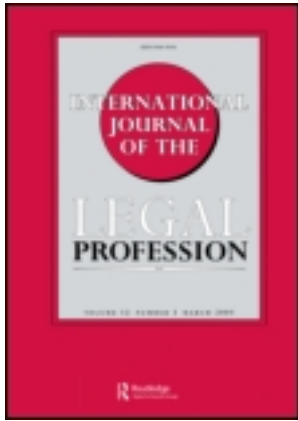


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### Demography, discrimination and diversity: a new dawn for the British legal profession?

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# Demography, discrimination and diversity: a new dawn for the British legal profession?

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## Introduction

For most of its history, the legal profession has operated as an exclusive club of white middle-class men. On the assumption that demographic homogeneity leads to shared attitudes and values, this was thought to have the useful consequence that lawyers would naturally adhere to common ethical standards, thus obviating the need for formal ethical regulation (Halliday, 1986, pp. 72–73; Burrage, 1996, pp. 71–72). Instead, entry controls could be used to ensure that only those made of the ‘right stuff’ gain the privilege of practising.

However, the fact that such entry controls and various other discriminatory practices have been used to ensure privileged access to membership of and progression within the legal profession has increasingly come under attack in a modern, meritocratic society which proclaims equality of opportunity irrespective of class, race, gender or other personal characteristics. Indeed, discrimination in the allocation of the benefits which accompany professional membership is particularly odious given that the adherence to high ethical standards is a central justification for professional status (Boon & Levin, 1999, pp. 49–50; Nicolson & Webb, 1999, p. 53). It is also particularly hypocritical for a profession whose professed *raison d’être* is to ensure access to justice and “uphold people’s rights without fear or favour” (The Bar Council, 2004, ‘Foreword’) to ignore the right to equal treatment and the principle of distributive justice in its own internal affairs. In fact, there has been a growing recognition of this within the legal profession, albeit far more so south of the border. There, the concern culminated in 2004 in highly detailed and impressively sophisticated measures to eradicate discrimination and promote diversity.

Nevertheless, a number of questions remain. One relates to the extent to which, notwithstanding the protestations of professional leaders (Abel, 2003, pp. 121, 130–131, 133, 134) discriminatory attitudes and practices remain entrenched. A second relates to whether the new measures are likely to be sufficiently effective to eradicate any remaining discrimination. Finally, it can be asked whether their concentration on eradicating discrimination and accommodating the different needs of previously

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excluded groups exhausts the profession's ethical obligation to act justly or whether they are obliged to take more positive action to increase demographic diversity throughout the profession.

In examining these questions, this article will concentrate on class, gender and race. This is not to deny that other demographic factors are important or raise similar issues. Thus, in recent years issues of age, sexuality, religion and disability have deservedly come to prominence (Halpern, 1994; Shiner & Newburn, 1995; Shiner, 1997, 1999; Duff *et al.*, 2000; Thomas, 2000; Abel, 2003, pp. 127–128, 131–133) and are being addressed by the English and Welsh professional bodies (Bar Council, 2004; Law Society, 2004). However, space constraints, and the fact that problems of class, gender and race have been most visible, wide-ranging, problematic and hence most extensively analysed, dictate a narrower focus. In any event, as the main aim of the article is to explore the ethical implications of lawyers' social background, any lessons learnt in relation to the 'big three' may also apply to other demographic groups.

### **A discriminatory or discriminating profession?**

The following description of the legal profession's historical and current record on class, gender and race inclusivity is unavoidably rather patchy. This is because there are no comprehensive and up to date statistics on all three demographic dimensions of all branches of the profession. Consequently, in order to ensure the greatest degree of comparability between the different branches and in relation to the widest spread of demographic groups and area of possible discrimination, the latest statistics referred to are for 2001. Although there are more up to date figures for some of the branches and in relation to some of the groups, they do not alter the pattern described below. Moreover, the 2001 statistics allow for useful comparisons with the census of that year.

At the same time, one needs to be careful about inferring discrimination from statistics alone. For instance, the fact that a previously excluded group is represented in the profession in numbers equivalent to, or in excess of, their general social presence may be explicable by that group's unusual interest in law rather than an absence of discrimination. Conversely, a particular group's under-representation may arise from a lack of interest in law or poor education. Thus, instead of being *discriminatory*, the profession may claim to be merely *discriminating* in selecting the best applicants. This might, however, hide various forms of indirect discrimination, which arise from the application of formally neutral selection or promotion criteria, such as attendance at an elite university or employment uninterrupted by parental leave, but which impact differentially and unfairly upon certain groups. These in turn may stem either from factors chosen by the profession itself, over which they have control and hence could change (what is usually called indirect discrimination), or from physiological or social factors, over which they have no control but nevertheless could seek to accommodate. Moreover, both direct and indirect discrimination may not be overt but remain hidden in lawyers' unexpressed attitudes or even their subconscious.

Consequently, care needs to be exercised in assessing the profession's record on discrimination.

### *Gender*

Notwithstanding this caveat, the legal profession has clearly failed to make women welcome (Podmore & Spencer, 1982; Spencer & Podmore, 1987; Abel, 1988, pp. 79–85; Skordaki, 1996; McGlynn, 1998; Sommerlad & Sanderson, 1998; Abel, 2003, Ch. 4). In 1919 Parliament had to overturn judicially sanctioned professional bans on female entry (Sex Discrimination Act 1919). But, even then, continuing assumptions about women's unsuitability to the rigours and intellectual demands of legal practice, as well as male lawyers' desire to retain its 'gentleman's club' atmosphere, not to mention their privileged market position, meant that the door to entry was opened only a crack. Indeed, it was 50 years before women began to exceed even 10% of new entrants.<sup>1</sup> Moreover, those who did manage to become lawyers were consistently paid less than men, relegated to 'female' specialisms, and generally made to feel unwelcome. Unsurprisingly, the attrition rate for female practitioners was high (Abel, 1988, pp. 80 and 173).

Only from around the 1970s did women begin to enter legal practice in significant numbers and today they still constitute a minority in all branches. In 2001, they comprised 39.4% of Scottish solicitors (Law Society of Scotland, 2001), 38.6% of English and Welsh solicitors (Law Society, 2001, p. 14), 26.7% of all barristers in independent practice<sup>2</sup> and 21.1% of practising advocates.<sup>3</sup> However, over the last decade women have exceeded 50% of new solicitors (Law Society, 2001, p. 28), have almost reached that figure for new barristers<sup>4</sup> though still constitute substantially fewer new advocates.<sup>5</sup> When combined with women's overrepresentation in legal education<sup>6</sup> and their strong academic performance (Law Society, 2001; Shiner & Newburn, 1995, p. 25; Shiner, 1997, p. 33)<sup>7</sup> numeric gender parity seems likely relatively soon.

Nevertheless, women's greater representation has yet to translate into equality. While the situation has undoubtedly improved, women (at least in England and Wales—there are no equivalent Scottish studies) still seem to face greater difficulty in obtaining pupillages and tenancies (Holland & Spencer, 1992, p. 8; but cf. Shiner, 1997, p. 104), training contracts (Shiner, 1999, pp. 10–14), and in negotiating the transition from trainee to qualified solicitor if they have children (Duff *et al.*, 2000, p. 17). However, it is after qualification that gender differences really begin to bite. Thus, while studies differ as to whether men receive higher starting salaries as trainee solicitors (cp. McGlynn, 1998, pp. 83–84; Shiner, 1999, pp. 44 and 49), a gender gap emerges soon after qualification which increases with career progression. For example, in England and Wales in 2001, the gap in median salaries was £1,250 for assistant solicitors, £12,000 for salaried partners and £21,000 for equity partners (Law Society, 2001, p. 10)<sup>8</sup>—differences that cannot be put down solely to experience and differences in firm size and locality (Sidaway, 1997; Cole & Sidaway, 1997, pp. 78–83; McNabb & Wass, 2005). Similarly, a 1992 study revealed almost twice as many female as male barristers earning below £25,000 and almost twice as

many men as women earning more than £100,000 (Holland & Spencer, 1992, Appendix D). Equally stark gender differences can be seen as regards progress up the career ladder. Less than 10% of QCs are female,<sup>9</sup> though this seems attributable to the lower rate of applications rather than lower success (Holland & Spencer, 1992, p. 19; McGlynn, 1998, p. 148). Women are similarly under-represented amongst senior solicitors. Thus, in 2001, 20% of Scottish and 23.9% of English and Welsh female solicitors were partners as compared to 53.5% and 52.4% of male solicitors, respectively (Law Society of Scotland, 2001; Law Society, 2001, p. 26).

Prima facie, then, women still face discrimination in the legal profession, and in particular a glass ceiling barring career progression. This can no longer be dismissed as a temporary stage on the road to equality. Thirty years after large-scale female entry into legal practice, the expected 'trickle up' (Sommerlad, 1994, pp. 34–35) has not materialised and women with appropriate levels of experience still fail to match men in career progression. For example, in England and Wales in 2001, 83% of men but only 57% of women solicitors with 10–19 years experience were partners (The Law Society, 2001, p. 9; see also McGlynn, 1998, p. 148 regarding barristers).

