suggests that some High Court judges are from more modest backgrounds. Sir John Thompson's *Times* obituary records how he

“was the opposite of what many members of the public believe High Court Judges to be. He was not born into a prosperous family, his father being the head gardener on a large Scottish estate. Nor did he go to a public school but to Bellahouston Academy near Glasgow ... At that time ... Queen's Bench Judges ... spent most of their judicial time trying personal injury cases. John Thompson did so admirably ... above all, his background enabled him to appreciate the stresses and anxieties to which working people were exposed when they had an accident at work.”<sup>32</sup>

Although even in this case there are clearly some elite connections.

Of particular interest is the large proportion of the children of lawyers (17 per cent) who become QCs. Obviously, this does not necessarily imply any unfair biases or advantages—for example, they may be more inclined to become barristers. It is also interesting to note how, respectively, 14 per cent, 24 per cent and 33 per cent of the children of solicitors, barristers and judges who become QCs have subsequently become judges. Again, a certain upbringing might incline a person to seek and accept judicial office. This may, at least in part, explain some of this difference.

But can upbringing influencing children's career choices explain all the difference? At a recent public lecture at LSE,<sup>33</sup> Brenda Hale recalled how—despite receiving the only starred first class degree in her year at Cambridge—she was unable to initially pursue a career at the Bar. This was because of coming from a modest background (her mother having been widowed when she was young) she required the financial support from a scholarship to pursue such a career. However, her Inn awarded the scholarship she applied for to the son of a Bencher of that Inn, who was in her year in Cambridge and who was awarded a second class degree (and who had no need for the money). Such entry level discrimination is also witnessed to by the recollections of a very experienced barristers' clerk, with whom an interview recently appeared in the Lincoln's Inn newsletter. He recalls how:

“In those days it was *more* about who you knew ... If you were well connected and had been to Eton and Oxford or Cambridge you'd get pupillage. It *started* to change about twenty years ago.”<sup>34</sup> (emphasis added)

For QCs appointed since 1965 who have been elevated to the High Court bench, the mean time between call and such elevation is 29 years. Accordingly, on the

<sup>32</sup>“Obituary of Sir John Thompson” *The Times*, July 21, 1995.

<sup>33</sup>LSE Public Lecture, *Baroness Hale in conversation with Mr Justice Cranston*, January 26, 2010.

<sup>34</sup>M. Taylor, “13 Old Square's Warren Lee: 50 years and still going strong” [2010–2011] *Lincoln's Inn Newsletter* 36 (originally published in *The Lawyer*, January 10, 2010).



basis of these comments, if High Court judges almost invariably continue to be recruited from the Bar, it may be another decade before we even really start to see High Court judges from more diverse socio-economic backgrounds. Indeed, whether things have changed much regarding socio-economic class at the entry-level for the Bar may be questioned. The 2008/9 pupillage survey reveals that less than 3 per cent of pupils are from socio-economic groups characterised by routine and semi-routine manual service occupations.<sup>35</sup> In contrast, about 25 per cent of the UK working population are engaged in such occupations.<sup>36</sup>

### Combined effects

In this section the joint effects of gender and educational background are considered, using a popular statistical technique from event history analysis. The technique models the “hazard” of an event, that is to say that an event occurs at particular time given that it has not occurred before that time. Event history models, sometimes called duration models or survival models, originate from biostatistics<sup>37</sup> where they are used to model how observed variables (such as smoking) are associated with the hazard of death. These models are now frequently used in the social sciences. For example they are used to model whether and when, following release from prison, an offender returns to prison and the effect of various rehabilitation programmes on this.<sup>38</sup>

	Hazard Ratio	P	95% confidence interval
Male	0.573	0.046	(0.332; 0.990)
Clarendon	1.332	0.044	(1.007; 1.761)
Oxbridge	2.115	<0.001	(1.523; 2.938)

**Table 4:** : Estimated hazard ratios for a Cox model, for the risk of a QC appointed since 1965 to be appointed to the High Court Bench. The explanatory variables are gender, attendance at one of the nine schools which were subjects of the Clarendon Commission and being a graduate of Oxford or Cambridge universities.

The event modelled here is the “hazard” of a QC who has been appointed since 1965 being elevated to the High Court bench. The model includes each QC in the “risk set” from their time of appointment. Each QC is removed from the risk set on appointment to the High Court bench and “censored” on attaining the age of 65.<sup>39</sup> The model estimates the partial effect (that is to say the effect, holding all other explanatory variables constant) of education and gender on the “hazard” of

<sup>35</sup> General Council of the Bar, *LSB Consultation: Increasing Diversity and Social Mobility in the Workforce: Transparency and Evidence: Response on Behalf of the Bar Council's Equality and Diversity Committee*, (2011), p.21.

