

# The 'Social Magic' of Merit: Diversity, Equity, and Inclusion in the English and Welsh Legal Profession

By Professor Hilary Sommerlad

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# THE “SOCIAL MAGIC” OF MERIT: DIVERSITY, EQUITY, AND INCLUSION IN THE ENGLISH AND WELSH LEGAL PROFESSION

Hilary Sommerlad\*

*The discourse of merit is central to the “boundary” practices deployed by the white male elite of the English legal profession to exclude outsiders. The official discourse of government and regulatory body reports presents merit as an objectively verifiable and quantifiable property, synonymous with “excellence,” the salience of which in the recruitment process is indicative of the modernization of the profession. In this form it is mobilized to deflect criticism of the slow progress toward diversity. Critical interrogation of the discourse of merit reveals that it operates rather differently as a key structuring principle of the profession. The alternative meaning of merit as “deservingness” provides a teleological argument for rewarding the embodied cultural practices of white male elites and underscores individual white men’s sense of their property rights to high status positions. Using historical sources and data from a series of qualitative studies, this Article will explore how merit in this sense of deservingness has been, and continues to be, deployed to resist outsiders’ usurpatory projects. It will further argue that this understanding of merit also illuminates how such traditional practices as homosocial bonding through, for instance, sporting or drinking activities and all hours work establish men’s merit with other men and generally support the naturalization of white male authority.*

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## INTRODUCTION

I would like, obviously, the judiciary to be as diverse as we can get it. But that must not interfere with the fundamental principle that we have got to choose the best man for the job.<sup>1</sup>

\* \* \*

It goes without saying—but is often said—that appointments must be made on merit. But it is strange how this word “merit” only pops up when there is talk of changing or expanding the pool from which judges are appointed.<sup>2</sup>

\* \* \*

I strongly support diversity when—and only when—it equals merit. It will be very important that women—particularly those from ethnic minorities—who may not be able to bear the strain of the judicial process are not placed in a position where they may find themselves failing because there has been too much enthusiasm for diversity and not enough for merit. This is very important. I have a vivid recollection of a woman judge many years ago who was a very fine pianist. She should have remained a pianist.<sup>3</sup>

\* \* \*

This Article contributes to the debate over diversity, equity, and inclusion in the legal profession by interrogating the concept of merit and exploring its functional relationship with the English legal profession.<sup>4</sup> It argues that the “social magic” of merit lies in its capacity to sanctify an exclusionary social order by masking its material basis. Rarely problematized in mainstream accounts,<sup>5</sup> merit displays an empty, teleological quality that

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1. Kate Malleon, *Rethinking the Merit Principle in Judicial Selection*, 33 J.L. & Soc'y 126, 126 (2006) (quoting Lord Lloyd of Berwick, Evidence to the Constitutional Affairs Committee, First Report, *Inquiry into the Provisions of the Constitutional Reform Bill*, 2003–04, HC 48-II).

2. Lady Brenda Hale, House of Lords, Women in the Law, Address at the British-German Jurists' Association Birmingham Conference (Apr. 24, 2004), available at <http://www.bgja.org.uk/wp-content/uploads/2014/02/Bham-Conf-Lady-Hales-Speakers-Notes.pdf> (emphasis added); see also Brenda Hale, *Equality and the Judiciary: Why Should We Want More Women Judges?*, 2001 PUB. L. 489, 493.

3. 28 May 2012, PARL. DEB., H.L. (2012) 987 (U.K.) (Lady Butler Sloss), available at <http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/120528-0001.htm>.

4. The various countries that make up the United Kingdom have their own legal systems; here, I am discussing the legal profession of England and Wales.

5. Talent is another concept commonly deployed in recruitment circles and which, like merit, is rarely defined; for instance, it has been called the “sum of a person’s abilities,” which, however, “eludes description: [y]ou simply know it when you see it.” ED MICHAELS ET AL., *THE WAR FOR TALENT* xii (2001). This study also implied that talent (like merit) is a finite resource. *Id.* However, there is an extensive academic literature that challenges the possibility of an objective interpretation of merit. See generally Margaret Thornton, *‘Otherness’ on the Bench: How Merit Is Gendered*, 29 SYDNEY L. REV. 391 (2007) (revealing the misogyny which underpins the selection and appointment of women judges in Australia); Savita Kumra, *Gendered Constructions of Merit and Impression Management Within Professional Service Firms*, in *THE OXFORD HANDBOOK OF GENDER IN*

allows it to appear as a transcendent, ahistorical component of a moral order based on universality, disinterest, and achieved excellence. Its entwinement with law in naturalizing and legitimizing the social order is revealed by the grounding of law’s public interest role in the objective verification of the profession’s competence, the claims to the neutrality of its labor markets, and to a corresponding social detachment. In practice, as the above quotations suggest, conceptualizations of merit and professionalism are rooted in the contemporary system of social stratification and the criteria or standards which encompass “concrete monuments to socially accepted subjective preference.”<sup>6</sup> I demonstrate this point by beginning the Article with a brief statistical overview of the demographic profile of the main branches of the legal profession in England and Wales.

In Part II, I discuss the formation of the legal profession to expose its hidden structures, including mental structures, the effect of which is reflected in these statistics. The legal profession exemplifies *par excellence*, the “relative *dehistoricization* and *eternalization* of the structure of [the] sexual [and other] division[s],”<sup>7</sup> and there is correspondingly an acute need to trace the genealogy of professional merit as it came to be embodied as male and white. The significance for law’s legitimacy and its world-affirming role of an appearance of antiquity require us to unpack those elements of professional culture which present it as without history<sup>8</sup> and to shed light on the emergence of merit as one of its founding “truths.” A further reason for reflecting on the historical conditions that shaped the modern profession is that social change does not progress in a linear fashion but is rather characterized by the persistence of archaic residues, including premodern practices and inequalities. This is particularly true of the professional project that, like any historical process, “[bound] together elements which, analytically, pertain to different and even antithetic structural complexes.”<sup>9</sup>

In this part, I draw on historical accounts and documentary sources to show how antique cultures of masculine domination and class (noting the resilience of aristocratic culture in British society) contoured the complex

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ORGANIZATIONS 269 (Savita Kumra, Ruth Simpson & Ronald J. Burke eds., 2014); IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 192–222 (1990) (contesting the U.S. claim to be a meritocratic society); Barbara F. Reskin, *Including Mechanisms in Our Models of Ascriptive Inequality*, 68 AM. SOC. REV. 1 (2003).

6. PATRICIA A. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 99 (1991).

7. PIERRE BOURDIEU, MASCULINE DOMINATION vii–viii (2001) [hereinafter BOURDIEU, DOMINATION]. Bourdieu’s conceptualization of a dynamic social order entails revealing the contingency of a culture’s products; a consistent theme of his work, therefore, is the need to expose the “false eternalization” of social structures by revealing the conditions that produced them. See PIERRE BOURDIEU, THE RULES OF ART: GENESIS AND STRUCTURE OF THE LITERARY FIELD 298 (1996); see also Joan Wallach Scott, *History in Crisis: The Others’ Side of the Story*, 94 AM. HIST. REV. 680 (1989) (positing the need to question who has the power to produce social consensus about truth).

8. Michel Foucault, *Nietzsche, Genealogy, History*, in LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS BY MICHEL FOUCAULT 139, 139–40 (Donald F. Bouchard ed., 1980).

9. MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: MONOPOLIES OF COMPETENCE AND SHELTERED MARKETS 5 (2013).

relationship between merit and the profession, and how these cultures and modes of thought continue to underpin its current segmentation by social category. I also show how the processes of exclusion and differentiation that produced this segmentation played out in complex and intersecting ways. For instance, despite the close relationship of the development of modern law with the idea of the nation<sup>10</sup> and, correspondingly, with imperialism and hence the racial stranger, law's preeminent role in colonial governance<sup>11</sup> was predicated on the *possibility* of the nonwhite male professional, albeit in a subaltern position. By contrast, the contemporary status of women (who in England and Wales were until recently overwhelmingly white) may be traced to law's denial, until the 1920s, of their legal subjecthood and the consequent impossibility of recognizing them as professionals (or indeed persons).

In Part III, which discusses the more recent history of the profession, I draw on data from a range of qualitative studies<sup>12</sup> to argue that the ostensible democratization of British society, which has taken place since the end of the Second World War and in particular from the late 1960s onwards, masks the persistence of these structures of colonialism, patriarchy, and class domination. Nevertheless, the differentiation of the legal field resulting from social modernization<sup>13</sup> has made it more difficult

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10. See PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* 54 (1992).

11. Law may be described as "the cutting edge of colonialism." MARTIN CHANOCK, *LAW, CUSTOM AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA* 4 (1985).