Nevertheless, many lawyers refuse to put this down to discrimination. Thus male domination of the more lucrative legal specialties (Skordaki, 1996, pp. 24–25; Sommerlad, 1994, p. 34; Cole, 1997, p. 12ff; Law Society, 2001, pp. 8–9), so important to promotion, is sometimes explained away by the discriminatory choices of clients and instructing solicitors (Holland & Spencer, 1992, pp. 9–10; McGlynn, 1998, pp. 152–153; Sommerlad & Sanderson, 1998, pp. 83–84, 86)—begging the question why their wishes are accommodated (but see now Law Society, 2004, pp. 21 and 30). More generally, women's lower earnings and promotion prospects are ascribed to their own choices about how to invest the 'human capital' represented by their education, training, expertise, experience and motivation (McGlynn, 1998, p. 98ff; Sommerlad & Sanderson, 1998, esp. Ch. 2; Sanderson & Sommerlad, 2000, p. 162ff; McNabb & Wass, 2005). If female lawyers are disadvantaged, the argument goes, it is because they choose to work outside private practice<sup>10</sup> and the large law firms (Sommerlad & Sanderson, 1998; but cf. now Shiner, 1999, p. 15), specialise in less lucrative areas of practice, and are far more likely than men to work part-time and take career breaks for childcare purposes.<sup>11</sup>

This argument is, however, doubly flawed. First, not all women choose to work in particular specialist areas or outside private practice (see Shiner, 1999, Ch. 2, regarding men's greater chances of getting the jobs they want). Instead, they may be channelled that way by received knowledge of recruiters' behaviour, or by instructing solicitors, barrister clerks, and those who allocate work in solicitors' firms; all of whom may be motivated by assumptions about women's inherent suitability for certain types of work, if not by a desire to protect male privileges (Podmore & Spencer, 1982, p. 346; Holland & Spencer, 1992, pp. 9–10; McGlynn, 1998, pp. 152–153; Sommerlad & Sanderson, 1998, pp. 164–165).

Secondly, the legal labour market is not a gender-neutral arena. In a comprehensive study of English solicitors, Sommerlad and Sanderson (1998),<sup>12</sup> have persuasively argued that legal practice continues to be a highly masculine domain. This maleness, and the resulting discrimination against women, emerges in various ways.

One is that recruitment and promotion decisions are not made purely or even primarily on factors like academic performance, work experience or legal skill.<sup>13</sup> In addition to human capital, lawyers need the correct sort of ‘cultural capital’. According to Bourdieu, cultural capital involves a “permanent disposition, a durable way of standing, speaking, walking and thereby of feeling and thinking” (1990, pp. 69–70) and is gained at school, and through family, social and sporting connections (see further Sommerlad & Sanderson, 1998, p. 32ff). Sommerlad and Sanderson argue that the core form of a lawyer’s cultural capital has always been those attributes socially constructed as male and considered to be absent in women: rationality, aggression, unemotional technical skill, etc. Having the correct cultural capital is particularly important because of the extent to which ‘personalist’ or ‘clientist’ relationships “underpin power hierarchies and key decision-making” in legal practice (Sommerlad & Sanderson, 1998, p. 7). Thus advancement depends on mentoring, patronage, being allocated training and the right sort of work, as well as the ability to attract and retain clients. But women are frequently excluded from the “fraternal contract” (Thornton, 1996) that characterises intra-professional and lawyer–client relationships. Such exclusion can arise simply from the apparent contradiction between women’s perceived feminine qualities and the assumed requirements of legal work,<sup>14</sup> but it may also arise from the masculine, if not male-only, settings and laddish atmosphere in which much personal contact occurs—sport events, after-hours drinking, Rotarianism, etc. Moreover, to add insult to the injury of exclusion from the professional ‘men’s club’, women may sometimes be expected to use their sexuality at work, particularly in cultivating clients (Sommerlad & Sanderson, 1998, pp. 175–177). In this context, it is not surprising that sexual harassment is rife in legal practice, nor that, because of the importance of personal relations and reputation, it is rarely challenged (Shapland & Sorsby, 1995, p. 71; Sommerlad & Sanderson, 1998, pp. 179–184; Shiner, 1999, pp. 36–37; Duff *et al.*, 2000, pp. 60–61; Sommerlad, 2002, pp. 225–228).

But, even if this ‘fraternal contract’ were to be dissolved, as long as women are seen (and see themselves) as having primary responsibility for childcare, they will continue to be disadvantaged by a career structure modelled on the working life of someone unencumbered by domestic responsibilities. Women’s commitment to family means that they take substantially more time out of work than men, usually at a time most crucial for promotion prospects (the Law Society, 2001, p. 5) and are less available for the long hours, and after hours socialising and practice development regarded as important for advancement. However, it is not simply that the profession has failed to adopt flexible working practices (Holland & Spencer, 1992; Sommerlad, 1994, p. 40ff; Skordaki, 1996, pp. 31–33; McGlynn, 1998, pp. 102, 151–152; Sommerlad & Sanderson, 1998, p. 236ff; Duff *et al.*, 2000, pp. 47–49); according to Sommerland and Sanderson, it is that (mostly male) decision-makers interpret commitment to family as a concomitant absence of commitment to work, and this is *the* criterion for recruitment and advancement. Indeed, an important reason why female lawyers tend to be overlooked for mentoring, favourable work allocation, training opportunities, etc. is the assumption that their gender renders them inherently predisposed to commitment to family and not career—a fact reflected in

the continuing illegal practice of recruiters asking female applicants about their family plans (McCabe, 1995; Sommerlad & Sanderson, 1998, pp. 130–131).

Overall, we see that, while women have been entering legal practice in large numbers and, while exceptional women have risen to the top, most tend to be located below the glass ceiling, and, in the solicitor's profession, constitute a 'reserve army' of relatively low paid, less permanent and expendable labour. In response, many choose to leave private practice for more favourable working conditions (Holland & Spencer, 1992, pp. 12–13; McGlynn, 1998, pp. 112–113; Duff *et al.*, 2000, p. 48; Duff & Webley, 2004)<sup>15</sup> or the profession altogether (Holland & Spencer, 1990, p. 3; Sommerlad & Sanderson, 1998, pp. 106–107; Duff *et al.*, 2000, p. 17) or alternatively to forego family plans.<sup>16</sup> In other words, eight decades after women first began entering legal practice, they still encounter a profession that refuses to accommodate their different needs, and in which they are subjected to overt and covert forms of direct and frequently illegal discrimination, if not hostility (see Holland & Spencer, 1992, p. 7; Shapland & Sorsby, 1995, p. 71; Shiner, 1999, p. 36). Rather than women's increased presence leading to the expected feminisation of the profession (Menkel-Meadow, 1985; Sommerlad, 1994), male lawyers seem to have responded protectively by intensifying the masculinist culture (Sommerlad & Sanderson, 1998, pp. 193–194).

### *Race*

Whereas women are still approaching parity of numbers in legal practice, in England and Wales<sup>17</sup> the number of ethnic minorities<sup>18</sup> now substantially exceeds their general social presence not just in terms of admissions but also total numbers. Thus in 2000, when ethnic minorities constituted only 7.9% of the general UK population (Office for National Statistics, 2003), they constituted 8.7% of barristers in independent practice whose ethnic origin is known;<sup>19</sup> a figure which should slowly rise given that the number of ethnic minority pupils is frequently double that percentage (Thomas, 2000, p. xiv). In the same year, of those whose ethnicity was known, ethnic minorities represented 19.0% of admissions (Cole, 2000, p. 78), 8.8% of solicitors on the Roll and 7.0% of those with practising certificates (Cole, 2000, p. 14). Moreover, as with women, the high numbers of ethnic minority law school admissions (Cole, 2000, 5.58) suggest an even greater expansion.

Once again, however, the raw figures conceal past and continuing discrimination. Until its repeal in 1974 by the Solicitors Act, the Law Society's ban on non-British solicitors helped ensure that ethnic minorities still only constituted an estimated 0.25% of the total number by 1982, increasing slowly to 1% in 1986 and 2.3% of those with known ethnicity in 1994 (Cohen, 1982b, p. 11; Morton & Harvie, 1990b; Harvie, 1994b)—making the present position even more remarkable. The position at the Bar was better, with ethnic minorities constituting 4.3% of all barristers in 1983 and 6% in 1990 (Abel, 1988, p. 78; Morton & Harvie, 1990a). Nevertheless, research reveals evidence of overt discrimination in both branches of the profession in the early years (*Royal Commission on Legal Services*, 1979, paras

35.31–35.38; Cohen, 1982a, 1982b; Abel, 1988, 2003; Morton & Harvie, 1990a, 1990b, 1990c; Harvie, 1992).

