

# Patronising Lawyers? Homophily and Same-Sex Litigation Teams before the UK Supreme Court<sup>1</sup>

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In 2013, the Centre for Family Law and Practice intervened in *In the matter of A (Children)*.<sup>2</sup> The Centre was one of three intervenors, the others being Reunite International and Children and Families Across Borders. What was unusual about this intervention was that all four counsel appearing on behalf of the Centre were female: Baroness Scotland QC appeared along with Ruth Kirby, Rachel Chisholm, and Maeve O'Rourke. Same-sex legal teams are not per se remarkable. All-male legal teams are quite common before the Supreme Court. Indeed, the respondents in *In the matter of A* were represented by four male barristers. Yet all-male legal teams escape notice because most of the barristers who appear before the Supreme Court are male. Consequently, it is easy to “explain” all male teams as a “natural” outcome of random sampling from a very unbalanced pool of lawyers. To wit: if three-quarters of all lawyers before the Supreme Court are men (and they are), and if legal teams were to be formed by drawing names out of a hat, then the chances of an all-male team of two lawyers would be relatively high. The chances would simply equal the probability that one randomly drawn barrister from the pool of those appearing before the Supreme Court would be male (three-quarters), multiplied by the probability that a second randomly drawn lawyer would be male (also three-quarters).<sup>3</sup> The chances of an all-male two-person team would therefore be approximately 56%.<sup>4</sup> The chances of all all-male team of three lawyers would

<sup>1</sup> We are grateful for comments on an earlier draft from the two anonymous referees, Nicholas Allen (barrister, 29 Bedford Row), Fiona de Londras, John Flood, Jeremy Hopkins (former Practice Manager at 3 Verulam Buildings), Marc Mason and Erika Rackley. Chris gave a version of this paper at the University of Copenhagen in March 2016 at a Workshop entitled, “Trust, Social Capital and Networks: A different perspective on International Courts”. We are both grateful for feedback from the workshop participants. The usual disclaimer applies.

<sup>2</sup> *In the matter of A (Children)* [2013] UKSC 60; [2014] A.C. 1.

<sup>3</sup> Here, we ignore the complications which result from having a fixed pool of lawyers. Strictly speaking, the odds that a second randomly drawn lawyer will be male are slightly smaller than three-quarters, since there is at least one male lawyer who cannot be “drawn from the hat”, namely the lawyer who was chosen at the first stage. The pool of lawyers in our paper is large enough that we can ignore these complications, which have only a very slight effect on the calculations.

<sup>4</sup>  $75\% * 75\% = [0] 56\%$

be lower (42%),<sup>5</sup> and that of an all-male team of four lower still (32%),<sup>6</sup> but in no case would these odds seem exceptional. By contrast, under the same assumptions, the chances of an all-female team are somewhere between low and exceedingly remote. The chances of an all-female team of two lawyers is relatively low, at one quarter times one quarter, or 6.25%; the chance of an all-female team of four lawyers is tiny, at 0.4%.

Given this, either the formation of the eight-handed female legal team that appeared on behalf of the Centre for Family Law and Practice was a very improbable event, or the formation of legal teams is governed by practices and preferences which make same-sex legal teams more likely than they would be if team formation simply involved a gender-blind draw from a pool of barristers. The purpose of this article is to draw attention to the second possibility, and in particular the possibility that lawyers might prefer to work with other lawyers of the same gender. Phrased slightly differently, we wish to know the degree to which the formation of barrister teams before the UK Supreme Court is characterised by gender homophily, and which factors exaggerate or attenuate this characteristic. To do this, we use data on the gender of all of the barristers who appeared before the UK Supreme Court between October 2009 and July 2015: 1,292 individual barristers in 470 cases. Using this data, we are then able to work out whether the number of same-sex teams of barristers is greater or smaller than the number which would be predicted if team formation were gender neutral. With the aid of logistic regression models, we are able to progressively introduce other factors which might explain the relative preponderance of same-sex legal teams without needing to invoke gender homophily.

In the section that follows, we briefly describe how the several Bars of the UK are organised, and provide some summary statistics regarding their diversity (or lack thereof). We set out why diversity at the Bar (and in particular among those appearing before the Supreme Court) is important. We then formally introduce the notion of homophily, contrasting homophily in team formation with gender-neutral team formation. We then go on to contextualise and present our data, before discussing methods of analysis of team formation. These methods move from the simple to the more complex: we begin by presenting the results of a cross-tabulation of barrister genders, before progressing to logistic regression models. We will come to show that same-sex teams of barristers (both male and female) are statistically over-represented in Supreme Court litigation compared to the number we would expect if barristers paired up randomly. We will also come to show that this gender homophily remains when we allow for the possibility that barristers pair up randomly within their chambers, or within their area of law. We conclude by reflecting on the significance of our findings in the light of stated objects for gender equality at the Bar.