12. The data is drawn from three studies conducted from 2009 through this year. They were all qualitative projects, where the samples were obtained by a mixture of advertisement, communication with lawyers' sectional groups (such as the Association of Women Solicitors), use of LinkedIn, and snowball techniques. Semi-structured interviews and focus groups were then conducted. The latest study began in September 2014 and is currently ongoing. Its aim is to explore with practitioners (barristers, solicitors, and judges, including those who no longer practice) their experiences of practice and their understanding of merit and professionalism. To date, ten interviews have been conducted. The two other studies were conducted in 2009 and 2010. The sample for the 2009 study included 16 female judges aged between 45 and 62, four of whom were black, Asian, or minority ethnic (BAME); in-depth interviews were conducted which aimed to elicit their biographies. The 2010 research was commissioned by the Legal Services Board to investigate with female and BAME professionals, at a variety of career stages including pre-entry, in a range of specialisms and sectors, and in several locations, the reasons for these practitioners' career patterns, and the extent to which they were the product of individual choice or the culture, structure, and institutions of the profession. There were 77 respondents: 13 BAME men, 31 BAME women, and 33 white women. For a full description of the studies' methodologies, see Hilary Sommerlad, *Let History Judge? Gender, Race, Class and Performative Identity: A Study of Women Judges in England and Wales*, in *GENDER AND JUDGING* 355 (U. Schultz & G. Shaw eds., 2013); and HILARY SOMMERLAD ET AL., *DIVERSITY IN THE LEGAL PROFESSION IN ENGLAND AND WALES: A QUALITATIVE STUDY OF BARRIERS AND INDIVIDUAL CHOICES* (2010), available at [http://www.legalservicesboard.org.uk/what\\_we\\_do/Research/Publications/pdf/lspb\\_diversity\\_in\\_the\\_legal\\_profession\\_final\\_rev.pdf](http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/lspb_diversity_in_the_legal_profession_final_rev.pdf).

13. The expansion and diversification of higher education has been at the forefront of U.K. government strategies to drive social modernization. See HIGHER EDUC. STATISTICS AGENCY, *STUDENTS, QUALIFIERS, AND STAFF DATA TABLES*, available at <http://www.hesa.ac.uk/index.php/content/view/1973/239/> (last visited Mar. 25, 2015) (documenting growth in education over the last fifteen years). This produced a parallel drive to optimize the use of human capital. See generally SIR ALAN LANGLANDS, DEP'T FOR EDUC.

for existing power holders to demarcate their physical space and retain the illusion of objectivity and equity. Further, merit and individual agency are essential components of the neoliberal discourse of the perfect market, and modernization of recruitment and promotion practices has produced a clearer delineation of the credentials and skills required by the “good lawyer.”<sup>14</sup> However, the essential plasticity of merit enables it to sustain the importance of other (unarticulated) attributes, such as “clubbability,” while the centrality of the market encourages notions of personal entitlement,<sup>15</sup> highlighting merit’s alternative meaning as deservingness.<sup>16</sup> Here we see how homosocial bonding through, for instance, such traditional practices as playing sports, drinking, and “all hours” work, has continued to establish men’s merit with other men and generally reinforce the naturalization of white male authority.

#### I. DIVERSITY AND INCLUSION IN THE CONTEMPORARY PROFESSION

In 2007, Lord Neuberger said, “The Bar can only flourish and retain public confidence if it is . . . diverse and inclusive . . . . Diversity and inclusivity are essential if a modern profession is to maximize its credibility.”<sup>17</sup> Lord Neuberger’s argument reflects the need for synergy between a profession and the macro social and normative context, and the reasons for his concern are graphically revealed by the statistics on the three main branches of the legal profession in England and Wales.<sup>18</sup> In all these branches, the past few decades have seen a dramatic increase in the numbers of historically excluded groups; however, their terms of inclusion have been largely those of subordinates. The Bar is deeply segmented by gender, ethnicity, and socioeconomic background. For instance, in 2011,

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& SKILLS, THE GATEWAYS TO THE PROFESSIONS REPORT (2005), *available at* [http://webarchive.nationalarchives.gov.uk/+http://www.bis.gov.uk/assets/biscore/corporate/migratedd/publications/g/gateways\\_to\\_the\\_professions\\_report.pdf](http://webarchive.nationalarchives.gov.uk/+http://www.bis.gov.uk/assets/biscore/corporate/migratedd/publications/g/gateways_to_the_professions_report.pdf); PANEL ON FAIR ACCESS TO THE PROFESSIONS, UNLEASHING ASPIRATION: THE FINAL REPORT OF THE PANEL ON FAIR ACCESS TO THE PROFESSIONS (2009), *available at* <http://webarchive.nationalarchives.gov.uk/+http://www.cabinetoffice.gov.uk/media/227102/fair-access.pdf>.

14. Hilary Sommerlad, *The Commercialization of Law and the Enterprising Legal Practitioner: Continuity and Change*, 18 INT’L J. LEGAL PROFESSION 73, 76 (2011); see Andrew Francis & Hilary Sommerlad, *Access to Legal Work Experience and Its Role in the (Re)production of Legal Professional Identity*, 16 INT’L J. LEGAL PROFESSION 63, 64 (2009).

15. Anne Phillips, *Egalitarians and the Market: Dangerous Ideals*, 34 SOC. THEORY & PRAC. 439, 458–59 (2008).

16. Thus in COLLINS ENGLISH DICTIONARY (2012), merit is described as “From Latin *meritum* ‘a merit, service, kindness, benefit, favor; worth, value, importance,’ neuter of *meritus*, past participle of *merere*, *meriri* ‘to earn, deserve, acquire, gain.’”

17. Lord Neuberger, *Chairman’s Foreward* to GEN. COUNCIL OF THE BAR, ENTRY TO THE BAR WORKING PARTY 5 (2007), *available at* [www.barcouncil.org.uk/media/164103/finalreportneuberger.pdf](http://www.barcouncil.org.uk/media/164103/finalreportneuberger.pdf).

18. The main branches of the profession are (1) solicitors, once the only lawyers with direct access to clients and who enjoyed a monopoly over transactions in land; (2) barristers, regarded as the “senior” branch of the profession, who specialized in advocacy and once alone had rights of audience in the higher courts, and (3) the judiciary. The highest ranking barristers are Queen’s Counsel (QC), which is a status conferred by the Crown on senior, leading barristers, known as “taking silk.” It is now also possible for solicitor advocates to be appointed QCs.

women made up 35.1 percent of barristers and 18 percent of Queens Counsel (QC).<sup>19</sup>

The statistics on ethnicity and class are harder to decipher because of the complexity and range of interpretations of both concepts.<sup>20</sup> The problem is exemplified by the term black, Asian, and minority ethnic (BAME), commonly used in official statistics and yet encompassing the entire range of nonwhite identities.<sup>21</sup> Nevertheless, statistical surveys reveal that 9907 self-employed barristers are white and 1203 are BAME, of whom a mere 68 were QCs (as opposed to 1273 white barristers).<sup>22</sup> Furthermore, both women and nonwhite barristers are overrepresented in less prestigious, poorly remunerated specialties such as the Criminal Bar.<sup>23</sup> The figures on socioeconomic background suggest that class is an even more significant predictor of professional destiny<sup>24</sup>—thus 29 percent of pupil barristers in 2005 and 2006 and 35 percent in 2010 and 2011 were educated at the universities of Oxford or Cambridge, whose students are overwhelmingly drawn from higher socioeconomic background.<sup>25</sup>

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19. Joanne Harris, *Silk Round 2014: 100 Promoted to QC but Female Representation Stalls at 18 Per Cent*, LAWYER (Feb. 19, 2014), <http://www.thelawyer.com/news/practice-areas/litigation-news/silk-round-2014-100-promoted-to-qc-but-female-representation-stalls-at-18-per-cent/3016526.article>.

20. The complexity of these concepts has been compounded by the disintegrating impact of macro-level socioeconomic changes leading to claims that contemporary society is post social category. See generally ANTHONY GIDDENS, *MODERNITY AND SELF-IDENTITY: SELF AND SOCIETY IN THE LATE MODERN AGE* (1991). As Carrier has noted, the consequent multiplicity and fluidity of contemporary identity and related complexity of classifications makes synoptic analysis of social life very difficult. James G. Carrier, *The Trouble with Class*, 53 EURO. J. SOC. 263, 264 (2012).

21. Clearly the deployment of the acronym BAME by both U.K. policymakers and academic researchers to denote nonwhite groups is a crude taxonomic device that cannot capture the hierarchies of ethnicities and other intersecting forms of identity, and, in fact, is fundamental to the ongoing reinscription of “race” as a central feature of professionalism—but since race is so salient, it is necessary to cite this evidence.