Thus stories of recruiters being patently surprised and prejudiced when ethnic minority applicants with Caucasian names appeared at interviews are reinforced by studies which showed that ethnic minority applicants found it much harder to obtain articles, jobs, tenancies and pupillages (Cohen, 1982a, p. 8; Abel, 1998, p. 76; Harvie, 1992; Clark, 1997). Once admitted, ethnic minority lawyers faced none too subtle forms of discrimination such as being insulted, socially ostracised, overlooked in work allocation and not extended the same support as white colleagues. Consequently most ethnic minority barristers ended up in exclusively or predominantly ethnic minority 'ghetto' chambers, which drew much of their work from their own community and specialised in areas like criminal defence and immigration, rather than more lucrative commercial and civil work. Similarly, ethnic minority solicitors were far more likely than white solicitors to be sole practitioners or work in small firms. In response to mounting criticism, the professional bodies reluctantly (Abel, 2003, pp. 123, 125, 131) produced a series of initiatives designed to monitor ethnicity, eradicate racial discrimination, and encourage diversity (Harvie, 1994a, 1994b; Clark, 1997; Bhalla & Hamylton, 1997).

However, not least because of internal resistance to such initiatives, resource problems, the exhortatory nature of many aspects of monitoring and equal opportunity policies, and the understandable reluctance of ethnic minorities to complain (cf. Shiner, 1999, pp. 36–37; Duff *et al.*, 2000, p. 59), these initiatives have yet to eradicate the problems they face in legal practice. Admittedly, the situation has improved, with ethnic minority lawyers now breaking into the more lucrative specialisations and prestigious law firms (Shiner, 1999, Ch. 2), being awarded silk<sup>20</sup> and obtaining partnerships.<sup>21</sup> Moreover, recent research failed to discover any discrimination in Bar Vocational Course admissions, allocation of pupillages and tenancies or the continued concentration of ethnic minorities in, especially small, high street solicitor firms (Shiner, 1997, pp. 75, 106, 123; 1999, p. 26). At the same time, even when factors like academic performance,<sup>22</sup> prior work experience, and firm size and geographic location are held constant, ethnic minorities still find it significantly harder to gain admission to the Legal Practice Course (Shiner, 1997, p. 20), training contracts (Shiner, 1997, p. 65), partnerships (Cole, 2000, p. 24), and the same starting salaries as their white counterparts (Shiner, 1999, pp. 51–52; Duff *et al.*, 2000, pp. 43–44). They also continue to be segregated in particular types of work settings (Legal Services Research Centre, 2001), experience high levels of racial discrimination, as trainees and qualified solicitors, and even higher levels as pupils (Shiner, 1997, p. 133; 1999, p. 36), with anecdotal evidence suggesting that African-Caribbean and African men are particularly singled out (Harvie, 1994a, 1994b; Vignaendra *et al.*, 2000, p. 127).

Given this dominance, the hegemonic form of cultural capital in legal practice is likely to be Eurocentric as well as masculine. Consequently, like women, ethnic minorities might well struggle to persuade recruiters that they will fit into their organisations. And if recruited, they might be less likely to gain mentoring, training opportunities and favourable work allocation, and be less comfortable with the socialising necessary for career progress. Equally, while their numbers remain small, the



performance of ethnic minorities is likely to be more closely monitored and harshly judged by those who assume their inferior competence. While these predictions have yet to be confirmed by detailed research, and it is perhaps too early to regard the continuing low number of ethnic minority partners and QCs as evidencing a glass ceiling,<sup>23</sup> the possibility that ethnic minorities, and especially African-Caribbean and African men, might be prejudiced by the cultural norms and personalist nature of legal practice is supported by anecdotal evidence (Cohen, 1972a, p. 8; Abel, 1998, p. 76; Harvie, 1992; Clark, 1997) and detailed research showing that ethnic minority trainees feel far less comfortable than whites in their work environments (Shiner, 1997, p. 84).

What is, however, clear is that ethnic minorities are over-represented amongst those who come from less privileged socio-economic backgrounds (Mason, 2000, Ch. 5). Consequently, in addition to racism, they face all the disadvantages associated with class.

### *Class*<sup>24</sup>

Although information is patchy—not least because class background has never been consistently monitored by the profession<sup>25</sup>—lawyers have undoubtedly always been drawn predominantly from the higher socio-economic classes (Abel, 1988, Chs 2 and 10, pp. 170–172; Paterson, 1988, pp. 86–87 and 94; Paterson *et al.*, 1999, pp. 258–259). This was particularly so at the Bar, which at one time was quite explicit about its desire to exclude the ‘lower classes’ (Lucas, 1962; Abel, 1988, Ch. 2). For example, in one late nineteenth century survey, three quarters of all barristers came from the urban and upper-middle-classes (Abel, 1988, pp. 74–75). With the expansion of university education, a state funded university degree becoming the predominant route into practice, the abolition or devaluing of many of the fees and premiums charged to entrants, and the introduction of remuneration and financial assistance to offset the huge expense of surviving apprenticeship and the early years of practice, the financial obstacles to becoming a lawyer were ameliorated. Yet those from less privileged backgrounds continued to struggle. For example, only 14% of admissions to Middle Temple in 1977 had working class fathers (Abel, 1988, p. 76) whereas 82% of a 1976 survey of articled clerks had parents who were professionals, employers or managers (when compared with 66% of the general population aged 16–19: Abel, 1988, p. 172). Even in 1989, more than a third of English and Welsh solicitors surveyed had attended fee paying schools and only 14% comprehensive or secondary modern schools (Chambers, 1992). Today, class appears to be the greatest obstacle to entry and progress within legal practice.

One contributing factor is that the dramatic increase in female entrants has been drawn largely from the middle classes, further squeezing out working class applicants (Paterson, 1988, pp. 93–94; Skordaki, 1996, pp. 16–17). Another is that the costs of qualifying remain daunting, especially because of the decrease in state funding of education (Thomas & Rees, 2000, p. 35), and the introduction of tuition fees and abolition of university grants in England and Wales,<sup>26</sup> and especially for aspiring barristers and advocates, who still have to survive many years of unremunerative practice.

Law student debt now runs at very high levels (Shiner & Newburn, 1995, p. 75), requiring many to undertake part-time work. This has detrimental effects on academic performance (Thomas & Rees, 2000, p. 27) and the ability to gain the unpaid work experience (Shiner & Newburn, 1995, p. 40), which is so important for recruitment (Shiner & Newburn, 1995, pp. 83–86, 122–123; Shiner, 1997, pp. 55–56, 63–64, 121–122) and may well dissuade some from a legal career altogether (Shiner, 1997, pp. 136–137). Not only are these factors likely to affect those without family support disproportionately (Shiner & Newburn, 1995, pp. 69–75, 113–117; Shiner, 1997, pp. 34–39, 115–117; Rolfe & Anderson, 2003, p. 319), but local authority grants, professional scholarships and grants, and pre-vocational training offers of training contracts or pupillages tend to go to those who least need them (Shiner & Newburn, 1995, pp. 70–73).

However, the main reason why class matters so much is because of the way in which it interacts with the selection criteria used by educational and professional gatekeepers so as to discriminate indirectly against those from less privileged backgrounds. Thus, parental access to financial capital may place children onto an escalator of privilege by enabling them to attend fee-paying schools (cf. Shiner & Newburn, 1995, p. 19; Vignaendra, 2001, p. 20), which, when combined with the social capital represented by the atmosphere, expectations and parental support in middle-class homes (Kay & Hagan, 1999) substantially increases the chances of middle-class children choosing a legal career and obtaining the academic results necessary to enter law school, especially the more prestigious ones (cf. Halpern, 1994, pp. 24–25, 26–27; Thomas & Rees, 2000, p. 33). These and other class advantages have recently been confirmed by a comprehensive longitudinal study of aspirant English and Welsh lawyers (Halpern, 1994; Shiner & Newburn, 1995; Shiner, 1997, 1999; Duff *et al.*, 2000; see also Anderson *et al.*, 2003 regarding Scotland). Thus, compared with the general school population, those who had been to independent schools were over-represented in law schools by a factor of five, and when compared to those from non-selective state schools were over three times more likely to study law at Oxbridge, and 40% less likely to attend a new university (Shiner & Newburn, 1995, Ch. 2). Having a graduate or professionally qualified parent conferred similar advantages (Shiner & Newburn, 1995, Ch. 2).<sup>27</sup>

Attendance at a prestigious law school, in turn, increases the chances of obtaining a good law degree (see e.g. Sedley, 2000, p. 8), and hence progression to the vocational stage of legal education (Shiner & Newburn, 1995, pp. 46 and 96; Rolfe & Anderson, 2003, pp. 319–320). Good degree results (and, in the case of training contracts, also school results) (Shiner, 1997, pp. 56–57 and 122), and the educational institution attended,<sup>28</sup> substantially enhance the chances of obtaining work experience (Shiner & Newburn, 1995, p. 37), pupillages and training contracts, especially in the better paying<sup>29</sup> and more prestigious firms.<sup>30</sup> Finally, while there is little relevant UK research,<sup>31</sup> studies in other jurisdictions and occupations suggest that the academic advantages gained by social background do not disappear with career progression (Lena *et al.*, 1993).