## The British Bar: context and diversity

Explaining patterns of legal representation before the Supreme Court of the United Kingdom is difficult because there is no UK Bar, but rather a separate Bar for each

<sup>5</sup>  $75\% * 75\% * 75\% = 42\%$

<sup>6</sup>  $75\% * 75\% * 75\% * 75\% = 32\%$

legal system of the UK. This section begins by discussing the Bar of England and Wales, before noting more briefly the situation in Scotland and Northern Ireland (where the respective Bars are much smaller). Readers already familiar with the respective Bars may wish to proceed quickly through this part of this section. It then turns to the work on diversity at the Bar before setting out why diversity might be thought to be important in this context.

### *England and Wales*

The 16,000 barristers in England & Wales are specialist courtroom litigators, and until 1990 had a virtual monopoly on advocacy.<sup>7</sup> The Bar is an historic, traditional institution with antique-like qualities dating back to the 13th century.<sup>8</sup> Unlike law firms, which are owned (usually, but not exclusively) by the solicitor partners,<sup>9</sup> with employee solicitors and others working for those partners, the majority of barristers (just under 13,000) are self-employed.<sup>10</sup> They commonly work in chambers, groupings of self-employed barristers under the same umbrella (e.g. “29 Bedford Row”). They do not share profits with each other (save via contributions to chambers for matters including real estate maintenance, IT and other support functions). Their work is almost exclusively derived from solicitors who instruct the barristers on behalf of the clients.<sup>11</sup> Barristers’ clerks act as intermediaries in the giving of work from solicitors to barristers, and otherwise act as support for the members of chambers.<sup>12</sup> Progression at the Bar appears in various forms. Certain barristers “take silk” and are known as QCs (Queens Counsel). Becoming a QC was once a matter of nods and winks, an informal “old boys club,”<sup>13</sup> but is now a (seemingly) independent process which begins with an application by the barrister to QC Appointments. The other significant route of progression for barristers is to join the judiciary which, while outside the primary scope of this paper, has its own challenges in the context of diversity and inclusion.<sup>14</sup> The self-employed nature and organisational structure of the Bar in England & Wales, and the way in which work is given or allocated to barristers, are important considerations for our discussions below.

The Bar, like the other branches of the legal profession in England & Wales, does not reflect the society it serves. The Bar Standards Board (the regulatory body for barristers) publishes diversity statistics on an annual basis. The report for 2015 draws on data from the Core Database (the membership records of the Bar Council,

<sup>7</sup> This was removed via the Courts and Legal Services Act 1990

<sup>8</sup> Justine Rogers, “Representing the Bar: how the barristers’ profession sells itself to prospective members” (2012) 32(2) *Legal Studies* 202.

<sup>9</sup> The Legal Services Act 2007 permits the creation of Alternative Business Structures, which can see law firms owned and/or managed by non-lawyers

<sup>10</sup> A number of barristers are also employed, working for various organisations. The latest statistics show that around 20% of the bar is employed, by law firms, the government, etc. see, <http://www.barcouncil.org.uk/careers/students/faqs/> [Accessed 4 May 2017].

<sup>11</sup> Since 2004, however, clients have been able to instruct barristers themselves without the solicitor intermediary via a process known as “direct access”. See: John Flood and Avis Whyte, “Straight there, no detours: direct access to barristers” (2009) 16(2) *International Journal of the Legal Profession* 131.

<sup>12</sup> John Flood, *Barristers’ Clerks — The Law’s Middlemen* (Manchester University Press, 1983).

<sup>13</sup> Hilary Sommerlad, “Socio-legal studies and the cultural practice of lawyering” in D. Feenan (ed.), *Exploring the “Socio” in Socio-legal Studies* (Palgrave Macmillan, 2013).