22. *Bar Barometer: Trends in the Profile of the Bar*, GEN. COUNCIL OF THE BAR OF ENGLAND AND WALES 27, 44 (June 2014), [https://www.barstandardsboard.org.uk/media/1599997/bsb\\_barometer\\_report\\_112pp\\_june\\_13.pdf](https://www.barstandardsboard.org.uk/media/1599997/bsb_barometer_report_112pp_june_13.pdf).

23. *Equality Analysis (EA)—Litigation*, LEGAL SERVS. BD. 1–2, [http://www.legal-services-board.org.uk/Projects/statutory\\_decision\\_making/pdf/annex\\_1.pdf](http://www.legal-services-board.org.uk/Projects/statutory_decision_making/pdf/annex_1.pdf) (last visited Mar. 25, 2015).

24. Louise Ashley & Laura Empson, *Differentiation and Discrimination: Understanding Social Class and Social Exclusion in Leading Law Firms*, 66 HUM. REL. 219, 219 (2013).

25. In 2007 it was reported that during the previous five years, 100 elite schools—making up under 3 percent of 3700 schools with sixth forms and sixth form colleges in the United Kingdom—accounted for a third of admissions to the universities of Oxford and Cambridge (commonly termed “Oxbridge”). Sutton Trust, *University Admissions By Individual Schools 2007*, at 6, available at <http://image.guardian.co.uk/sys-files/Education/documents/2007/09/20/Strust.pdf>. From 2010 to 2011, the situation was no better, with just 2.5 percent of Oxford students and 3.1 percent of Cambridge students from low-participation neighborhoods. Both universities scored below admission benchmarks calculated by the Higher Education Statistics Agency, a nongovernmental body, for students from lower socioeconomic backgrounds, admitting around 10 percent from that group. Sonia van Gilder Cooke, *Britain’s Class Divide: Can Oxbridge Solve Its Privilege Problem?*, TIME (Jan. 8, 2013), <http://world.time.com/2013/01/08/can-oxbridge-solve-its-privilege-problem/>.

Similar inequalities pattern the solicitors' profession. For instance, since 2002, the number of male solicitors with Practising Certificates (PCs) increased by 23.9 percent as compared to a 77.5 percent increase in the numbers of women, and in 2012, 47.4 percent of solicitors with PCs were female.<sup>26</sup> However, in 2013, women represented only just over 20 percent of partners in the profession as a whole,<sup>27</sup> and this discrepancy is more marked when we correlate the proportions who are equity partners with the prestige of the firm. So, women account for less than 10 percent of equity partners in the top one hundred law firms by turnover, and 5 percent in the top thirty.<sup>28</sup> A survey conducted in 2013 also revealed the persistence of a significant gender pay gap: the average female lawyer is paid £51,396 a year less than a male lawyer and receives half the amount in bonuses.<sup>29</sup> Like women, the proportions of solicitors drawn from groups categorized as BAME are overrepresented as compared to in the population as a whole: In 2011, 12.6 percent of solicitors with PCs were recorded as BAME.<sup>30</sup> However, they were only 5 percent of partners in top firms<sup>31</sup> (a mere 0.6 percent of black solicitors)<sup>32</sup> and were more likely to be solo practitioners and working in low status, less profitable sectors.<sup>33</sup> Turning to the significance of class origins for an individual's career trajectory, recent years have seen a reinvigoration of archaic signs of privilege, so that it is increasingly difficult for those from "lower" socioeconomic backgrounds and/or low status universities to even enter the profession; conversely, the value of a degree from Oxford or Cambridge has increased.<sup>34</sup>

The confinement of minority groups to subordinate positions in the judiciary is even more striking. Data collected by the Judicial Office shows that in 2013–2014, out of a total of 3452 judges, 845 were women (24.5

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26. BILL COLE, LAW SOC'Y, TRENDS IN THE SOLICITORS' PROFESSION, ANNUAL STATISTICAL REPORT 2002, at 9 (2003), available at <http://www.lawsociety.org.uk/policy-campaigns/research-trends/annual-statistical-reports/>; LAW SOC'Y, TRENDS IN THE SOLICITORS' PROFESSION, ANNUAL STATISTICAL REPORT 2012, at 4 (2013), available at <http://www.lawsociety.org.uk/policy-campaigns/research-trends/annual-statistical-reports/>.

27. See LAW SOC'Y, *supra* note 26, at 26.

28. Lucy Burton, *Revealed: Females Make Up Less Than 10 Per Cent of Top 100's Equity Partner Ranks*, LAWYER (Oct. 24, 2012), <http://www.thelawyer.com/revealed-females-make-up-less-than-10-per-cent-of-top-100s-equity-partner-ranks/1015190.article>.

29. Equality Law, *Women Lawyers' Pay Lags Behind Male Colleagues'* (Jan. 24, 2013), <http://www.equality-law.co.uk/news/2998/66/Women-lawyers-pay-lags-behind-male-colleagues/>.

30. See LAW SOC'Y, *supra* note 26, at 5, 13.

31. Kathleen Hall, *Glass Ceiling Most Apparent in Magic Circle*, LAW SOC'Y GAZETTE (Nov. 7, 2013), <http://www.lawgazette.co.uk/practice/glass-ceiling-most-apparent-in-magic-circle/5038631.article>; see also *Ethnic Minorities Make Up Only 3 Per Cent of UK 100 Partners*, LAWYER, Apr. 3, 2006, at 2, available at <http://www.thelawyer.com/ethnic-minorities-make-up-only-3-per-cent-of-uk-100-partners/119388.article>.

32. Kathleen Hall, *Diversity League Table Shows Promotion Gap*, LAW SOC'Y GAZETTE (Nov. 11, 2013), <http://www.lawgazette.co.uk/law/diversity-league-table-shows-promotion-gap/5038711.article>.

33. See LAW SOC'Y, *supra* note 26, at 14, 15, 29.

34. See Marc Galanter & Simon Roberts, *From Kinship to Magic Circle: The London Commercial Law Firm in the Twentieth Century*, 15 INT'L J. LEGAL PROF. 143, 168 (2008).



percent), 2686 white (77.8 percent), and 164 BAME (5.8 percent).<sup>35</sup> Further, once the higher courts are reached, the number of individuals drawn from nonnormative groups dwindles dramatically. The Supreme Court judiciary comprises all white males and one white female—Lady Brenda Hale—and there are only two BAME judges at the deputy masters, deputy registrars, deputy costs judges, and deputy district judges (PRFD) level, and none higher up, the lone black female High Court judge having left the judiciary a couple of years ago.<sup>36</sup> At the same time, the judiciary as a whole is a virtually exclusive preserve of the socioeconomic elite: as of 2004, 75 percent of the judiciary attended fee-paying schools and 81 percent the universities of either Oxford or Cambridge.<sup>37</sup>

The bias toward middle-class white males suggested by these statistics, reinforced by the lack of transparency in appointment processes,<sup>38</sup> produced mounting public criticism.<sup>39</sup> In an attempt to retrieve the image of the profession as neutral and hence meritocratic, the judicial recruitment processes have been reformed by the Constitutional Reform Act 2005<sup>40</sup> (CRA), research studies and enquiries commissioned, and numerous other initiatives launched.<sup>41</sup> The ongoing marketization of the profession has underpinned these moves, the ideological presumption being that the free market will erode bias and generate a true meritocracy. Phillips describes this notion as an absurdity, noting that “markets everywhere continue to be

35. 2014 JUDICIAL DIVERSITY STATISTICS: GENDER, ETHNICITY, PROFESSION, AND AGE, available at <http://www.judiciary.gov.uk/wp-content/uploads/2014/07/courts-diversity-stats-2013-14.xls> (last visited Mar. 25, 2015).

36. See *Dame Linda Dobbs Retires from the High Court Bench*, QUEEN MARY, UNIV. OF LONDON SCHOOL OF LAW, <http://www.law.qmul.ac.uk/eji/news/index.html> (last visited Mar. 25, 2015).

37. See SUTTON TRUST, *THE EDUCATIONAL BACKGROUNDS OF THE UK’S TOP SOLICITORS, BARRISTERS AND JUDGES 7* (2005), available at [http://www.suttontrust.com/wp-content/uploads/2005/05/Comparison\\_educational\\_backgrounds.pdf](http://www.suttontrust.com/wp-content/uploads/2005/05/Comparison_educational_backgrounds.pdf).

38. See LORD ELWYN JONES, *IN MY TIME: AN AUTOBIOGRAPHY* 265 (1983) (clarifying why the process was known as secret soundings “when a . . . vacancy had to be filled, the heads of the Division . . . were invited to my office to consider likely names. Usually we agreed as to the one most meriting appointment. Occasionally two names were equally supported. Then the choice was left to me.”).