A middle-class background does not, however, only confer academic advantages. Families and attendance at the better schools, universities and vocational training

institutions also provides the social capital constituted by the social connections and ‘old boy’ networks that facilitate finding work experience (Shiner & Newburn, 1995, pp. 18 and 38) and consequently also training contracts, pupillages and post-qualification employment. For example, in the longitudinal study, 10% of those with training contracts were employed by a firm containing a relative or family friend (Shiner & Newburn, 1995, p. 55), whereas having a close relative in the profession significantly increased the probability of receiving a training contract offer prior to the Legal Practice Course (from 0.30 to 0.41: Shiner, 1997 p. 63) and a City job (from 0.15 to 0.23: Shiner & Newburn, 1995, p. 28), as well as helped find post-qualification jobs (Duff *et al.*, 2000, p. 32).

Also important is the cultural capital associated with class. Particularly because of the current surplus of qualified candidates, more subjective selection criteria are likely to play a bigger role (cf. Watkins, 1984), as expressed in the advice of a Clifford Chance partner to candidates: “Go to a good university, get a 2.1 and have a fantastic personality” (Thomas & Rees, 2000, p. 39). What constitutes a fantastic personality is likely to reflect an instinctive judgment about a candidate’s ‘fit’, significantly determined by their having the cultural capital cultivated in middle-class families, independent schools, and elite universities. The subtle advantages conferred by being seen to be of the ‘right stuff’ is suggested by the fact that, even after ‘objective’ criteria like academic results and work experience are held constant, having graduate or professionally qualified parents<sup>32</sup> and an independent school education<sup>33</sup> substantially increase the chances of obtaining training contracts, especially in the City and large provincial firms, whereas parental qualifications increase those of obtaining pupillages (from 0.68 to 0.81: Shiner, 1995, p. 124). Similarly, the profession’s bias [also displayed by LPC providers (Shiner, 1995, pp. 18–19)] in favour of those who attend elite law schools<sup>34</sup> and take the Common Professional Examination (CPE) rather than an LLB,<sup>35</sup> may owe as much to the greater likelihood of such candidates being from privileged backgrounds (Shiner & Newburn, 1995, pp. 21–23) as to a belief in their superior legal knowledge and skills (cf. Bermingham & Hodgson, 2001; Vignaendra, 2001, p. 23). This unconscious or even conscious class bias is confirmed by the fact that 4% of solicitors from less privileged backgrounds in the longitudinal study claimed to have suffered discrimination on class grounds (Shiner, 1999, p. 36).

We thus see very little change to the legal profession’s privileged class background over recent years. Moreover, given the structural causes of this position and the profession’s apparent lack of concern over the issue (partly evidenced by its failure to monitor class background and prohibit class discrimination), significant future change seems unlikely. This is particularly disappointing because of the way in which class overlaps with other forms of discrimination and disadvantage. While female lawyers appear only marginally less likely to come from privileged backgrounds (Skordaki, 1996, pp. 16–17; Shiner & Newburn, 1995, pp. 17 and 19), the same cannot be said for ethnic minorities. Thus in the longitudinal study, 60% of white students had at least one parent with a degree or professional qualification and 31% had been to an independent school, compared to, respectively 47% and 13% of African-Caribbean, 40% and 22% of Indian, and only 20% and 11% of

Pakistani and Bangladeshi students (Shiner & Newburn, 1995, pp. 18–19). Although it is difficult to establish the extent to which ethnic minorities face direct double discrimination, the longitudinal study clearly shows that they experience the same disadvantages as those from less privileged socio-economic backgrounds. Thus, compared to whites, ethnic minorities were prejudiced by their notably poorer academic results at school (Mason, 2000, Ch. 6; Shiner & Newburn, 1995, p. 21) university (Shiner & Newburn, 1995, p. 26), and at the vocational stage of training (Shiner, 1999, pp. 34 and 115), their much greater likelihood of attending a non-selective school and a new university, to study the LLB rather than the CPE, and to be slightly less likely to have had prior work experience with solicitors (Shiner & Newburn, 1995, pp. 19, 24, 22 and 37).

### **From discrimination to diversity?**

This overview reveals a profession still guilty of both direct and indirect discrimination against women, ethnic minorities and especially those from less privileged backgrounds, who struggle even to get a foot in the professional door. The main causes are the dominant middle-class, masculinist and Eurocentric culture within the profession, and selection and promotion criteria which combine with social stratification along gender, race and class lines to produce a bias in favour of white, upper middle-class men<sup>36</sup> (but not a perfectly mirrored bias against ethnic minority, working class women).<sup>37</sup> This is particularly so within the more lucrative and prestigious practice sectors which use economic and status incentives to create an “elite within an elite” (Shiner, 1999, p. 73; 2000, p. 117).

The argument that lawyers are simply selecting and promoting the “best” candidates is specious. Aspirant lawyers must not only overcome the hurdle of relatively objective evaluations of their academic ability and legal skills, but also face the need to fit with the dominant culture and (in the case of women) career patterns within legal practice, as well as simple sexism, racism and class bias. Women, ethnic minorities and those from less privileged socio-economic backgrounds are unlikely to know this, thus undermining the argument that their career trajectories are freely chosen.<sup>38</sup>

### *From discrimination to distributive justice*

The question thus arises whether the profession can do anything to improve its record on ensuring distributive justice as regards entry into and progress within the profession. In fact, anything at all would be an improvement as regards the two Scottish branches. Currently, as far as can be gathered, all they have managed is a brief code requirement prohibiting solicitors from discriminating “on grounds of race, sex, sexual orientation, religion or disability” (Law Society of Scotland, 2002, para. 11), though the Law Society is planning to launch a Diversity Action Plan in August 2005 (Law Society of Scotland, 2004).

By stark contrast, since the early 1980s the English and Welsh branches have taken steps to eradicate discrimination and more recently also to promote equality

and diversity more actively. Thus, in addition to professional rules prohibiting various forms of discrimination, the Bar Council introduced race awareness training into the professional stage of legal education, whilst both it and the Law Society have taken measures to monitor gender and ethnicity, set up relevant committees, appoint dedicated officers and even set targets for ethnic recruitment by chambers and firms. Most recently, in 2004, both professional bodies published highly detailed provisions on ensuring equality and promoting diversity. Both the Law Society's *Delivering Equality and Diversity: A Handbook for Solicitors* (Law Society, 2004, henceforth, "the Handbook")<sup>39</sup> and the Bar Council's *Equality and Diversity Code for the Bar* (Bar Council, 2004, henceforth, "the Code") evidence a serious commitment to the goals of equality and diversity. Both require firms and chambers to monitor, not just the overall distribution of gender, ethnicity and other relevant categories, but also to check for possible discrimination in all decisions relevant to recruitment and career progress. Both provide detailed guidance on how to avoid such discrimination, whether direct or indirect, conscious or unconscious, and how to prevent lawyers leaving because of inhospitable work environments. Both, though primarily the Law Society, extend the process of eradicating discrimination to seeking actively to promote greater demographic diversity, while the Law Society also seeks to accommodate the special needs and sensitivities of different cultural and religious groups.

While the two documents are undoubtedly the product of considerable effort and a sophisticated understanding of the factors which cause indirect discrimination in entry into and progress within the legal profession (e.g. Law Society, 2004, pp. 40–41, 43, 47ff; Bar Council, 2004, paras 1.47, 1.50, 1.59, 173–174, 2.28 and Annexes B and M, *passim*), it remains to be seen whether this is matched by an equal commitment to promoting equality and diversity on the ground. But even if it is, before one rushes to conclude that Scottish lawyers should adapt the English and Welsh provisions wholesale, a number of questions can be raised about their potential effectiveness. Because space constraints prevent an exhaustive listing of possible omissions and flaws, criticism will be confined to what I regard as the most glaring problems and, on the assumption that the Scottish branches would want, where appropriate, to combine the best of both documents, to the limitations of whatever is the best version of similar measures.

Here, two major omissions in both documents stand out. One is the failure to counter the continuing assumption in the legal profession that it is women who naturally take primary responsibility for childcare. Thus both branches provide for disparate periods of maternity and paternity leave. While it is obviously impossible in a society purportedly organised along liberal lines to force men to care equally for children, and even many feminists would argue that women need longer leave because of the physical impact of birth, if parenting continues to be more expensive for men, nothing is done to challenge traditional gender roles.