<sup>36</sup> Office for National Statistics, *Labour Force Survey: Quarterly Supplement* Vol.29 (2005), p.25.

<sup>37</sup> J. M. Box-Steffensmeier and B. S. Jones, *Event History Modeling: A Guide for Social Scientists* (Cambridge University Press, 2004), p.7.

<sup>38</sup> J. M. Box-Steffensmeier and B. S. Jones, *Event History Modeling: A Guide for Social Scientists* (Cambridge University Press, 2004), p.1.

<sup>39</sup> The judicial retirement age was originally 75 and subsequently reduced to 70 (Judicial Pensions and Retirement Act 1993 s.26and Sch.6). Accordingly appointments of anyone above 65 are unlikely. In the data set only one QC has been appointed a High Court judge when 65 or older (he was 66), but two have been appointed when aged 64.

being elevated to the High Court bench. A proportional hazards model<sup>40</sup> (often referred to as a Cox model) is used.

The results are set out in table 4. All variables are significant at the 5 per cent level of significance, which is the most common level used in social science. The interpretation of the coefficients is as follows:

- Since at all relevant times only boys were eligible to attend Clarendon schools, the variable male is essentially a comparison of women with men who did not attend Clarendon schools. Accordingly, for QCs not educated at Clarendon schools and controlling for whether they are educated at Oxbridge, the estimated expected effect of a QC being male rather than female is to at any time multiply the hazard of becoming a judge by 0.57, i.e. to decrease it by 43 per cent. So, controlling for education, the hazard rate of becoming a judge is actually greater for women than for men.
- Since at all relevant times only boys were eligible to attend Clarendon schools, the variable Clarendon is essentially a comparison of (male) QCs who attended Clarendon schools with male QCs who did not attend Clarendon schools. Accordingly, controlling for whether they are Oxbridge graduates, the estimated expected effect of a male QC attending a Clarendon school is to multiply the hazard of becoming a judge by 1.33, i.e. to increase it 33 per cent.
- Controlling for gender and whether they attended a Clarendon school, the estimated expected effect of a QC being an Oxbridge graduate is to multiply the hazard of becoming a judge by 2.11, i.e. to increase it by 111 per cent.

Interestingly, this suggests that female silks are actually more likely to become judges than their male equivalents. This is not to say that there are no barriers to women becoming judges—just that for the women who have been appointed QCs (and clearly far fewer women than men are appointed) they are more likely to be appointed to the High Court bench than their male equivalents. Obviously there are likely to be barriers at an earlier career stage that account for the small proportion of female QCs. It is also important to note that these are associations and not necessarily causal—it may be that a certain type of person (say, one who is connected with the legal establishment) is more likely to have a certain educational background and these type of people are also more likely to become judges if they are QCs.

## Conclusion

The evidence presented in this paper indicates that the English judiciary is still predominantly composed of men from a narrow range of educational backgrounds often with family connections to the legal profession. The gains to diversity that could follow from the appointment of a greater proportion of solicitors to the High Court bench have been highlighted. But the appropriateness of such appointments

<sup>40</sup>D. R. Cox, "Regression models and life-tables" (1972) 34 *Journal of the Royal Statistical Society. Series B (Methodological)* and D. R. Cox, "Partial likelihood" (1975) 62 *Biometrika*.

has only briefly touched on (making a prima facie argument in favour). Also, the processes that may impede solicitors becoming judges has not been discussed.

Anyone who has worked in a City law firm will be aware of the immense drive to maximise profits—with the acts of fee-earners being strongly directed towards the “business case” to achieve this end. Undoubtedly this has some benefits for diversity in the profession, as law firms seek to recruit and retain the most able people (from whatever background) to maximise profits. In contrast, as barristers are self-employed they, arguably, do not directly financially profit to such a degree from being in chambers with the most able colleagues—in such cases consideration of “clubability” may be more paramount in recruitment. But the “business case” undoubtedly acts as a barrier for solicitors to become judges. The effective eligibility requirement to “sit part-time for at least three weeks a year over a minimum of two years”<sup>41</sup> makes it very difficult for any solicitor in private practice (at least in the City) to become a judge. Taking up such an appointment would risk being thought to show a lack of commitment to the firm, which could limit career progress as well as making the existing job significantly less secure. Indeed, Baroness Neuberger’s report acknowledges that some solicitors fear the repercussions of their firms finding out if they make an unsuccessful application—especially as it is difficult to apply in confidence due to the need to attend test days and submit references.<sup>42</sup> Further, the first annual report of Baroness Neuberger’s taskforce concedes that the Law Society regards it as “a long term ambition that will require a degree of cultural change” for law firms to regard part-time judicial service as positive for their practices.<sup>43</sup> The House of Lords’ report reaches an identical conclusion.<sup>44</sup> Those who have not worked in City law firms, but who have read John Grisham novels, will be familiar with the level of devotion required by *The Firm*.<sup>45</sup>