<sup>14</sup> Kate Malleson, *The New Judiciary: The Effects of Expansion and Activism* (Ashgate Press, 1999); see also Kate Malleson, “The Legal Profession as Gatekeepers to the Judiciary: Design Faults in Measures to Enhance Diversity” (2011) 74(2) *Modern Law Review* 245, and Erika Rackley *Women, Judging and Judiciary: From Difference to Diversity* (Routledge, 2013).

which includes voluntary questions on diversity characteristics) and the Pupillage Registration Survey (a voluntary diversity survey of pupil barristers (i.e. trainees) undertaken by the BSB).<sup>15</sup> In terms of gender,<sup>16</sup> women make up just over a third of the overall Bar (35.9%), but far fewer women (13%) are QCs.<sup>17</sup> This is striking given there is almost gender parity at the introductory pupillage stage (48.5% women),<sup>18</sup> and given that “trickle up” arguments have been put forward for some time as to why the profession is not more diverse at the senior levels (i.e. that the profession was not diverse enough at entry and so diverse members did not trickle up/progress). Little has changed in the last five years: women made up 14% of QCs and 35% of the overall English & Welsh Bar in 2010.<sup>19</sup>

### *Scotland and Northern Ireland*

The Scottish legal profession is divided into solicitors and advocates. The division is roughly analogous to the division between solicitors and barristers, but it is far more common for advocates to have first practised as solicitors.<sup>20</sup> It is not possible to provide firm conclusions as to rates of change within the profession, as the Faculty of Advocates (the body which brings together all Scottish advocates) does not systematically compile information on the diversity of the Faculty in the way that the Bar Standards Board does for England and Wales. Nor is current diversity data available on the Faculty website. Instead, we asked the Faculty for data on the gender composition of its advocates<sup>21</sup>: of 453 practising advocates, 329 are male and 124 are female. The proportion of female advocates (27%) is lower than the proportion of female barristers in England and Wales (35.9%). This is notwithstanding the fact that undergraduate law cohorts have been majority-female in Scotland as early as 1983.<sup>22</sup> 112 advocates in Scotland are QCs, 92 male and 20 female. The percentage of female QCs in Scotland (16%) is slightly higher than the proportion in England & Wales (13%).

The Faculty of Advocates occupies a more central role in relation to Scottish advocates than the Inns of Court do for English and Welsh barristers. The Faculty of Advocates, though like the Inns of Court in bringing together all Scottish advocates, is dissimilar in that it enjoys a single, central physical location in Parliament House, which contains the Advocates’ Library. Melville and Stephen describe the Advocates’ Library as providing a form of “hot-desking” *avant la lettre*, such that “the senior might have just received instructions, and ... walk

<sup>15</sup> Bar Standards Board, *Report on Diversity at the Bar* (London, December 2015).

<sup>16</sup> This paper is focused on gender and the Bar. The BSB does publish diversity data on other protected characteristics but response rates from the Bar on questions other than gender and ethnicity vary significantly. In the December 2015 diversity report, for example, 73% of the profession did not provide data on their socio economic background; 69% did not provide data on their disability status; and 72% did not provide data on their sexuality.

<sup>17</sup> Bar Standards Board, *Report on Diversity at the Bar* (2015), p.6

<sup>18</sup> Bar Standards Board, *Report on Diversity at the Bar* (2015).

<sup>19</sup> Bar Standards Board Statistics, <https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/> [Accessed 4 May 2017].

<sup>20</sup> Angela L. Melville and Frank H. Stephen, “The more things change, the more they stay the same: explaining stratification within the Faculty of Advocates, Scotland” (2011) 18(3) *International Journal of the Legal Profession* 211, 220.

<sup>21</sup> Email of 6 June 2016 from Andrew Tregoning (Dean’s Secretariat, Faculty of Advocates). Copy on file with the authors.

<sup>22</sup> Alan Paterson, “The Legal Profession in Scotland—An Endangered Species or a Problem Case for Market Theory?” in Richard A.L. Abel and Philip S.C. Lewis (eds), *Lawyers in Society: the Common Law World* (University of California Press, 1988), p.87.

through the library looking for a free junior”. We raise this as the greater physical clustering of advocates thus offers greater potential for the formation of homophilous ties, independently of the patterns of stratification known to exist in the Faculty.<sup>23</sup>

In Northern Ireland, the split between barristers and solicitors is analogous to that in England & Wales. The Bar Council, the combined regulatory and representative body for barristers in Northern Ireland, does not publish any data on the gender breakdown of the barristers it regulates. Its website simply sets out a list of all barristers in the jurisdiction.<sup>24</sup> These total 786, and each entry in the list has a title (Lord/Mr/Miss/Ms/Mrs). Counting these, we see that 35% of all Northern Irish barristers are female (almost identical to the percentage in England & Wales), and that 17% of QCs in the jurisdiction are female (slightly higher than for England & Wales). We have been unable to find any data or commentary, published by the Bar Council or elsewhere, which shows trends over time as regards gender and the Northern Irish Bar.