The other important omission relates to the demographic categories covered by the Code and Handbook. While they have slightly different lists of protected groups,<sup>40</sup> and there are occasional oblique references to the impact of social disadvantage such as in relation to 'A' levels achieved or universities attended (Law Society, 2004, p. 40),<sup>41</sup> neither prohibits discrimination on the grounds of socio-economic class or

extends to the working class its policies for greater inclusiveness. Class, as we have seen, is not only the most tenacious source of disadvantage, but it reinforces other forms of discrimination and disadvantage such as those flowing from race. Given the difficulty of definition and the way in which class is so woven into the hegemonic cultural capital of the profession, its inclusion may operate more at a symbolic and educative level rather than directly eradicating discrimination in recruitment and promotion. On the other hand, firms, chambers and the professional bodies could easily take a more pro-active role by targeting recruitment drives in underprivileged areas, and providing bursaries and scholarships for legal education, pupillage and devilling for those from less privileged backgrounds (Sedley, 2000, p. 11). More radically much can be achieved if the profession was to pressurise universities into following the example of Bristol University, which has to a limited extent overridden the predominant recruiting focus on school results in order to widen access to its law school (see Bibbings, 2000). Given that this has not resulted in a watering down of academic standards, and that the effects of class are likely to continue after entry into university, there is also an argument for extending these programmes to decisions about entry to the professional stage of training.

As regards the likely effectiveness of the provisions, a major problem relates to the drafting of the two documents. One problem stems from the sheer difficulty of trying to find one's way around the relevant provisions. Thus to understand the Bar Council's requirements one needs to navigate between the very broad principles of its general Code of Conduct, its Equality and Diversity Code, which heads of chambers must follow, and the various annexes providing guidance on specific aspects of the latter code. Unfortunately, these various elements have not been fully integrated.<sup>42</sup> Even worse in this regard is the Handbook which contains the Law Society's Anti-Discrimination Rules, along with guidance on the rules, a model policy, which firms must either adopt or provide equivalent provisions thereto, detailed guidance on implementing the policy and two self-assessment questionnaires for checking such implementation—the more minimalist of which “will probably be more useful for very small Firms or those with limited resources” (Law Society, 2004, p. 71).

The complexity of the two documents and their lack of integration render it far from easy to ascertain the exact details of the various anti-discrimination and pro-diversity obligations. To make matters worse, the detail provided and exact wording of related provisions vary between the different levels of regulation. For example, the requirement in the Code that chambers monitor applications for pupillage, tenancy and work allocation, harassment and possibly<sup>43</sup> maternity or paternity leave or flexible working arrangements (Bar Council, 2004, paras 1.16, 1.38, 1.75, 1.86), is watered down in Annex E to only a recommendation that selection decisions and work allocation are monitored. The Law Society Handbook is equally unclear. No guidance is provided as to the exact extent of a firm's duty to monitor implementation of its anti-discrimination policy except that it should be proportionate to its “size and nature” (Law Society, 2004, p. 32). And, while a commendably inclusive list of monitoring subjects is provided (see esp. §6, Law Society, 2004), this is only a recommendation and firms are left to adopt a more minimalist approach if they

consider this justified by their size and resources (Law Society, 2004, p. 72). The Law Society also requires equal pay reviews to be conducted in relation to gender, but only that firms consider extending them to other groups. In addition, while it is probable that breach of the above monitoring obligations is intended to attract disciplinary action, this and the manner in which the professional bodies intend to go about ensuring compliance is not expressly, let alone clearly, articulated.

In undercutting any message about the importance of monitoring, the possibility thus exists that firms and chambers may continue (cf. Morton & Harvie, 1990b; Harvie, 1994b) to flout their duties, arguing that their ambiguous nature precludes disciplinary action. Without clearer requirements and notification of enforcement measures, there is a consequent danger of firms and chambers lacking the necessary information to put into effect measures needed to eradicate discrimination and promote diversity. And without such information, the professional bodies might have information as to overall numbers, but will be unable to evaluate whether their policies are effective in eradicating discrimination in the various actions of firms and chambers which affect recruitment and career progression. There thus exists the risk that these policies might be misdirected, inadequate or even otiose, and hence that they succeed only in annoying those charged with applying them, disappointing intended beneficiaries and possibly even fanning tensions along demographic lines.

The gap between aim and implementation is most disappointing in relation to the more innovative measures designed to deal with unconscious direct discrimination and indirectly discriminatory practices affecting recruitment, promotion and staff retention. Again, a major problem relates to a lack of clarity about the consequence of non-compliance. Thus, most of these provisions are contained in parts of the Code and Handbook providing guidance on the implementation of the law, professional rules and suggested anti-discrimination policies (Law Society, 2004, pp. 17–25, §4; Bar Council, 2004, Annexes B, H, I and J) but again the consequences of non-compliance are not always specified. Ambiguity also creeps in on matters like diversity training which is variously described in terms suggesting that it is mandatory, recommended only or required to rectify past discrimination (Bar Council, 2004, ‘Foreword’, paras 1.46, 1.133, 2.27; Law Society, 2004, pp. 31, 57, 64, 68, 70, 84, and 89–90). Nor are matters helped by the less than fully imperative language used. For example, instead of clearly prohibiting potentially discriminatory acts, the Law Society frequently informs firms to “avoid” them, suggesting that exceptionally they might be acceptable. Similarly, the Bar Council predominantly favours “should” rather than the less ambiguous ‘shall’ and creates further ambiguity on one occasion by preferring “must” and on another by following “should” with the risks that follow non-compliance (Bar Council, 2004, paras 1.20 and 1.2, respectively).

There is, however, less ambiguity when it comes to the most progressive provisions in the two documents, but unfortunately this is because they mostly seem to be recommendatory rather than mandatory. Thus, of the positive action measures designed to reach out to previously excluded groups, the Law Society’s model policy only specifies as mandatory (and only “where appropriate”) those designed to attract job applications from members of under-represented groups and to target

them for special training and support (Law Society, 2004, pp. 28 and 29). Elsewhere in the Handbook, the former measure is reduced to a suggestion (Law Society, 2004, pp. 41–42), whereas the provision of work placements or vacation work and encouragement to those under-represented in senior positions to take up development opportunities need only be considered (Law Society, 2004, pp. 42 and 44). Also specified as being for consideration only are measures designed to accommodate different cultural and religious groups, such as providing prayer rooms or marking religious festivals (Law Society, 2004, pp. 53–55). More disappointingly, given its central importance to gender equality, firms are only required to consider requests for flexible work patterns to accommodate parenting, extending parental leave obligations to those (usually women) who care for others and making jobs available on a part-time or job share basis (Law Society, 2004, p. 53). The Code also displays a similar hesitancy when exceeding legal requirements. Thus its (admittedly rather generous)<sup>44</sup> policy on maternity and paternity leave (Bar Council, 2004, paras 1.54–8, Annexes G and H) is not compulsory, whereas chambers are encouraged, but not required, to accede to requests to work during maternity leave or other career breaks (Bar Council, 2004, para. 1.59). Most disappointingly, its policy on encouraging inclusiveness is limited to recommending that recruitment advertisements encourage applications from under-represented groups (Bar Council, 2004, para. 1.2).

In making many positive requirements to promote equality and diversity merely optional, or at least not clearly mandatory, or in defining them in overly vague terms or terms which portray them simply as means to financial ends, the Handbook and Code do much to undermine the message about their importance. Perhaps the best example is the Code's statement that "recruitment practices *may* need to be reviewed" when chambers find discrepancies between the proportion of candidates from particular groups and their success rate [Bar Council, 2004, para. 1.16 (emphasis added)]. However, it is noteworthy that most of such cases do not involve provisions designed to eradicate illegal direct or indirect discrimination. Instead they involve more positive steps to rectify disadvantages and accommodate factors that lead to indirect discrimination but which are beyond the immediate control of the profession, such as the effects of social disadvantage, the way in which society pushes women but not men into caring roles, and the fact that the beliefs of certain cultural or religious groups clash with Eurocentric work and social patterns. This suggests that the two professional bodies are willing to accept an ethical duty to eradicate discrimination—hardly surprising given the legal position—but not to take more positive steps to accommodate diversity and social disadvantage, and to promote inclusivity.

This hesitancy over the more progressive and demanding provisions is perhaps unsurprising given that both documents are likely to represent a compromise between, on the one hand, the informed outlook and commitment of dedicated and expert equal opportunities officers responsible for making recommendations and, on the other, professional leaders who would also be concerned with pragmatic considerations like profit margins and the difficulty of selling burdensome requirements to a sizeable constituency of sceptical practitioners. This tension reveals itself in the documents' underlying philosophies. The need to promote equality and diversity is



briefly justified in terms of fair treatment, respect for individual dignity, and social justice in a “modern, multicultural democracy” (Bar Council, 2004, Annex H) and the fact that a profession existing “to uphold a person’s rights without fear and favour” should itself uphold these values (Bar Council, 2004, ‘Foreword’; see also Law Society, 2004, pp. 2 and 23), but this need is linked to the benefit of enhancing the profession’s image and public confidence in it. Moreover it is swamped by references to the commercial benefits of equality and diversity, such as: avoiding the costs, in terms of money, time and bad publicity of defending discrimination claims; providing better services to an increasingly diverse client base, thus opening up access to new markets; better chances of obtaining work from organisations which impose equal opportunity and diversity requirements; access to a wider pool of talent in recruitment; a return on the investment in employees who might otherwise leave; and increased productivity through better employee relations, more satisfied staff, greater availability to clients because of flexible working arrangements, increased innovation and creativity through fresh thinking and new ideas (Law Society, 2004, §3, pp. 2, 22–23 and 52; Bar Council, 2004, para. 1.64, Annex H).