39. Criticisms of the uniform social composition and political views of the judiciary began to be widely voiced in the 1970s and 1980s. See, e.g., J.A.G. GRIFFITHS, *THE POLITICS OF THE JUDICIARY* 18–22 (1977).

40. See Constitutional Reform Act 2005, c. 4, § 61 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2005/4/section/61/data.pdf>; see also *id.* § 64, available at <http://www.legislation.gov.uk/ukpga/2005/4/section/64>. The failure of this reform to generate progress led to a new provision for a diversity preference where candidates are of equal merit in the context of judicial appointments. See Crime and Courts Act 2013, c. 22, § 20, sch. 13, pt. 2 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2013/22/schedule/13/enacted> (empowering the selection commission to make use of the so-called “Equal Merit” or “Tipping Point” provision).

41. See, e.g., DEP’T OF CONSTITUTIONAL AFFAIRS, *INCREASING DIVERSITY IN THE LEGAL PROFESSION: A REPORT ON GOVERNMENT PROPOSALS* (2005), available at [http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/legalsys/diversity\\_in\\_legal\\_2col.pdf](http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/legalsys/diversity_in_legal_2col.pdf); see also *Chairman’s Foreward*, *supra* note 17 (the working party on the Bar chaired by Lord Neuberger); SOMMERLAD, *supra* note 12, at 21–24.

characterized by systemic differentiation by gender and race,”<sup>42</sup> and the evidence supports her argument.

For instance, since the appointment of Lady Hale to the Supreme Court eleven years ago, thirteen new Supreme Court judges have been appointed, all of whom, despite the enactment of the CRA in 2005, have been white males; furthermore, 2013 saw the appointment of three Supreme Court judges, the Lord Chief Justice, and the President of the Queen’s Bench Division—all of whom were white males.<sup>43</sup>

Nevertheless, mainstream commentators persist with the claim that the profession is meritocratic. As a result, the “trickle up” narrative remains the most popular explanation for the profession’s segmentation, exemplified by Jonathan Sumption’s evidence to the Justice Committee:

[T]he diversity of appointments is extremely sensitive to the profile of the higher reaches of the legal professions. My own impression . . . based on a fair amount of experience—is that the quality of BME candidates entering the legal profession now has continuously increased over a number of years, just as the quality and number of women entering the legal profession continuously increased over a substantial period a generation ago.<sup>44</sup>

The failure to mention any structural causes of professional segmentation and, instead, the explicit attribution of the absence of marginalized groups<sup>45</sup> to their own “quality” and choices, finds its counterpart in the narrative that legal professionals who are in a position to select and promote are incapable of bias. Thus, in his response to questioning by the House of Lords Select

42. Anne Phillips, *Egalitarians and the Market: Dangerous Ideals*, 34 SOC. THEORY & PRAC. 439, 447 (2008).

43. For rich discussions of merit and judicial selection procedures, see Kate Malleon, *White, Male, and Middle Class—Is a Diverse Judiciary a Pipe Dream 2* (June 1, 2012) (unpublished manuscript), available at <http://www.law.qmul.ac.uk/eji/docs/78402.pdf>; Kate Malleon, *Gender Quotas for the Judiciary in England and Wales*, in GENDER AND JUDGING, *supra* note 12, at 481; Malleon, *supra* note 1; see also *Equal Justices Initiative*, QUEEN MARY, UNIV. OF LONDON SCHOOL OF LAW, <http://www.law.qmul.ac.uk/eji/>; Hilary Sommerlad, *Diversity, Merit, and the English Judiciary: The Lessons that Can Be Learned from the Reform of Selection Processes, a U.K. Contribution*, 40 FORDHAM URB. L.J. CITY SQUARE 94, 94–107 (2013).

44. JUSTICE COMM., THE WORK OF THE JUDICIAL APPOINTMENTS COMMISSION: ORAL EVIDENCE, 2010, H.C. 449-I (U.K.), available at <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmjust/449-i/10090702.htm>.

45. Iris Marion Young, *Equality of Whom? Social Groups and Judgments of Injustice*, 9 J. POL. PHIL. 1, 8 (2001) (“A large set of the causes of an unequal distribution of [resources] or unequal opportunities between individuals, however, is attributable neither to individual preferences and choices nor to luck or accident. Instead, the causes of many inequalities of resources or opportunities among individuals lie in social institutions, their rules and relations, and the decisions others make within them that affect the lives of the individuals compared.”). A further critique of current thinking argues that it “misrepresents the effects of social relations and institutions as if these were generated by individual choice,” and that “political philosophers have conjured up a large cast of contrasting individuals around which to build their stories of equality, responsibility or choice,” the effect of which is to encourage us to think that our chance talents and aspirations really do explain how and where we end up drawing us “into a discourse of individual variation that has less and less purchase on the larger issues of inequality.” Anne Phillips, *Defending Equality of Outcome*, 12 J. POL. PHIL. 1, 15 (2004).

Committee inquiry into the reasons for slow progress on judicial diversity, then-Lord Chancellor Kenneth Clarke said, “[t]he legal world at the kind of level we are talking about is free of people with prejudice.”<sup>46</sup> His subsequent description of the judicial selection process as carried out “[by] competent upper middle class professionals who are utterly beyond all that”<sup>47</sup> is a powerful proclamation of the essential justice of the status quo. It also corresponds to the profession’s self-justification in its formative period as uniquely ethical and objective, and in particular its “consecration” of its leading figures as honorable “gentlemen.”

## II. MERIT AND THE FORMATION OF THE MODERN PROFESSION

The claim to be structured by merit, or objectively verified competence, was a major rationale for the professions’ warrant to practice since it underpinned the professions’ further claims to be characterized by a distinctive ethicality and expert knowledge.<sup>48</sup> In turn, these claimed characteristics justified the erection and policing of jurisdictional boundaries and the control of the production of practitioners and were thus fundamental to the professional project of market creation and attainment of social status.<sup>49</sup> This grounding of the professions’ legitimacy in the achievement of socially recognized expertise entailed the development of formal training and credentialing.<sup>50</sup> In other words, the essence of the modern professional project was that its criteria for recognition be based on achievement rather than ascription. Consequently, professions prefigure the “general restructuring of social inequality in contemporary capitalist societies,”<sup>51</sup> that is, a form of inequality in which social status is tied to expertise rather than to privileges of social category, and which is, therefore, in contrast to the ancient regime of inherited status, essentially meritocratic.<sup>52</sup>

However, this Enlightenment aspect of the professional project was compromised by two further features connected to the ways in which professions sought to establish their legitimacy. First, the emphasis on the cognitive and normative dimensions of their contribution to society, and hence its transcendent values, required detachment from the class

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46. SELECT COMM. ON THE CONSTITUTION, MEETINGS WITH THE LORD CHIEF JUSTICE AND THE LORD CHANCELLOR, 2010–2011, H.L. 89, at 56 (U.K.), available at <http://www.parliament.uk/documents/lords-committees/constitution/LordChancellor/FinalLCandLCJEvidence.pdf>.

47. *Id.*

48. LARSON, *supra* note 9, at xvii.

49. *Id.* Trait theorists also emphasized the professions’ independence and formal knowledge base and memberships based on achieved rather than ascribed status. See, e.g., GEOFFREY MILLERSON, THE QUALIFYING ASSOCIATIONS: A STUDY IN PROFESSIONALIZATION (1964).

50. LARSON, *supra* note 9, at xvii.

51. *Id.*

52. For Enlightenment intellectuals, the concept of a meritocracy was therefore viewed as a key feature of the new regime that was hoped would replace the ancient regime of inherited privilege.

structure.<sup>53</sup> Clearly, it was especially vital to the function of the legal profession that the claim to neutrality and independence be convincing. Yet, the credibility of the claim to be people who, to paraphrase the comments of Kenneth Clarke,<sup>54</sup> were incapable of bias, depended in turn on establishing themselves as upper middle class. This claim therefore meshed with professionals' aspiration to become "gentlemen." As a result, professions are preeminent "status groups"—that is, communities based on ideas of proper lifestyles who "had honor" and were owed deference by wider society.<sup>55</sup> This goal of embedding themselves within the existing class structure as a high status group was both particularly significant and relatively easy for lawyers: their monopoly of property transactions and role in the development of the industrial economy as "conceptive ideologists" of capital<sup>56</sup> led to the imbrication of the worlds of law and business.<sup>57</sup> The resulting tensions between the modernizing and status aspects of the professional project were compounded by the aim of naturalizing and indeed sacralizing professionals' key social role by asserting their historical continuity,<sup>58</sup> that is with the ancient regime. Again, as noted above, for the legal profession it was particularly important to present both itself and the law as dating from time immemorial.<sup>59</sup> Yet this claim contradicted the Enlightenment assault on natural law, and modern law's self-representation as posited by official, human authority.