### *Research on diversity and the Bar*

Our work here is concerned with gender preferences, and gendered team formation, among barristers in the UK Supreme Court. While there is a relatively voluminous body of research on diversity and solicitors in England & Wales,<sup>25</sup> comparatively little has been done in relation to the Bar. What work does exist suggests patterns of inequality, exclusion and forms of direct and indirect discrimination. In 2014, the Bar Council conducted focus groups and interviews with 85 women barristers. The women who had been in practice at the Bar for some time spoke of, “a hostile environment, inappropriate behaviours and discrimination in the allocation of work (particularly in crime by both clerks and solicitors) when they started their working lives”, but that these experiences had changed, for the better, over time.<sup>26</sup> The power of clerks in allocating, or not allocating, work to female lawyers has been a recurrent theme ever since women were first allowed to join in the Bar in 1919.<sup>27</sup> This phenomenon may be important for our research.

In research covering pupillages from 2004–2008, Zimdars and Sauboorah found that, “social origin factors play a role in influencing earnings, employment status and location.”<sup>28</sup> More specifically, their data showed that, “Women and those older than 25 earn significantly less during pupillage. Women, those older than 25 and

<sup>23</sup> Paterson, “The Legal Profession in Scotland—An Endangered Species or a Problem Case for Market Theory?” in Abel and Lewis (eds) *Lawyers in Society: the Common Law World* (1988), p.87.

<sup>24</sup> The Bar of Northern Ireland, *Register of Practising Barristers*, <http://www.barofni.com/page/practising-barristers> [Accessed 4 May 2017].

<sup>25</sup> Each of the following sets out helpful summaries of the work that has been done in this area: Hilary Sommerlad, Lisa Webley, Liz Duff, Daniel Muzio and Jennifer Tomlinson, *Diversity in the Legal Profession in England & Wales: A Qualitative Study of Barriers and Individual Choices* (Report for the Legal Services Board 2010), <https://research.legalservicesboard.org.uk/wp-content/media/2010-Diversity-in-the-legal-profession.pdf> [Accessed 4 May 2017]; Louise Ashley, Hilary Sommerlad, “Diversity and Inclusion” in Laura Empson, Daniel Muzio, Joseph Broschak, and Bob Hinings (eds), *Oxford Handbook of Professional Service Firms* (Oxford University Press, 2015).

<sup>26</sup> Bar Council, “Barristers’ Working Lives: A Second Biennial Survey of the Bar” (Bar Council of England & Wales 2013), p.41, [https://www.barstandardsboard.org.uk/media/1597662/biennial\\_survey\\_report\\_2013.pdf](https://www.barstandardsboard.org.uk/media/1597662/biennial_survey_report_2013.pdf) [Accessed 4 May 2017].

<sup>27</sup> Patrick Polden, “Portia’s Progress: Women at the Bar in England 1919–1939” (2005) 12(3) *International Journal of the Legal Profession* 293.

<sup>28</sup> Anna Zimdars and Jennifer Sauboorah, *Some observations on meritocracy and the Law: the profile of pupil barristers at the Bar of England and Wales 2004–2008* (The Bar Council 2009), [http://www.barcouncil.org.uk/media/18148/pupillage\\_analysis\\_zimdars\\_and\\_sauboorah.pdf](http://www.barcouncil.org.uk/media/18148/pupillage_analysis_zimdars_and_sauboorah.pdf) [Accessed 4 May 2017].

those with a disability are more likely to join the employed Bar.” The constant “othering” of women at the Bar is a recurrent theme in the existing scholarship. These findings in many ways mirror patterns of diversity and difference in the solicitors’ branch of the profession.<sup>29</sup> Recent work has shown that, despite the changes outlined above regarding appointment to Queen’s Counsel, women remain statistically less likely than men to be so appointed.<sup>30</sup> In work on how the Bar sells itself to prospective entrants, Rogers notes how a recruitment event for the Bar that she attended included a specific “discrimination session”. Panellists at these events warned would-be female and minority ethnic student entrants to the Bar that they would face pressure to work in the “in the “caring”, less financially secure areas”, such as Family Law or Crime.<sup>31</sup> A 2013 report by the Bar Council shows that women are far more likely to work in the area of Family Law than any other area of law (where fees were historically likely to come from legal aid),<sup>32</sup> and other data suggests that only 25% of the Corporate & Commercial Bar are female.<sup>33</sup> In 2014, the Equality, Diversity and Social Mobility Committee of the Bar Council commissioned a *Momentum Measures* report.<sup>34</sup> The aim was to understand, “when the profession might reflect the population profile of England & Wales.” In respect of gender,<sup>35</sup> the report comes to two very strong conclusions: first, that an overall gender balance at the Bar is “unlikely to ever be achieved” (because of high rates of attrition of women barristers); and secondly, gender balance among QCs and those barristers with more than 15 years of experience is unlikely “in the foreseeable future.”<sup>36</sup> The picture painted thus far is of a Bar which (on the data available) does not reflect the society it serves (particularly as regards women, and especially at the senior levels of the Bar), in which there are a number of structural and cultural challenges to change, and which offers up a construction of women as uniquely appropriate for only certain aspects of the law.