However, while this focus has obvious short-term benefits in persuading an increasingly commercially-minded profession (Boon & Levin, 1999, Ch. 3, esp. pp. 89–94; Nicolson & Webb, 1999, pp. 70–81 *passim*; Francis, 2005) of the case for equality and diversity, these benefits are bought at the risk of undermining the long-term likelihood of their achievement. The danger is that if the ethical case becomes transformed into a business one, it may—as in the United States (Edwards, 1995, pp. 152–153; Bachi, 1996, Ch. 3)—encourage calls for deregulation on the grounds that firms and chambers are best placed to manage their own diversity and equal opportunity needs. But even if such calls are rejected, the retention, let alone extension, of current policies becomes hostage to a continued belief in their business advantages. This is highly problematic because, as McGlynn shows, empirical studies and rhetorical arguments exist which challenge the idea that diversity and equality are economically efficient (2003). Moreover, once this is accepted, the business case lacks a normative argument in favour of equality and diversity. In this light it is essential to ensure that attention is clearly focussed on the ethical case for eradicating discrimination and promoting diversity.

The ethical case for not discriminating is based on the obvious distributive justice principle of treating people fairly according to the same criteria when it comes to allocating social benefits or burdens. But, as Aristotle also made clear, equality also requires treating different people differently, and distributive justice can also be said to require accommodating the differing needs and cultures of those admitted to the legal profession.

This is what the Law Society understands by diversity (Law Society, 2004, p. 4). However, as the Bar Council comes closer to recognising (Bar Council, 2004, Annex H), promoting diversity can also mean ensuring that all social groups are equally distributed throughout social activities like legal practice which are accompanied by desirable financial and social benefits, or that at least they should contain a non-tokenistic distribution of previously excluded groups. The question then becomes one of establishing an ethical case for diversity understood as inclusivity.

*From distributive justice to diversity*

A potentially fruitful approach argues that demographic diversity will ensure that the community receives improved legal services. While this argument echoes the business case for diversity, making it easy to sell to lawyers, it does have a substantial ethical basis. As already noted, professional status is premised on lawyers upholding high ethical standards, *inter alia* through the provision of quality legal services to clients, and sometimes also on them displaying an altruistic concern with meeting the community's needs for legal services (Boon & Levin, 1999, pp. 49–50; Nicolson & Webb, 1999, p. 53). Thus, if demographic diversity can be linked to both improved and more extensive legal services, it fulfils two of the profession's ethical obligations.

As regards better legal services, admittedly, some clients may expect lawyers to fit traditional images of authoritative and competent professionals—middle class, middle-aged and probably also male and white. But research (Davis *et al.*, 1993) confirms the intuition that many would prefer to be represented by someone like themselves, who is familiar with their accent, way of speaking, and social milieu, and who accordingly is far more likely to understand their problems and empathise with them (*Report of the Committee on Legal Education*, 1971, p. 41; *Royal Commission on Legal Services in Scotland*, 1980, pp. 244–245; Hing, 1993; Cunningham, 1992). Similarly there may be issues where female clients would prefer a female lawyer or even, as with rape or domestic violence, be totally unwilling to speak to male lawyers. Quality improvements are likely to be even greater in public interest work, where, particularly because of orthodox technocratic and paternalistic approaches to lawyer–client relations (Nicolson & Webb, 1999, Ch. 5), lawyers acting for those from less advantaged communities commonly impose unwanted and harmful solutions on clients because of a failure to comprehend and identify with their very different world-views and needs (e.g. Wexler, 1970).

Greater demographic diversity may also improve legal services if social background and ethical orientation are linked. Thus, whereas men are said to display an ethic of justice which stresses formal equality, the protection of rights, abstract logical reasoning and the hierarchical ranking of moral principles, Gilligan and others argue that women prefer an ethic of care, involving empathy and connection with others, the resolution of moral dilemmas through holistic and lateral thinking, and attention to context and the concrete individuality of moral actors (Gilligan, 1993a; Noddings, 1984). Care-orientated lawyers will, it is predicted, abandon the detached, authoritative professional stance and enter more deeply and empathetically into their clients' worlds in order to understand their complex needs and desires rather than seeing them simply as bearers of discrete legal problems to be resolved with maximum efficiency and financial gain (e.g. Menkel-Meadow, 1985, 1995; Cahn, 1992; Rhode, 1994). They are also likely to have a greater orientation towards altruism and public service.

While this argument was initially developed in relation to women and has been confirmed by (admittedly small-scale) studies of lawyers and other professionals (see Podmore & Spencer, 1982, pp. 350–351; Cahn, 1990; Rhode, 1994, p. 41; Menkel-Meadow, 1995, pp. 35–36; Sommerlad & Sanderson, 1998, p. 22), later

research suggests that African and African-American people exhibit many aspects of the ethic of care, leading some to argue that it derives from oppressive social relations generally (Harding, 1987; Tronto, 1993a, pp. 83–84; 1993b, pp. 243–245). If so, one might also expect ethnic minorities and those from less privileged socio-economic backgrounds to reject the ethic of justice—not least because of its similarities to the values of Western individualism and the limited altruism associated with capitalism (Benhabib, 1982, esp. pp. 274–280; Nicolson & Webb, 1999, Ch. 2). This, in turn, suggests that lawyers from previously excluded backgrounds might be more prepared to engage in pro bono legal work and enter practice areas offering opportunities to serve the vulnerable and needy. In fact, some United States commentators (Epstein, 1993, Ch. 15; Wilkins, 1993, 1998) have argued that lawyers from previously excluded backgrounds owe special moral duties, not just to refrain from causing their original communities harm while representing clients (but cp. Alfieri, 1995 with Barnes, 1996), but also to use their legal skills more positively by practising in areas like family law, immigration and trade union representation, engaging in unpaid legal representation and promoting law reform.

In response to these arguments, a number of objections might be raised. One<sup>45</sup> is that reference to the ethic of care reinforces essentialist ideas about biological or at least immutable cultural difference between the sexes, races and classes (Du Bois *et al.*, 1985; Larrabee, 1993; Tronto, 1993a, 1993b; Abel, 2003, p. 152). This may be taken to echo the traditional denigration of the morality of the “weaker sex”, ‘uncivilised nations’ and the ‘lower classes’, while also suggesting that women are naturally suited to home and family rather than business, politics and law. However, Gilligan herself denied that the caring and justice ethics are exclusively female and male respectively—merely that men and women tend to start with a preferred orientation (1993a, p. 2; 1993b)—or that the differences are rooted in biology. Instead, gender differences have been traced to the gendered nature of childcare (Chodorow, 1978; Dinnerstein, 1987), general socialisation (Bender, 1990; Kerber, 1993) and the different moral issues which arise in men and women’s different social spaces (Flanagan, 1991, pp. 232–233), whereas, as we have already seen, with other groups the ethic of care is traced to an experience of oppression. As each of these phenomena can be addressed by social reform, reliance on the ethic of care is not essentialist. Nevertheless, in order to overcome such connotations, the fact that it overlaps with other ethical approaches such as virtue ethics, communitarianism and postmodernism (e.g. Nicolson & Webb, 1999, Ch. 2) means that the possibility of increased diversity leading to an alternative ethical perspective can be asserted without specifically tying it to the ethic of care.

A more worrying problem for the argument for better and more extensive community legal services relates to its empirical accuracy. Thus, assuming that clients might be best served by those from their own background (but cf. Graglia, 1970, pp. 354–355), it is arguable that there are already enough female, black and Asian lawyers to meet clients’ desires for a lawyer of the same sex and ethnicity. The same cannot, however, be said regarding working class lawyers or those working in areas which serve disadvantaged groups, or undertaking pro bono or public interest work.

Yet, there is no guarantee that lawyers from disadvantaged communities will accept that they owe special duties to member of their original communities (cf. Graglia, 1970, p. 355). Indeed, it seems unfair to impose all the burdens of remedying social injustice on those who have had to struggle to overcome such injustice in order to become lawyers, leaving white, middle class lawyers to pursue their careers and private lives unhampered by such duties. In response, Wilkins has eloquently argued in the American context that, not only is it unrealistic to expect the privileged to take the lead in remedying social injustice, but it is precisely the principle of fairness, along with those of reciprocity and gratitude, which requires African-American lawyers to recognise their debt to previous generations whose efforts made their legal careers possible by continuing the struggle against continuing discrimination and disadvantage (1993, 1998). In fact, Wilkins claims, many African-American professionals do feel a strong sense of connection to their communities, which they see as important sources of strength and well-being in an otherwise hostile world. Accordingly, lawyers who turn their backs on their communities risk becoming alienated and schizoid in being unable wholly to embrace either their professional role or personal identity. In the British context, however, while some ethnic minority lawyers do appear to feel such community connection (Vignaendra *et al.*, 2000, pp. 142–143), it is debatable whether the same can be said for the more amorphous communities of female and working class lawyers, in which class, race, religion and sexual orientation compete strongly as sources of identity, and when a comfortable middle-class existence may well anaesthetise political commitment and moral conscience.