The tensions generated by these contradictory facets of the professional project—on the one hand, the connection between its legitimacy and credentialed knowledge and independence, and, on the other, its drive to achieve social status and its social embeddedness—were particularly acute in British society where the aristocracy's lingering political, social, and cultural power placed structural and ideological constraints on professional reformism. Larson writes of "a context where aristocratic status models and ideologies were available and never entirely defeated by the attacks of the

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53. As Larson writes, "[T]he emphasis on the cognitive and normative dimensions of profession tends to separate these special categories of the social division of labor from the class structure in which they are also inserted." LARSON, *supra* note 9, at xiii. This self-representation, as unattached to social class and hence neutral, became a key part of orthodox accounts of the professions. *See, e.g.*, KARL MANNHEIM, *IDEOLOGY AND UTOPIA* 156 (1936).

54. *See* SELECT COMM. ON THE CONSTITUTION, *supra* note 46.

55. Max Weber's proposition was that professions only exist because of people's ideas of prestige or dishonor; further, and relatedly, members of such status communities are only supposed to associate with people of like status, and all other people are looked at as inferiors (or intrinsically un-meritworthy when judged by professional standards). *See* Max Weber, *Class, Status, Party*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 180 (H. H. Gerth & C. Wright Mills eds., 1946).

56. Maureen Cain, *The General Practice Lawyer and the Client: Towards a Radical Conception*, 7 INT'L J. SOC. L 331, 352 (1979).

57. David Sugarman, *Blurred Boundaries: The Overlapping Worlds of Law, Business, and Politics*, in *LAWYERS IN A POSTMODERN WORLD* 105 (Maureen Cain & Christine Harrington eds., 1994).

58. LARSON, *supra* note 9, at xv.

59. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 820 (Richard Terdiman trans., 1987); *see also* FITZPATRICK, *supra* note 10, at 44–45.

rising bourgeoisie against idle property and the system of patronage.”<sup>60</sup> The resulting early aspiration to assimilate into the upper middle classes and the persistence of ascription are clearly demonstrated in histories of the creation of the professions. These reveal the work that went into producing an institution that had a strong shared identity<sup>61</sup> and ensuring that this was the right identity. Thus, Carr-Saunders and Wilson recount the concerns of the members of the first professional societies that the individuals lacked “social prestige and that their occupations were not fit for gentlemen” and the consequent campaign by both solicitors and barristers to construct, reconstruct, and affirm their respectability.<sup>62</sup> Sugarman describes how the Bar did this by distancing itself (geographically, professionally, historically, and culturally) from the lower branch,<sup>63</sup> whose members tended to be extremely poor, by banishing them from the Inns of Court.<sup>64</sup> Consequently, ideas of social respectability and gentlemanliness were embedded in the Bar’s discourse of merit, encapsulated in its rules on entry, dining, dress, and its opposition to examinations. And even when (belatedly) examinations were adopted, they were mediated by this essentially aristocratic interpretation of “merit” and the desire to filter out those not regarded as gentlemen: “The character of law teaching and thought reflected and sustained the intensely hierarchical, Victorian character of English society and . . . national identity in the second half of the nineteenth and the first half of the twentieth centuries.”<sup>65</sup>

Sugarman shows too how the Law Society’s professional project similarly strove to build respectability so as to assimilate within the upper middle classes, and the concerns this generated about being flooded by people of lowly standing.<sup>66</sup> His account of this construction (and policing) of such “folk devils” is illustrated by a quote from the 1880s: “[There] are . . . men who have travelled up the gutter from Fleet Street to the Law

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60. LARSON, *supra* note 9, at 81. Parkin subscribes to Larson’s argument that the profession’s privileges were achieved and retained through social closure, describing this as where professions maintain an artificial skill scarcity and maximize rewards by limiting access and opportunities “to a limited circle of eligibles.” FRANK PARKIN, *THE SOCIAL ANALYSIS OF CLASS STRUCTURE* 3 (1974).

61. See, e.g., Elizabeth Popp Berman, *Before the Professional Project: Success and Failure at Creating an Organisation Representative for English Doctors*, 35 *THEORY & SOC.* 157, 188 (2006).

62. A.M. CARR-SAUNDERS & P.A. WILSON, *THE PROFESSIONS* 302 (1933).

63. Thereby illustrating Weber’s observation of the need to guard their “honor” by only associating with people of like status.

64. David Sugarman, *Who Colonized Whom?: Historical Reflections on the Intersection Between Law, Lawyers, and Accountants in England*, in *PROFESSIONAL COMPETITION AND PROFESSIONAL POWER: LAWYERS, ACCOUNTANTS AND THE SOCIAL CONSTRUCTION OF MARKETS* 226 (Y. Dezalay & D. Sugarman eds., 1995).

65. David Sugarman, “*Great Beyond His Knowing*”: *Morton Horwitz’s Influence on Legal Education and Scholarship in England, Canada, and Australia*, in *TRANSFORMATIONS IN AMERICAN LEGAL HISTORY II—ESSAYS IN HONOR OF MORTON J. HORWITZ* 508 (Daniel W. Hamilton & Alfred L. Brophy eds., 2009).

66. The Law Society is the professional body of solicitors.

Institution . . . Doubtful h's and dirty linen pass freely through the examination hall of our Society."<sup>67</sup>

Sugarman has speculated whether we can see in this expression of class-consciousness a racial element, since it was in the 1880s that Jews were beginning to emigrate in large numbers from Eastern Europe, generating significant concerns within British society and the resurgence of anti-Semitism.<sup>68</sup> If he is correct, this would have merely added a layer of overt anti-Semitism to a profession that, like all of British society, had already been thoroughly racialized by the colonial project to remake the world in European terms. While the rule of law and merit-based bureaucracy were key components of colonialism's civilizing mission, it reserved for itself exceptions "premised on racial and ethnic, religious and linguistic differences between the colonizing and subaltern populations."<sup>69</sup> The colonial encounter between ethnic groups therefore *produced* ethnic identities and hierarchies,<sup>70</sup> symbolized by the racialized stranger who exists outside civilization, making ethnicity as central as was class to professionalism's ascriptive inequalities. As a result, once the meaning of professional merit had been standardized in the form of the gentleman, the grounds of inclusion/exclusion became relatively uncontroversial: the construction of professional institutions within the parameters of white, patriarchal-capitalism in nineteenth-century Britain made it inevitable that they largely were limited to privileged white males.

Nevertheless, there were contradictions embedded in the nineteenth-century colonial project that parallel those which beset professionalism, complicating the professional conceptualization of merit and ethnicity, because colonial techniques of governance depended on the recruitment of male members of the colonized communities as active agents in the process. Thus, Dezalay and Garth show how the role of law in British governance in India entailed the progressive opening of the high courts to Indian advocates as "both a project of professional promotion and a political project for the construction of an aristocracy of compradors."<sup>71</sup> This

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67. See *Law Societies: Incorporated Law Society—Annual Provincial Meeting*, 81 LAW TIMES 395, 406 (1886).

68. David A. Coleman, *U.K. Statistics on Immigration: Development and Limitations*, 21 INT'L MIGRATION REV. 1138, 1142 (1987).

69. Terence Halliday & Lucien Karpik, *Political Liberalism in the British Post Colony: A Theme with Three Variations*, in FATES OF POLITICAL LIBERALISM IN THE BRITISH POST-COLONY: THE POLITICS OF THE LEGAL COMPLEX 4 (T. Halliday, L. Karpik & M. Feeley eds., 2012).

70. FREDRIK BARTH, *ETHNIC GROUPS AND BOUNDARIES: THE SOCIAL ORGANIZATION OF CULTURE DIFFERENCE* (1969). Barth sees ethnic identities as intertwined; he writes in his introduction: "[C]ategorical ethnic distinctions do not depend on an absence of mobility, contact and information, but do entail social processes of exclusion and incorporation whereby discrete categories are maintained *despite* changing participation and membership in the course of individual life histories." *Id.* at 9–10.

71. Yves Dezalay & Bryant G. Garth, *The Legal Construction of a Politics of Notables: The Double Game of the Patricians of the Indian Bar in the Market of Civic Virtue*, 29 RETFÆRD. ÅRGANG 42, 48 (2006). Miriam Ming-Cheng Lo has shown that the Japanese empire in Taiwan similarly sustained itself through promoting and institutionalizing an indigenous medical profession. MIRIAM MING-CHENG LO, *DOCTORS WITHIN BORDERS:*

dependence of the colonial project on the creation of a cadre of (upper class) nonwhite male professionals entailed their inclusion in the professional imaginary, and their (provisional) acceptance was facilitated by, first, their geographical distance from the “Mother Country” and second, the fact that, as high status males, they did not destabilize the key social norm of masculine authority.