### *The importance of diversity at the Bar*

The data we present below shows that women barristers appear in fewer numbers before the UK Supreme Court and (and we think more importantly) that single-gendered teams of barristers occur statistically more frequently than can be accounted for by chance or by other factors, suggesting there may well be forms

<sup>29</sup> Sommerlad, Webley, Duff, Muzio and Tomlinson, *Diversity in the Legal Profession in England & Wales: A Qualitative Study of Barriers and Individual Choices* (Report for the Legal Services Board 2010), <https://research.legalservicesboard.org.uk/wp-content/media/2010-Diversity-in-the-legal-profession.pdf> [Accessed 4 May 2017]; Ashley, Sommerlad, “Diversity and Inclusion” in Empson, Muzio, Broschak, and Hinings (eds), *Oxford Handbook of Professional Service Firms* (Oxford University Press, 2015).

<sup>30</sup> Michael Blackwell, “Taking Silk: An Empirical Study of the Award of Queen’s Counsel Status 1981–2015” (2015) 78(6) *Modern Law Review* 971.

<sup>31</sup> Justine Rogers, “Representing the Bar: how the barristers’ profession sells itself to prospective members” (2012) 32(2) *Legal Studies* 202, 220.

<sup>32</sup> Bar Council, “Barristers’ Working Lives: A Second Biennial Survey of the Bar” (2013), pp.41, 60.

<sup>33</sup> Bar Council, *Snapshot: The Experience of Self-Employed Women at the Bar* (London, 2015).

<sup>34</sup> Martin Chalkley, *Momentum Measures: Creating a Diverse Profession — Summary Findings* (Report for the Bar Council of England & Wales, July 2015), [http://www.barcouncil.org.uk/media/378213/bar\\_council\\_momentum\\_measures\\_creating\\_a\\_diverse\\_profession\\_summary\\_report\\_july\\_2015.pdf](http://www.barcouncil.org.uk/media/378213/bar_council_momentum_measures_creating_a_diverse_profession_summary_report_july_2015.pdf) [Accessed 4 May 2017]. The findings of this report run somewhat against the views of Lord Sumption that ‘time’ is one of the major factors in why so few women reach the top of the profession and are appointed to judicial positions. See: Lord Sumption, “Home Truths About Judicial Diversity” (Bar Council Law Reform Lecture, 15 November 2012). For a reply to Lord Sumption’s views about diversity, the Bar, and the judiciary, see: Steven Vaughan, “Diversity and the Profession: A Reply to Lord Sumption”, *The Lawyer*, 22 September 2015.

<sup>35</sup> The report also speaks to ethnicity.

<sup>36</sup> Chalkley, *Momentum Measures: Creating a Diverse Profession — Summary Findings* (July 2015), p.2.

of same-sex gender-based preferences at play. Or, to put it another way, the teams of barristers appearing before the UK Supreme Court are not as diverse as they could or should be. Various reasons have been put forward as to why diversity in the legal profession might be thought to important. These reasons tend to fall into two camps: a dominant narrative framed around “the business case”; and a minor narrative which pushes against the business case and which might be thought of as “the moral case”.

The business case arguments suggest that more diverse organisations are likely to see, “improvement in recruitment outcomes, positive impact on employee performance, reduction of the risk of discrimination-based litigation, and reduced employee turnover leading to cost savings”.<sup>37</sup> Equally, business case arguments have been deployed to assert a link between improved diversity and the enhanced ability of firms to serve new markets,<sup>38</sup> and provide higher quality service to existing clients.<sup>39</sup> It is not immediately apparent how well the business case arguments, which are framed in terms of organisations (businesses, professional service firms, public bodies etc),<sup>40</sup> map onto the Bar. At the Bar, turnover is very low,<sup>41</sup> the vast majority of barristers are self-employed, and any increased “performance” of individual barristers may bear little connection on the overall “performance” of their chambers.<sup>42</sup> There is also no existing work to suggest that business case linked, demand-side diversity drivers (for example, solicitors using certain chambers because of their record on diversity) operate at the Bar.<sup>43</sup>