Moreover, all legal entrants face a strong socialisation process in law school and legal practice, which remains biased towards what Levinson vividly describes as “bleached out professionalism” (1993), which holds that a lawyer’s identity is irrelevant to the question of whether and how clients should be represented. This is likely to be reinforced by the lawyer’s traditional role morality of neutral partisanship (Nicolson & Webb, 1999, Ch. 6) and economic and pragmatic pressures in the work environment (Boon & Levin, 1999, Ch. 3, esp. pp. 89–94; Nicolson & Webb, 1999, pp. 70–81 *passim*; Francis, 2005). Such factors are also likely to limit the extent to which previously excluded groups give effect in practice to an alternative ethical orientation. Thus, research shows that, while gender differences in the ethical orientation of lawyers and others are generally small (see the studies cited in Larrabee, 1993 *passim*; Menkel-Meadow, 1995, pp. 35–36; Rhode, 1994, p. 42; Granfield, 1994, pp. 3–4; Paludi, 1998, p. 38ff)<sup>46</sup> the greater female display of empathy towards clients, and orientation towards altruism and public service is much more pronounced where socialisation and other pressures to conform to traditional behavioural norms are weak or absent, such as before women enter legal practice (Halpern, 1994, pp. 58–61; Erlanger *et al.*, 1996), where they practice in feminist law firms and female judicial associations (Epstein, 1993, Ch. 9; but cf. Rhode, 1994, regarding female adjudication), and where professional ethics do not clearly stipulate required behaviour (Jack & Jack, 1989, Chs 3–4).

Consequently, it might be concluded that in the current educational, ethical and institutional context, the chances of those from previously excluded backgrounds

making a huge difference to the quality and level of legal services provided to the community is insufficiently strong by itself to justify the active promotion of a much more inclusive legal profession. This, however, ignores the possibility that through developments such as collaborative learning, law clinics and embedding ethics into the curriculum, law schools could expose students to alternative ethical perspectives and encourage them to seek careers that allow altruism, public service, empathy and connectedness (Wilkins, 1993, p. 2013ff; Rhode, 1993). It also ignores the possibility that increases in the number of women, ethnic minorities and those from underprivileged backgrounds, especially in positions of leadership, might contribute to a slow change in legal ethics and practice values, which in turn would allow for more varied ethical orientations, and hence a greater chance for improved community service.

Reliance on a possible “multiplier effect” (Brest & Oshige, 1995) also features in two other arguments for increased diversity. One is that lawyers from previously excluded backgrounds, particularly if visible in the higher echelons of practice, may act as role models, encouraging later generations to aspire to a career which might have previously seemed unattainable (Abel, 2003, p. 156). The other is that greater numbers of professional leaders from previously excluded groups are likely to increase challenges to unthinking sexist, racist and classist prejudices and promote greater reform of practices which indirectly discriminate against women, ethnic minorities and those from disadvantaged socio-economic groups (e.g. Menkel-Meadow, 1985, 1995). However, leaving aside the potentially heavy burden of having to act as a role model (Delgado, 1991) or the danger of being typecast as humourless, obsessed and overly sensitised to seeing sex, race or class prejudice everywhere, neither argument provides an independent ethical justification for increased diversity. Instead they simply support arguments against direct and indirect discrimination and moreover, in requiring only sufficient numbers from previously excluded groups to perform as role models or anti-discrimination crusaders, are limited to demanding far less than proportionate representation.

There is, however, an argument which does require far more proportionate representation and which, as it flows from the requirement of distributive justice, may be more persuasive. According to Fiscus, distributive justice requires that individuals should receive the employment positions they would have attained had they been allocated under fair conditions (Fiscus, 1992). Moreover, in an ideal non-discriminatory world, all social groups would be represented in all activities in numbers proportionate to their overall social distribution (see also Selmi, 1995). If they are not, Fiscus argues, this is due to discrimination or at least to the impact of disadvantage on aspirations and academic achievement, and hence there is a duty on those responsible for promotion to seek actively to increase the numbers of previously disadvantaged groups to the point where they do not exceed their overall distribution either in the population as a whole or in the relevant locality.

Notwithstanding possible assertions that differences in the overall distribution of different social groups within the profession might be due to personal choices, Fiscus’ argument seems persuasive given that personal choice is always constructed in the context of concrete life chances. Moreover, it hardly seems plausible to put down

to personal preferences towards such huge differences in the aspirations of the socially disadvantaged to enter the profession and of women and those from ethnic minorities to stay and progress on an equal footing with white men. If this is accepted, the question becomes how greater demographic inclusivity can be achieved.

### **Conclusion: toward a more diverse legal profession**

To my mind, current measures to target previously excluded groups for recruitment and the provision of training and other career development will make speedy inroads into the various demographic differences remaining in the legal profession. In this regard, it is very disappointing that the Bar Council seems to have replaced its targets for ethnic minority recruitment with the mere suggestion that chambers who identify the under-representation of particular groups “might wish to consider setting equality targets as a standard against which to monitor performance” (Bar Council, 2004, Annex E). The Law Society of England and Wales has retained targets and requires firms to use their “best endeavours” to meet them (Law Society, 2004, p. 28). However, not only is this requirement toothless, but the targets only apply to ethnic minorities and recruitment. At the very least, targets need to become widespread throughout the profession, and apply to all previously excluded groups and in regard to all levels of career progression.

In addition, serious thought needs to be given to ‘harder’<sup>47</sup> forms of affirmative action, such as quotas and tie-break preferences in recruitment and promotion decisions. No doubt, lawyers are likely to resist this argument by denying any obligation to act as ‘social engineers’ in order to remedy the consequences of social disadvantage for which they lack responsibility (cf. Abel, 2003, pp. 127, 130, 150) and argue that as long as they avoid *discrimination* they must remain *discriminating* so as to maintain professional standards. In response, one might note that professional incumbents benefit from the current unequal distribution of social goods and the role lawyers have played in helping to develop and apply a legal system which has expressly discriminated against women, allowed racial discrimination and upheld those relations of production and ownership which lie at the heart of class differences. Nor have they held back from acting for clients bent on using the law to ensure social oppression and exploitation (Nicolson & Webb, 1999, Ch. 6).

Less radically, it can be argued that even hard forms of affirmative action do not necessarily conflict with the profession’s (in the light of its record, rather hypocritically) asserted commitment to recruit and promote “solely on merit” (Law Society, 2004, p. 18). For one thing, the concept of merit can be expanded to include a lawyer’s improved ability to serve clients with a similar background. More importantly, it can be argued that recruitment and promotion candidates who have had to overcome social disadvantages and possibly also discrimination in order to compete equally with more advantaged candidates are in fact more qualified than the latter, and that even those who are on paper less qualified may in fact have more potential and inherent ability. Accordingly, if the form of preferential treatment

used is suitably gauged to reflect this fact, there need be no conflict with the merit principle and the need to maintain professional standards.

Admittedly, there remains a host of other objections to hard forms of affirmative action, most notably the emotively loaded complaints about “innocent victims”, “undeserving beneficiaries” and the stigma of being an “affirmative action baby” (Carter, 1991). In addition, much work still needs to be done on justifying the exact form of affirmative action to be used, which groups deserve its benefits and in relation to what areas of current discrimination and disadvantages. Space constraints prevent these issues being dealt with here (see Nicolson, 2006, forthcoming). Suffice to say that these and other alleged obstacles have been painstakingly addressed by supporters of affirmative action in other jurisdictions as well as the United Kingdom (e.g. Edwards, 1995; Fiscus, 1995, esp. Ch. 12; Harris & Narayan, 2002). Furthermore, lest much credence is given to the other likely response from the legal profession that preferential treatment is currently prohibited by national (but not European) law (Fredman, 2001, Ch. 5), it might be appropriate to quote the Law Society of England and Wales’s own acknowledgement that those “who serve the public and public interest in ensuring access to justice and upholding the rules of law should take a lead on issues of equality and fairness” (Law Society, 2004, p. 2)<sup>48</sup> and ask if any other profession is better placed to bring about the legal changes necessary to put its own house in order.

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### Notes

- [1] E.g. women constituted 1.7% of the annual admissions of English and Welsh solicitors in the 1920s, 2.3% in the 1930s, 2.9% in the 1940s, and 4.2% in the 1950s, rising to 11.6% in 1972 (Abel, 1988, pp. 173 and 415). Rates of increase were similar for barristers and Scottish solicitors (Abel, 1988, pp. 80 and 328–330; Paterson *et al.*, 1999, p. 262; McGlynn, 1998, p. 146), though much slower for advocates (Paterson, 1988, pp. 93–94).
- [2] (Excluding pupils and squatters): personal communication, General Council of the Bar Records Office.
- [3] Personal communication, Faculty of Advocates Records Office.
- [4] I.e. 49.6% in 2000–01: personal communication, General Council of the Bar Records Office; cf. McGlynn (1998, p. 146) for earlier years.
- [5] Only 27 out of 95 entrants (28.4%) over the last four years: personal communication, Faculty of Advocates Records Office.
- [6] In England and Wales, consistently over 55% since 1995–96 (McGlynn, 1998, p. 12) and 63% in 2000–01 (The Law Society, 2001, p. 4).
- [7] But see Shiner (1997, p. 114), regarding the Bar Vocational Course.
- [8] See also Duff *et al.* (2000, p. 44), regarding newly qualified solicitors, and NcNabb and Wass (2005), who in their survey report that on average women solicitors in private practice earn 56% as much as men—a difference of £26,093.