However, whereas the construction of “race” as a despised category dates from the beginnings of the European colonial project, masculine domination is the fundamental classification through which we construct the world.<sup>72</sup> As a result, men have, for millennia, written women as irrational objects, naturalizing their confinement to the private sphere and, correspondingly, masculine domination of the public sphere.<sup>73</sup> The formalization of women’s domestic status in Britain through the law of coverture<sup>74</sup> made them unimaginable as professionals.<sup>75</sup> Women’s “natural” functions embedded them in the world of the particular and the irrational—only men could act as the neutral vectors of a universal moral authority. As a result, in the profession’s response to the challenges that middle-class women began to raise in the late 1870s, merit was not mentioned—it was hardly necessary. Instead, the courts overrode the nominal inclusivity of the Interpretation Clause of the Solicitors’ Act 1843 (which stated that “every Word importing the Masculine Gender only shall extend and be applied to a Female as well as a Male”)<sup>76</sup> by drawing on the Common Law, which had the added virtue of eternalizing and thereby naturalizing the bar to women. Citing the *Mirrou of Justices* where, along with “serfs, deaf mutes . . . [and] criminal persons,” women were ineligible for appointment to the Bench, and referring to the “natural” qualities of women and contemporary images of women as “frail vessels” and “angels

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PROFESSION, ETHNICITY, AND MODERNITY IN COLONIAL TAIWAN 110–11 (2002). There were however limits to the inclusion of the black stranger in a comprador capacity; thus the majority black population of Trinidad and Tobago experiences similar patterns of exclusion and underrepresentation in professional accountancy as persons of African and African Caribbean origin in the United Kingdom. Marcia Annisette, *Imperialism and the Professions: The Education and Certification of Accountants in Trinidad and Tobago*, 25 ACCT., ORGS. & SOC’Y 631 (2000).

72. BOURDIEU, DOMINATION, *supra* note 7, at 5.

73. Thornton, *supra* note 5, at 408–09. Margaret Thornton writes that, stretching back to Aristotle, women have been deemed “possessed of an imperfect deliberative faculty.” *Id.* at 409. The development following the capitalist transformation of production of gendered separate spheres has been theorized in terms of a sexual contract, which maintained private patriarchy. CAROLE PATEMAN, *THE SEXUAL CONTRACT* 113 (1988).

74. The meaning of coverture is that “[b]y marriage . . . the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything; and is therefore called in our law-french a *feme-covert*.” 15 WILLIAM BLACKSTONE, COMMENTARIES 304 (Henry Winthrop Ballantine ed., 1915).

75. As Witz argues the generic notion of profession must be located “within the structural and historical parameters of patriarchal-capitalism. Professional projects are projects of occupational closure . . . [a] variety of strategies . . . characterise these projects . . . [which are] gendered.” Anne Witz, *Patriarchy and Professions: The Gendered Politics of Occupational Closure*, 24 Soc. 675, 675 (1990).

76. Solicitors Act, 1843, 6 & 7 Vict. 5, c. 73, § 48 (Eng.).

in the house," the courts showed that it was inconceivable that women could be considered "persons."<sup>77</sup> The extent that these views on women's capabilities were entrenched is illustrated by the following comments in the debate over the male monopoly of the solicitors' profession in the latter half of the First World War:

[T]he common sense of mankind has taken a particular view of occupations that are fitted for women, and although you may have among women particular instances of great learning and great genius even, and in some respects the qualities that are appropriate to such a transaction as bringing an action, I do not think that the common sense of mankind will recognize the sort of thing that solicitors have to do as work which is appropriate to women.<sup>78</sup>

Nevertheless, the socioeconomic revolution produced by the war made continued resistance to women's inclusion untenable, and in December 1922, Carrie Morrison became the first woman to be admitted to the Law Society.<sup>79</sup> This breach in the exclusive masculinity of a key public institution symbolized the developing transformation of women's place in the social order.

However, despite the needs of a modernizing economy for women's labor and the corrosive effect of their participation in the public sphere, the animus exhibited by the judgments in the Persons' Cases persisted. Thornton argues that this is glossed over by liberalism "because it encapsulates a pre-modern, non-rational element that sits uncomfortably with the rational humanism of liberal individualism."<sup>80</sup> Archaic attitudes to other subordinated social categories remained similarly resistant to modernization, reinforcing the essential masculinity and color of merit.

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77. The following excerpt from a U.S. judgment is exemplary:

The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor . . . . Nature has tempered woman as little for the [judicial] conflicts of the court room as for the physical conflicts of the battle field. . . . It would be revolting to all female sense of the innocence and sanctity of their sex, shocking to man's reverence for womanhood . . . on which hinge all the better affections and humanities of life, that woman should be permitted to mix professionally in all the nastiness of the world which finds its way into courts of justice . . . .

*In re Goodell*, 39 Wis. 232, 232 (1875).

78. IVANA BACIK, CATHRYN COSTELLO & EILEEN DREW, *GENDER INJUSTICE: FEMINIZING THE LEGAL PROFESSIONS?* 119 (2003) (quoting Earl of Halsbury, former Lord Chancellor, speaking in the debate in the Lords on the Solicitors (Qualification of Women) Bill, 29 PARL. DEB., H.L. (1918) 269 (U.K.)).

79. HILARY SOMMERLAD & PETER SANDERSON, *GENDER, CHOICE AND COMMITMENT: WOMEN SOLICITORS IN ENGLAND AND WALES AND THE STRUGGLE FOR EQUAL STATUS* 74 (1998).

80. Thornton, *supra* note 5, at 408.



### III. NEOLIBERALISM, THE LATE MODERN PROFESSION, AND THE CENTRALITY OF MERIT

A complex of socioeconomic and political forces has combined to make merit one of the dominant prescriptive norms of late modernity. These forces include the struggle by subordinated groups to develop a more inclusionary form of citizenship, one of the symbols of which was the 1944 Education Act,<sup>81</sup> which epitomized a democratization of the idea of merit.<sup>82</sup> The socialized form of citizenship underpinning the welfare state was expanded over the course of the three postwar decades, and the Civil Rights movements of the 1960s and subsequent identity politics weakened, to a degree, its patriarchal, postcolonial, and class-based character. The resulting impetus given to equal opportunity policies was a factor in the expansion and diversification of higher education, and beginning in the late 1970s, this led to an exponential increase first in female, and subsequently, BAME students.<sup>83</sup>

However, the conceptualization of equality and therefore merit was transformed by the advance of neoliberal philosophies,<sup>84</sup> which denounced policies that sought to address systemic disadvantage as unfair and productive of mediocrity.<sup>85</sup> Instead, the values of meritocracy were articulated as equality of opportunity (rather than outcome) in a market unfettered by “arbitrary obstacles”: “Not birth, nationality, color, religion, sex, nor any other irrelevant characteristic should determine the opportunities that are open to a person—only his abilities.”<sup>86</sup> A primary government goal therefore became ensuring that markets could function freely and flexibly, because perfect alignment of supply and demand would produce optimal outcomes for all: individuals would make rational choices either to invest in their human capital<sup>87</sup> or (if they are women) to concentrate their main efforts on their domestic role,<sup>88</sup> and employers’

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81. 7 & 8 Geo. 6, c. 31 (Eng.).

82. See MICHAEL YOUNG, *THE RISE OF THE MERITOCRACY 1870–2033*, at 37 (1959).

83. However formal education (like merit) facilitates the apparently legitimate preservation of social privilege across the generations. See generally PIERRE BOURDIEU & JEAN CLAUDE PASSERON, *REPRODUCTION IN EDUCATION, SOCIETY, AND CULTURE* (2d ed. 1990). For an application of this thesis to the U.S. system, see Lucille Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 *BUFF. L. REV.* 1155, 1173–74 (2008).

84. Neoliberalism is a portmanteau term for economic and political philosophy that conceptualizes the market as the natural, universal, core organizational form, and therefore seeks to restrict the role of government to stimulate and support the free market.

85. For instance: “Egalitarianism forces persons who exceed the average . . . to surrender, insofar as possible, the amount by which they exceed that average to persons below it.” Jan Narveson, *Egalitarianism: Partial, Counterproductive and Baseless*, in *IDEALS OF EQUALITY* 79, 87 (A. Mason ed., 1998).

86. MILTON & ROSE FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* 132 (1980).

87. See GARY S. BECKER, *HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS, WITH SPECIAL REFERENCE TO EDUCATION* (1964) (analyzing the effect of investment in human capital, particularly education, and its economic effects).