Given this, why might it matter if barrister team formation in the Supreme Court is based on same-sex gendered preferences? In the 2014 “Rainbow Lecture on Diversity” Lord Neuberger framed the “moral case” arguments for diversity in the following way:

“[I]t is simply unjust and incompatible with elementary justice that people should have fewer opportunities in life because they are women, because they are not white, or because they come from a background which is socially or economically under-privileged.”<sup>44</sup>

A decade earlier, in the Final Report into *Entry to the Bar*, he had written:

<sup>37</sup> Savita Kumra, “Busy Doing Nothing: An Exploration of the Disconnect Between Gender Equity Issues Faced by Large Law Firms in the United Kingdom and the Diversity Management Initiatives Devised to Address Them” (2015) 83(5) *Fordham Law Review* 2277, 2287. See further: Joanne P. Braithwaite, “Diversity Staff and the Dynamics of Diversity Policy-Making in Large Law Firms” (2010) 13 *Legal Ethics* 141.

<sup>38</sup> David B. Wilkins, “Valuing Diversity: Some Cautionary Lessons from the American Experience” in Laura Empson (ed.), *Managing the Modern Law Firm* (Oxford University Press, 2007), pp.41–42.

<sup>39</sup> Sara Ruthford and Sue Ollerearnshaw, *The Business of Diversity* (Schneider-Ross 2002), pp.10–11.

<sup>40</sup> See, for example, this piece and how it is cited in later work: Rajvinder Kandola and Johanna Fullerton, *Diversity in Action: Managing the Mosaic*, 2nd edn (Chartered Institute of Personnel Development, 1998).

<sup>41</sup> Bar Standards Board, *Increasing Diversity and Social Mobility in the Legal Workforce: The BSB Approach* (London, 2011).

<sup>42</sup> Unlike in law firms where increased profit making of individual solicitors contributes directly to the drawings of the partners.

<sup>43</sup> For how this works in relation to law firms, see: Joanne P. Braithwaite, “The Strategic Use of Demand-side Diversity Pressure in the Solicitors’ Profession” (2010) 37(3) *Journal of Law and Society* 442. What we do know, however, is that some chambers are taking active steps to hold out their diversity (and/or their commitment to diversity) when it comes to recruitment of pupils and chambers staff. For example, a small number of chambers now directly advertise positions on the website “Pink Jobs” which is targeted at the LGBT community.

<sup>44</sup> David Neuberger, “Diversity and the Legal Profession” (Rainbow Lecture on Diversity, 12 March 2014).

“Barristers are in one of the most high profile of the professions and should lead the way, and be seen to be leading the way, in promoting equality of opportunity and professionalism.”<sup>45</sup>

Greater equality (here, both as regards the number of women barristers appearing before the UKSC, and as regards the gendered formation of barrister teams) “signals equality of opportunity for women in the legal profession,”<sup>46</sup> over and above any desire for “numerical aestheticism”<sup>47</sup>

There are also various arguments put forward as to difference making a difference. While, in the UK at least, these have been operationalised in respect of a diverse judiciary,<sup>48</sup> we think that they may be generalisable to the Bar. Male and female barristers may, depending on the context, approach their advocacy differently (putting forward different sorts of arguments, framing arguments in different sorts of ways, etc.).<sup>49</sup> It has also been suggested that women lawyers may have greater empathy with women litigants and witnesses.<sup>50</sup> If these arguments are true, then single-gendered teams may be doing their clients (and the judges they appear in front of) a disservice by not offering up the greatest possible breadth of approaches and arguments.

Outside of the UK, there is a growing body of literature on the effects of female counsel. Other studies have considered the effects of women lawyers appearing before the senior courts in North America (the US Supreme Court and the Supreme Court of Canada) and Australia (the High Court). Szmer, Sarver, and Kaheny found that: (i) US Supreme Court justices (for the 1993–2001 court terms) are less likely to support parties when the attorneys who argue for them are women; and (ii) that as the proportion of women attorneys on the petitioner’s side increases relative to that of the respondent, the likelihood of a Supreme Court justice making a pro-petitioner decision decreases.<sup>51</sup> However, the authors make only passing comment to the frequency with which women appear before the US Supreme Court and to the likelihood of all same-sex litigation teams in that arena. In later work, Kaheny, Szmer, and Sarver found that justices on the Supreme Court of Canada were more likely to vote in favour of parties with a higher proportion of female barristers, which the authors attribute, at least in part, to greater gender diversity

<sup>45</sup> David Neuberger, *Entry to the Bar Working Party — Final Report* (Bar Council of England & Wales, 2007), para.20.