- [9] Some 8% in England and Wales (personal communication, General Council of the Bar Records Office); 9.7% of practising advocates in Scotland as at April 2002 (personal communication, Faculty of Advocates).
- [10] E.g. in 2000, 24.5% of female English and Welsh solicitors worked outside private practice compared to 17% of men (Cole, 2001, p. 19).
- [11] E.g. by a factor of 8 and 36, respectively, amongst English and Welsh solicitors in private practice in 2001 (The Law Society, 2001, pp. 5–6).
- [12] Although their study was based mostly in commercial law firms (who arguably set the tone for the rest of the profession), their findings are supported by other research in the UK (Holland & Spencer, 1992) and elsewhere (e.g. Epstein *et al.*, 1995; Hagan & Kaye, 1995; Thornton, 1996; Schultz & Shaw, 2003). See also Sommerlad (1994), McGlynn (1998, p. 12, esp. Chs 4 and 6), Sanderson and Sommerlad (2000), Sommerlad (2002) and McNabb and Wass (2005).
- [13] There is even evidence that firms discriminate in favour of male interviewees by taking into account that they mature later than female interviewees (Rolfe & Anderson, 2003, p. 326; but cf. Rhode, 1988, pp. 1187–1190, noting how the evaluation of female competence is affected by gender stereotypes).
- [14] Note, however, women's double bind in that if they do portray masculinist professional qualities, they are likely to be regarded as unnaturally unfeminine (Menkel-Meadow, 1985, p. 54; Sommerlad, 2002, p. 225).
- [15] Though according to Duff *et al.* (2000, pp. 59–60) and Sanderson and Sommerlad (2000, p. 161) not all aspects of work outside private practice may be as favourable.
- [16] See Holland and Spencer (1992, p. 11) on the greater number of both single and childless female as compared to male barristers. Cf. also the employer practice of recommending abortion to pregnant solicitors (McGlynn, 1998, p. 100; Sommerlad & Sanderson, 1998, p. 233).
- [17] The Scottish Law Society does not monitor ethnicity, whereas the statistical base of advocates (440, out of which seven are of ethnic minority origin: personal communication, Faculty of Advocates Records Office) is too small to warrant conclusions.
- [18] This expression is used to denote only black and Asian, and not white, ethnic minorities. On the terminological difficulties associated with race and ethnicity, see e.g. Vignaendra *et al.* (2000, pp. 133–135, 146–148) and Mason (2000, Ch. 2).
- [19] Some 89.3% of the total (personal communication, General Council of the Bar Records Office).
- [20] In 2001 they constituted 3.1% of all QCs (personal communication, General Council of the Bar) compared with 0.4% in 1992 (Harvie, 1992, p. 748).
- [21] In 2000 they constituted 3.45% of all partners (Cole, 2000, p. 24), compared with seven out of a straw poll of 472 in 1992 (Harvie, 1992).
- [22] In addition, when these factors were not held constant, ethnic minorities were found to be less likely to be retained on qualification (Duff *et al.*, 2000, p. 23).
- [23] E.g. the number of ethnic minority barristers with sufficient years practice for appointment to silk (see McGlynn, 1998, p. 149) is not out of line with the number of awards.
- [24] Although the definition of class is controversial (see e.g. Scase, 1992) in the current context, the class indicators used in the studies cited below provide a sufficiently accurate picture (cf. Shiner & Newburn, 1995, p. 17; Vignaendra, 2001, pp. 8–9).
- [25] The Inns used to record fathers' occupation but this was to ensure class exclusivity rather than inclusivity.
- [26] Scottish law students are entitled to grants for the academic, but not vocational, stage of legal education, though they will normally have to pay a small 'graduate endowment' after graduation.
- [27] Shiner and Newburn (1995, Ch. 2) also report that only 14% and 12% of those surveyed had working class fathers and mothers, respectively.
- [28] E.g. in Shiner's study, Oxbridge law graduates had a 89% chance of a training contract offer, old university graduates 69%, and those from new universities 49% (Shiner, 1997, p. 53, and see p. 122 regarding pupillages).
- [29] See especially the strong link between class and starting salaries (Shiner, 1995, p. 43ff), which is not shaken by subsequent pay increases (Duff *et al.*, 2000).



- [30] E.g. 63% of Oxbridge law graduates obtained training contracts in City firms, as opposed to 24% from other old universities, and 6% from new universities (Shiner, 1995, p. 18; cf. also Halpern, 1994, pp. 53–54 on firms’ recruiting priorities).
- [31] But see note 32 and Duff *et al.* (2000, p. 23) regarding the effect of institution attended on the chances of post-traineeship employment.
- [32] From 0.24 to 0.30 and 0.73 to 0.80 in the case of pre- and post-LPC offers, respectively (Shiner, 1997, p. 6).
- [33] From 0.30 (for those from a non-selective school) to 0.41, but no statistically significant differences regarding post-LPC offers (Shiner, 1997, p. 6).
- [34] E.g. graduating from Oxbridge rather than a new university more than doubled the probability of receiving a pre-LPC training contract offer and doubled the chances of a City job (Shiner, 1997, pp. 62 and 77), whereas an Oxbridge 2.2 degree gave candidates a slightly higher chance of obtaining a pupillage than a new university first (Sedley, 2000, p. 7). See also Rolfe and Anderson (2003, pp. 320–323).
- [35] E.g. this increased the chances of a pupillage from 0.81 to 0.90 (Shiner, 1997, p. 124). The effect on training contract offers was similar, albeit more complex (pp. 60–61).
- [36] E.g. according to Shiner (2000, p. 109), all things being equal, an independent school and old university educated whites with a graduate or professionally qualified parent have a 70% chance of obtaining a training contract prior to the LPC, compared with 11% for non-selective school and new university educated ethnic minorities whose parents lack a degree or professional qualification.
- [37] Thus, while the disadvantages of class and ethnicity might operate cumulatively as we have seen, anecdotal evidence suggests that ethnic minority (or at least African-Caribbean) women are treated better than their male counterparts, possibly because they simultaneously satisfy two equal opportunity targets (cf. Harvie, 1992, p. 748).
- [38] Cf. Shiner and Newburn (1995, pp. 32–34) on expectations of gender, race and class discrimination, Morton & Harvie, 1990b and Vignaendra, 2001, p. 14, on how ethnic minority and working applicants lower their career sights.
- [39] Page references are to the online version at: [http://www.lawsociety.org.uk//documents/downloads/ED\\_DiversityHandbook.pdf](http://www.lawsociety.org.uk//documents/downloads/ED_DiversityHandbook.pdf).
- [40] Thus, whilst both include race, sex, religion or belief, sexual orientation, and disability, the Law Society also includes nationality and ethnic origin and highlights that gender includes marital status, but has not yet followed the Bar Council in prohibiting age discrimination [but see Law Society (2004, p. 8) where it warns that age discrimination may amount to gender discrimination].
- [41] Cf. also the recognition of the need to accommodate a lawyer’s different characteristics stemming from their social class and education (The Law Society, 2004, p. 8).
- [42] E.g. one even finds a reference to adherence to equal opportunities requirements being a prerequisite for BARMARK accreditations not in the Code’s introduction or main body but hidden away in Annex G which contains the Council’s policy on maternity and paternity leave.
- [43] Paragraph 1.60 of the Code is entitled “Grievance, Procedure, Monitoring and Review” but omits to deal with monitoring!
- [44] Noting that employed staff in chambers are only required to be given the statutory minimum (Bar Council, 2004, para. 1.137), cynics might put this down to the fact that chambers’ rent rather than salaries is involved.
- [45] Another less worrying objection is that the desire to accommodate requests from clients for lawyers of the same background might be exploited by those motivated by sexism, racism or class snobbery (cf. Edwards, 1995, p. 210), but this can be prevented by carefully drafted professional rules (cf. The Law Society, 2004, pp. 21 and 30).
- [46] Indeed, some continue to say that they can see no gender differences at all (see Flanagan, 1991, Ch. 10; Larrabee, 1993 *passim*).
- [47] The distinction between ‘hard/strong’ and ‘soft/weak’ affirmative action is notoriously difficult to make (see e.g. Rhode, 1988, pp. 1196–1197) but in simple terms one can characterise the former as involving some form of *prima facie* preferential treatment.
- [48] Cf. also the Bar Council (2004, ‘Foreword’), which claims that the Bar does in fact take this lead.

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