Looking at the proportions of certain categories of people in the judiciary may strongly suggest that there is a problem with diversity in the judiciary. But the rebalancing of such numbers would not necessarily mean that there was no problem. As Terrence Etherton notes, true diversity is more than failing to discriminate in accordance with the protected characteristics including sex, age and gender as prescribed in the Equality Act—although conversely such discrimination is likely to impair diversity. The aim of increasing diversity should be achieving the goals of (i) equal opportunities; (ii) making a difference; and (iii) democratic legitimacy as set out by Brenda Hale.<sup>46</sup> If equal gender representation was achieved by predominately appointing “sisters of the Lord Chancellor” (metaphorically), then the first two of these objectives would not have been met and, if democratic legitimacy is increased, it would have only been done by creating an illusory change such as that famously advocated by Prince Tancredi Falconieri where

<sup>41</sup> J. Rozenberg, “Solicitors and judicial appointments” *Law Society Gazette*, January 15, 2009.

<sup>42</sup> Advisory Panel on Judicial Diversity, *The Report of the Advisory Panel on Judicial Diversity 2010*, paras 113 and 118.

<sup>43</sup> Advisory Panel on Judicial Diversity, *Improving Judicial Diversity Progress towards delivery of the ‘Report of the Advisory Panel on Judicial Diversity 2010’* (May 2011), p.29.

<sup>44</sup> House of Lords Select Committee on the Constitution, 25th Report of the Session 2010–12, *Judicial Appointments* (HL Paper 272), para.125.

<sup>45</sup> e.g. J. Grisham, *The Firm* (Arrow, 1991).

<sup>46</sup> B. Hale, “Equality and the Judiciary: why should we want more women judges?” [2001] P.L. 489, 502.

everything must change so that everything remains the same.<sup>47</sup> To be blunt, such would have all the diversity of a black minstrel party. To this extent Lord Taylor is surely right to say that the number of women on the Bench should be increased simply in order to be able to say: “Look we have more women on the Bench.” For this reason we should be wary of quotas. Whilst not a quota, the House of Lords’ report recommends that the law should be amended to permit the use of a “tipping provision” to allow candidates from under-represented groups to be favoured in tie-break situations between candidates of equal merit. However, the report contemplates that such ties would only be likely to occur in large assessment exercises, such as where over 100 vacancies are to be filled.<sup>48</sup> Accordingly, this is unlikely to have relevance for appointments to the High Court and above, which is the subject of this paper.

Finally, some limits of this research are noted, which also may suggest possibilities for future research. This paper has focused on diversity in the High Court and above. It has not considered tribunals and county courts, to which more solicitors have traditionally been appointed, and where we expect judges tend to be less predominantly male and from public school and Oxbridge.<sup>49</sup>

This paper has not used statistical analysis to examine how characteristics, such as gender and educational background, may affect access to the legal profession and progression within it as a junior lawyer. This is due to the difficulties of assembling individual level data for such a group. It is welcomed that the Bar Council has accepted the recommendation of the *Entry to the Bar Working Party Final Report*, chaired by Lord Neuberger, and are now collecting such data. Obviously, if there are career level barriers, just looking at the chance of someone who is a QC becoming a judge may under-estimate the effect of gender and educational background. For example, one possibility for such a career level barrier could be if Gilligan’s theory that women have a “different voice”<sup>50</sup> to men was correct. Were this true and, further, were it the case that male judges were less receptive to the arguments of female advocates, an intriguing possibility would be that an overwhelmingly male judiciary impedes the career progress of female lawyers, which in a vicious cycle restricts women’s access to the bench.

<sup>47</sup> “Se vogliamo che tutto rimanga come è, bisogna che tutto cambi” T. di Lampedusa, *Il Gattopardo* (Universale Economica Feltrinelli, 2008), p.50.

<sup>48</sup> House of Lords Select Committee on the Constitution, 25th Report of the Session 2010–2012, *Judicial Appointments* (HL Paper 272), para.99.

<sup>49</sup> They are certainly more women and more solicitors: see Advisory Panel on Judicial Diversity, *The Report of the Advisory Panel on Judicial Diversity 2010*, pp.70–71.

<sup>50</sup> C. Gilligan, *In a different voice: psychological theory and women’s development* (Harvard University Press, 1993).