<sup>46</sup> Rosemary Hunter, “More than Just a Different Face? Judicial Diversity and Decision-making” (2015) 68 *Current Legal Problems* 119, 123. See also: Brenda Hale, “Equality and the Judiciary: Why Should We Want More Women Judges?” [2001] P.L. 489

<sup>47</sup> Erika Rackley, “Judicial Diversity, the Woman Judge and Fairy Tale Endings” (2007) 27(1) *Legal Studies* 74, 94

<sup>48</sup> See, for example: Sally J. Kenney, *Gender and Justice: Why Women in the Judiciary Really Matter* (Routledge 2013); Ulrike Schultz and Gisela Shaw, *Gender and Judging* (Hart Publishing, 2013); Rackley, *Women, Judging and Judiciary: From Difference to Diversity* (Routledge, 2013); and Hunter, “More than Just a Different Face? Judicial Diversity and Decision-making” (2015) 68 *Current Legal Problems* 119.

<sup>49</sup> Here, there is some suggestion that women judges may approach decision making on the basis of an “ethic of care” which is different to their male peers. If this is right, the same may well hold true for how women barristers approach their advocacy. See, generally: Carol Gilligan, *In a Different Voice* (Harvard University Press, 1982). For a discussion of the evidence and arguments as to whether difference does make a difference, see: Hunter, “More than Just a Different Face? Judicial Diversity and Decision-making” (2015) 68 *Current Legal Problems* 119 and Sumption, “Home Truths About Judicial Diversity” (2012).

<sup>50</sup> “More than Just a Different Face? Judicial Diversity and Decision-making” (2015) 68 *Current Legal Problems* 119, 123.

<sup>51</sup> John J. Szmer, Tammy A. Sarver, and Erin B. Kaheny. “Have we come a long way baby? Female attorneys before the United States Supreme Court.” (2010) 6(1) *Politics and Gender* 1.

on the bench of that court.<sup>52</sup> Lady Hale is the first (and only) woman on the Supreme Court in the UK. In this, as in many other things, we would be aided greatly by more female judges in the UK. Smyth and Mishra claim that their study of the Australian High Court (reviewing 776 cases between 1994 and 2011) is, “the first to find evidence of female barrister disadvantage, at least for female barristers representing appellants opposed to respondents represented by male barristers.”<sup>53</sup> They argue that their data shows that “gender schemas”—the idea that sex-linked characteristics are maintained and transmitted to other members of a culture (here, the gender of the High Court advocate)—can operate in a negative manner between elites in appellate courts.<sup>54</sup> While the data from these projects are equivocal (in that they suggest that context may have a large role to play), they do suggest elements of gender-based exchanges between judges and advocates.

### Lawyers, patronage, and homophily

The literature discussed above give reasons why gender, and gender imbalances, matter in the legal profession, and why the pattern seen in *In the matter of A* (four counsel for the Centre for Family Law and Practice, all of whom were women) stands in need of some explanation. Here, we discuss the concepts of kinship, patronage, and homophily, before moving on to discuss other concepts (merit, bias) which might also explain patterns of team formation. We begin with patronage.

As a behaviour and a pattern of relationships, patronage is found in almost every human society.<sup>55</sup> It is variously concerned with the use of influence and social position by one person in assistance of another,<sup>56</sup> and/or with the structural issues of protection and loyalty exchanged in transactions between multiple parties.<sup>57</sup> As such, patronage can either be dyadic, or involve several actors. There are good reasons for believing patronage to be important to the legal profession in England. Work from the field of legal history suggests that patronage has been one of the organising frames of the Bar since at least the 17th Century, at which time family and close family friends would stand as surety (known then as “manuaptors”) behind those seeking admission to the Inns of Court.<sup>58</sup> Peacey comments that patronage at the Bar at that time should not be understood as a simple relationship between patron and client, but should instead be seen as a more complex “manifestation of ties and bonds between groups of men, who were both patrons

<sup>52</sup> Erin B. Kaheny, John J. Szmér, and Tammy A. Sarver. “Women lawyers before the Supreme Court of Canada.” (2011) 44(1) *Canadian Journal of Political Science* 83.

<sup>53</sup> Russell Smyth and Vinod Mishra, “Barrister Gender and Litigant Success on the High Court of Australia” (2014) 49(1) *Australian Journal of Political Science* 1.

<sup>54</sup> This is something worthy of further exploration in relation to the UKSC—but we leave this task to others who will hopefully benefit from a more gender-balanced bench.

<sup>55</sup> Shmuel Noah Eisenstad, and Luis Roniger, *Patrons, clients and friends: Interpersonal relations and the structure of trust in society* (Cambridge University Press, 1984).