88. See generally CATHERINE HAKIM, *KEY ISSUES IN WOMEN’S WORK: FEMALE DIVERSITY AND THE POLARISATION OF WOMEN’S EMPLOYMENT* (2d ed. 2004) (describing and applying preference theory to explain women’s choices regarding the home and careers).

decisions similarly would be informed by rationality, that is, uninfluenced by cognitive stereotypes. This in turn would benefit not only the employer but also both the individual—because it would “responsibilize” him, driving him to incremental self-improvement and further career progression<sup>89</sup>—and society because having the “best” people in the job would enhance international competitiveness.

The related neoliberal assault on the monopolies of traditional professionalism, which has eroded the collegial structure of the solicitors’ profession and has replaced the kin-like relationships of traditional law partnerships<sup>90</sup> with hierarchical capitalist ones, together with the expansion of higher education appeared to enhance the possibility of creating this perfect labor market. But in practice, the conversion of what was once a scarce resource into abundance, the neoliberal marketization of universities, and the de-skilling of professional work as a result of technological developments and the demands of global capitalism have combined to transform both professional labor markets and the value of credentials.

Consequently, education, superimposed on the preexisting sources of disadvantage of gender and ethnicity, now functions as the primary mechanism in the reproduction of inequality, “a huge classificatory machine which inscribes changes within the purview of the (existing) structure.”<sup>91</sup> The related transformation in the meaning of a university degree from a public good into a private, individualized benefit of varying value<sup>92</sup> is illustrated by Galanter and Roberts’s comments on the continuing significance for corporate firms and their clients of “the class cachet conferred by Oxbridge and elite public schools.”<sup>93</sup> Nevertheless, since credentials ostensibly represent a legitimate source of distinction they ratify exclusions and inclusions from the benefits of the social order,<sup>94</sup> including the stratification of professionals. This development highlights some of the complexities underlying the apparent progressivism of the discourse of merit. In the rest of this part, I will rely on data drawn from a succession of qualitative research studies to comment on these features of the late modern profession.

Turning first to the changing nature of professional work, for tribunal and lower court judges, this is increasingly routinized and regulated, and for the majority of practitioners in solicitors’ firms, it is frequently de-skilled, labor-intensive, and undertaken in large, heteronomous organizations.<sup>95</sup>

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89. See John Brennan & Rajani Naidoo, *Higher Education and the Achievement (and/or Prevention) of Equity and Social Justice*, 56 HIGHER EDUC. 287, 290 (2008). This thereby also places the responsibility for failure onto the individual. See also Marieke van den Brink & Yvonne Benschop, *Gender Practices in the Construction of Academic Excellence: Sheep with Five Legs*, 19 ORG. 507 (2012).

90. Michael Burrage, *From a Gentlemen’s to a Public Profession: Status and Politics in the History of English Solicitors*, 3 INT’L J. LEGAL PROF. 45, 53–55 (1996).

91. BOURDIEU & PASSERON, *supra* note 83, at x.

92. M. THORNTON, *PRIVATISING THE PUBLIC UNIVERSITY: THE CASE OF LAW 1* (2012).

93. Galanter & Roberts, *supra* note 34, at 168.

94. BOURDIEU & PASSERON, *supra* note 83, at x.

95. See Rosemary Hunter, *Judicial Diversity and the ‘New’ Judge*, in *THE FUTURES OF LEGAL EDUCATION AND THE LEGAL PROFESSION* (Hilary Sommerlad et al. eds., 2014).

And while the ideology of professionalism sustains the profession's appeal, in practice, the enhanced status of elite universities consequent on their marketization means that the profession's salaried technicians are overwhelmingly drawn from graduates of lower status universities and other nonnormative groups. However, the projection of responsibility for their position onto the marginalized themselves is exemplified by the argument that women's reluctance to engage in self-promotion is a major reason for their failure to advance. The following quotations from a 2010 study are illustrative: "[They] are looking for the people who are performing and the people who are peacocks and the female psyche is such that we're uncomfortable in presenting what's positive about us . . .";<sup>96</sup> "[T]hey're (women) always putting themselves down. They're always saying they're not as good as they think they are, and it's not natural for women to expound about how good she is at something. It doesn't go with the territory."<sup>97</sup>

These views coincided with the account given in 2014 by a former Magic Circle salaried partner (a white woman), now working as an executive coach: "[I]t's common for women to be reluctant to put themselves forward. I hear that from women the whole time—saying things like, 'I'll be found out if I apply,' i.e., imposter syndrome. A man wouldn't think of that."<sup>98</sup>

However, this reluctance on the part of women may be linked to the knowledge that white men's sense of entitlement to high level positions means that the outsider's success may be attributed to "reverse discrimination." For instance, in a study of women judges, a British Asian woman described the resentment she experienced from white male barristers:

I think they see you there and think "I could have done that job and she's got it and she's half my age, so she's probably a judge just because she's female and black." That's sometimes a feeling I have, but on the other hand I know that some do think that because when I was appointed, comments like "she's black and female so she's ticked more of the Lord Chancellor's boxes" were made to a female colleague who passed them on to me.<sup>99</sup>

As her subsequent comments reveal, this reaction can reinforce the significance of merit for those who are generally the victims of the way it is currently conceptualized:

I found (these comments) very insulting—both to me and to the Lord Chancellor—i.e., the implication that he would appoint someone just because they are black and/or female. I also think those kinds of comments can be off-putting—they certainly put off the person to whom they were made from applying to be a judge. She said she'd be

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96. Anonymous interview (2010); *see also* SOMMERLAD, *supra* note 12.

97. Anonymous interview (2010); *see also* SOMMERLAD, *supra* note 12.

98. Anonymous interview (2014).

99. Anonymous interview (2009); *see also* Sommerlad, *supra* note 12, at 365.

embarrassed if she was appointed to think that those sorts of things were being said and/or thought.<sup>100</sup>

These reflections and the following description by the same female judge point up the alternative conceptualization of merit not as excellence, but rather as “deservingness”:

A year or two ago this kind of undercurrent was really quite bad . . . [and] you do still hear this sort of talk; over lunch for instance you might hear one of the judges say things like, “I hear Mr. Bloggs applied but didn’t get it—and he’s a silk with so much experience and a jolly good chap, but Miss Bahra has applied and now she’s a judge.” I think that the reality was that in the past, a lot of mediocre, average white men were appointed; also, whilst the Lord Chancellor did want more blacks and women to apply, I don’t think he ever appointed people other than on merit.<sup>101</sup>

Further, depictions of women’s humility are worryingly reminiscent of those offered by the courts in the Persons’ Cases. The corollary of such essentialist views is that self-promotion may not work to display a woman’s merit since it will instead be viewed as an unacceptable breach of the gendered script,<sup>102</sup> as a British Asian Muslim head of a tribunal found in the course of her application to become a Crown Court Judge:

[The feedback form said] “the panel felt you could have been a little less forceful at interview, in order better to display the restrained nature expected of a judge in the Crown Court. . . .” I have no idea what “a little less forceful” is supposed to mean! I want to ask them what evidence they have to suggest that I am not restrained. I told them I had to raise my voice in court on one occasion to stop a man from physically attacking me and members of my panel and that by so doing I had stopped him in his tracks long enough for him to be removed by security. This was in response to them asking me if my authority had ever been challenged in court. . . . Would a male candidate have received the same response I wonder?<sup>103</sup>

This experience of the resilience of gender stereotypes pervaded the accounts of other respondents and highlighted the significance of exclusionary homosocial practices and the mortification of the newcomer, who does not know the rules of the game, holds insufficient cards to play it, or is incapable of performing in it.<sup>104</sup> For instance, the executive coach cited above (interviewed 2014) gave the following account of the operation of the merit principle:

[T]he promotion processes are still very opaque—yes there’s now a form to fill in with your business case, but the men then tell the young men all

100. Anonymous interview (2009).

101. *Id.*

102. See Jo Silvester, *Questioning Discrimination in the Selection Interview: A Case for More Field Research*, 6 *FEMINISM & PSYCHOL.* 574, 577 (1996) (noting the tendency for employers to read behavior through the lens of social stereotypes).

103. Sommerlad, *supra* note 12, at 371.

104. On the performance of professional identity, see ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959).

the soft stuff, e.g., speak to so-and-so and he'll look at your figures/advise you on this, et cetera—and these are people who've already had their way eased by being included in the big deals. It's a club. It's these off-line conversations which mean that the men have all this collateral information about what to do/how to present themselves, what to emphasize and so on—and that in turn bolsters their confidence.<sup>105</sup>

She then elaborated on her own experience of the male club and its informal sponsorship:

When I was in the final stages of the application for partner process, we all had a dinner together and one of the partners stood up and told a dirty joke and then said, “now each of you has to tell a joke;” all the men knew about this, and us women (me and another) didn't—so all the advice I'd received went out the window—quite apart from the whole macho atmosphere.<sup>106</sup>

These descriptions of the clubbable nature of the profession evoke its origins and the significance of patron—client relationships both within firms and barristers' inns and across the profession. Bagehot's phrase “club government” encapsulates this characteristic and is particularly relevant to the higher levels of the judiciary.<sup>107</sup> Thus, the Association of Women Barristers described patronage as key to appointment to the senior judiciary.<sup>108</sup> Its significance and the sexualized nature of relationships between male and female lawyers are also the subject of the following comment, redolent of “droit de seigneur,” made in 2010:

[T]here was a lot of sexism, very casual sexism, at the bar. . . . When you went on things like advocacy weekends[], the older barristers would hit on you. And that was perfectly acceptable. And I think they, kind of, assumed that you would go along with that because you needed their patronage in order to get on. And you found that . . . (you) were expected to be nice . . . to some of the male barristers in order to be accepted.<sup>109</sup>

The evidence from other respondents confirms that while the profession's marketization is antithetical to, and should therefore be eroding, these premodern practices, in reality, as the discussion of the enhanced importance of high status educational markers indicated, it has had the opposite effect. The comments of a former practitioner in a general High Street solicitors' firm are illustrative; she explained that because the bulk of their work was obtained through referrals from other lawyers: “there was a lot of stress on schmoozing events,” and went on to recount the impact this

105. Anonymous interview (2014).

106. *Id.*

107. MARTIN LOUGHLIN, *SWORD AND SCALES: AN EXAMINATION OF THE RELATIONSHIP BETWEEN LAW AND POLITICS* 71 (2000); SELECT COMM. ON THE CONSTITUTION: JUDICIAL APPOINTMENTS PROCESS ORAL AND WRITTEN EVIDENCE, 2010–12, H.L., at 425–27 (U.K.), available at <http://www.parliament.uk/documents/lords-committees/constitution/JAP/JAPCompilevidence28032012.pdf> (discussing the merits of potential affirmative methods for ensuring a diverse judiciary).

108. SELECT COMM. ON THE CONSTITUTION, *supra* note 107, at 24.

109. Anonymous interview (2010).

had on the attributes which were valued:

I remember going out with a marketing boss (a partner) and a private client partner from the other firm, and he employed an Asian woman paralegal. He didn't bring her along . . . [and] openly said that he wanted to recruit a man instead of her (the paralegal) because he needed someone from a public school.<sup>110</sup> I questioned him about this, and he said, “it's because I want the person to be able to communicate with my clients.” . . . At the Bar in particular, it's all about how you speak and your background.<sup>111</sup>

This last comment—which evokes Sugarman's descriptions of the way in which the Bar formed itself into a gentlemanly preserve—is reiterated in a description by a British African Caribbean woman judge, given in 2009, of her sense of being an outsider, during her training:

I couldn't join in any of the informal chat the barristers engaged in, in the robing room, over coffee breaks, and so on. Everyone seemed to have a legal background and they'd all done lots of travelling, went skiing, played rugby, cricket and so on . . . it was very “clubby” and it was about feeling not as knowledgeable, not as cultured . . . a class thing. At one stage I felt so bad about it that I thought about reading the Encyclopaedia Britannica—I never did. But I did buy a whole load of books about cricket.<sup>112</sup>

In 2014, another young African Caribbean female pupil barrister recounted a similar experience of class humiliation:

I don't come from a very posh background and was continually scared, not of the work, but [of] not knowing what to do socially—for instance, the other day I had to meet with a client and senior barrister, and he told me to make some coffee, and it was a cafetiere and I didn't know how to do it—I was so humiliated.<sup>113</sup>

A further consequence of the prominence of the market to constructions of merit is the increased significance of the body “as bearer of symbolic value.”<sup>114</sup> The comments by a solicitor in 2014 illustrates this commodification of women's bodies: “[M]y boss talked about one woman and marketing, saying she'd be great because she's got the looks.”<sup>115</sup>

And in an echo of the discovery by a solicitor in 2011 that her “nickname was ‘big ones,’” she recounted, “I used to sit in the office with the principal partner, who I really liked, by the way, but he just used to look at my breasts constantly.”<sup>116</sup> Another solicitor stated, “[S]ome of the clients were racist—but to me it was the subtle but pervasive, everyday sexism that was

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110. British public schools are the elite, fee-paying schools (as opposed to state schools).

111. Anonymous interview (2014).

112. Anonymous interview (2009); *see also* Sommerlad, *supra* note 12, at 363.

113. Anonymous interview (2014).

114. CHRIS SHILLING, *THE BODY AND SOCIAL THEORY 2* (2d ed. 2003).

115. Anonymous interview (2014).

116. Anonymous interview (2010).

a problem . . . it went on all the time—things like the male partners having a conversation about who had the best breasts.”<sup>117</sup>

The impact of these premodern attitudes and practices grounded in personal relations on the profession’s claimed basis in objective credentialism are summarized in the following comment by a female Asian solicitor speaking in 2014:

It’s . . . difficult to establish your “merit” if you don’t drink and don’t have the same background so that it’s difficult for you to do the small talk—plus you may not have the right accent—the way you speak and your capacity to talk about the sorts of things that are expected is so important. So—you need to get these referrals from these other solicitors, and to do that, you have to click, and to do that, you need to be like them—they don’t know whether you’re a good solicitor or not—it’s about whether you’re like them and whether they like you.<sup>118</sup>

#### CONCLUSION

As an *idea*, merit was a central building block in the formation of the modern legal profession. The increased democratization of British society in the aftermath of the Second World War shifted its meaning to emphasize equality of outcome and began to open up the legal profession to diverse groups. However, the hegemony of free markets as the organizing principle of late modern society has led to merit’s fetishization, because it is critical to the ideological presumption that markets are “level playing fields.” As a result, merit is constructed as outside history, dissociated from structures of power, status, and influence, and its centrality in recruitment and promotion processes is read as an index of modernity, deflecting criticism of the slow progress toward diversity, equity, and inclusion. But, as Aristotle observed, although “everyone agrees that justice in distributions ought to be according to merit in some sense, they do not call merit the same thing.”<sup>119</sup> In his echo of this view, Sen stresses the materiality of merit:

[T]he idea of meritocracy may have many virtues, but clarity is not one of them. . . . There is some elementary tension between (1) the inclination to see merit in fixed and absolute terms, and (2) the ultimately *instrumental* character of merit—its dependence on the concept of “the good” in the relevant society.<sup>120</sup>

Young also describes meritocracy as a myth which legitimizes societies that in practice remain based on ascriptive inequalities,<sup>121</sup> while Bourdieu expresses it thus: “The particularity of the dominant is that they are in a

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117. Anonymous interview (2014).

118. *Id.*

119. 6 A HISTORY OF PHILOSOPHY OF LAW FROM THE ANCIENT GREEKS TO THE SCHOLASTICS 91 (Enrico Pattaro ed., 2007) (quoting ARISTOTLE, THE NICOMACHEAN ETHICS 3.1131a25–9).

120. Amartya Sen, *Merit and Justice*, in MERITOCRACY AND ECONOMIC INEQUALITY 5 (Kenneth Arrow, Samuel Bowles & Steven Durlauf eds., 1999).

121. See generally YOUNG, *supra* note 5.

position to ensure that their particular way of being is recognized as universal."<sup>122</sup>

This Article has sought to reveal the fluid, contingent, and instrumental character of merit, which these comments evoke. Like all spheres of social life, market behavior is in practice governed by a range of conventions and codes.<sup>123</sup> These conventions are informed by legal and nonlegal norms, including particular understandings of desert/merit.<sup>124</sup> In the legal profession these norms reflect dominant social relations and are thus shaped by category-based power hierarchies that have their roots in its history.<sup>125</sup> As a result, professional excellence is "charged with masculine implications,"<sup>126</sup> and merit is a key component of the informal practices of "racial rule."<sup>127</sup> This inscription of merit with subjective, hierarchically based social bias therefore works to reproduce the hegemony of white, upper middle-class males, while the commonsense understanding of it as objective enables it to perform the social magic of legitimizing these results of systemic privilege as justly deserved.

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122. BOURDIEU, DOMINATION, *supra* note 7, at 62.

123. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

124. Phillips, *supra* note 15, at 459.

125. See Daria Roitmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449, 1452 (1997). She writes: "We have forgotten or suppressed the standards' subjective history . . . and now represent the standards to be ahistorical, objective measures of ability. Having separated the standards from their history, we do not contemplate the notion that what constitutes ability itself is subjective." *Id.* at 1452–53.

126. BOURDIEU, DOMINATION, *supra* note 7, at 62.

127. See generally DAVID THEO GOLDBERG, *THE RACIAL STATE* (2002).