<sup>56</sup> See, for example: Jeremy Boissevain, “Patronage in Sicily” (1966) 1(1) *Man* 18; Michael Hechter, *Principles of group solidarity* (University of California Press, 1988); and Tom Brass, *Towards a comparative political economy of unfree labour: case studies and debates* (Psychology Press, 1999).

<sup>57</sup> Anton Blok, “Variations in patronage” (1969) 16(6) *Sociologische Gids* 365.

<sup>58</sup> See, for example: Jason Peacey, “Led by the hand: Manuaptors and patronage at Lincoln’s Inn in the seventeenth century” (1997) 18(1) *The Journal of Legal History* 26; David Lemmings, *Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century* (Oxford University Press, 2000); Wilfrid Prest, *The rise of the barristers: a social history of the English bar, 1590–1640* (Clarendon Press, 1986).

and clients”.<sup>59</sup> As such, patronage becomes a concept that is “faceted and multi-linear”, rather than a one way, dyadic patron-client relationship.<sup>60</sup> The calculation of the benefits of patronage may therefore involve a life-long process of accounting for different obligations incurred through patron-client exchange—except, of course, for women, who were not part of such exchanges. This notion of exchange, and of the multi-linear nature of patronage, is important for our research.

Somewhat more recently, Abel-Smith and Stevens have commented on how barristers’ clerks act as patrons to junior members of the Bar, despite (in theory) the barrister being senior to the clerk.<sup>61</sup> Once again, the patronage relationship displays multiple facets. Abel-Smith and Stevens wrote about the situation in the sixties, but it is questionable how much patronage at the Bar has really changed, either between the period discussed by Peacey and the period discussed by Abel-Smith and Stevens, or indeed between that latter period and the present day.<sup>62</sup> This is despite claims that the opening up of university education in the 1960s has produced a wider, more diverse body of would-be lawyers who are no longer dependent on family and kinship connections.<sup>63</sup> In the 1990s, “patronage, being noticed and being known” were said to be hallmarks of how barristers progressed from the Bar to the judiciary.<sup>64</sup>

One particular and sometimes extreme form of patronage results from kinship. Empirical work has shown that family ties matter for promotion within the judiciary,<sup>65</sup> and within the Bar.<sup>66</sup> It is not unfair to say that “the English judiciary is still predominantly composed of men from a narrow range of educational backgrounds often with family connections to the legal profession”.<sup>67</sup> What has, of course, changed over time is the (limited) opening up of the Bar to women (and other once excluded groups) who were then actively excluded from male patronage.<sup>68</sup>

Patronage is distinct from homophily, the principle that “contact between similar people occurs at a higher rate than among dissimilar people”.<sup>69</sup> This tendency can

<sup>59</sup> “Led by the hand: Manu captors and patronage at Lincoln’s Inn in the seventeenth century” (1997) 18(1) *The Journal of Legal History* 26, 28.

<sup>60</sup> “Led by the hand: Manu captors and patronage at Lincoln’s Inn in the seventeenth century” (1997) 18(1) *The Journal of Legal History* 26, 40.

<sup>61</sup> Brian Abel-Smith and Robert Stevens, *Lawyers and the Courts: a sociological study of the English legal system 1750–1965* (Heinemann, 1968).

<sup>62</sup> See, for example: (i) the way in which Hunter talks about briefing practices in this paper: Rosemary Hunter, “Discrimination against women barristers: evidence from a study of court appears and briefing practices” (2005) 12 *International Journal of the Legal Profession* 3, 11ff; and (ii) this report by the Bar Standards Board on the experience of women barristers in England & Wales: BSB, “Women At The Bar” (Bar Standards Board Research Report, July 2016), para.132.

<sup>63</sup> Michael Burrage, “From a gentlemen’s to a public profession: status and politics in the history of English solicitors” (1996) 3(1) *International Journal of the Legal Profession* 45; Simon Petch, “The business of the barrister in A Tale of Two Cities” (2002) 44(1) *Criticism* 27.

<sup>64</sup> Clare McGlynn, *Legal feminisms: theory and practice* (Ashgate, 1998), p.91.

<sup>65</sup> Chris Hanretty, “The appointment of judges by ministers” (2015) 3(2) *Journal of Law & Courts* 305.

<sup>66</sup> Blackwell, “Taking Silk: An Empirical Study of the Award of Queen’s Counsel Status 1981–2015” (2015) 78(6) *Modern Law Review* 971; Michael Blackwell “Old Boys’ Networks, Family Connections and the English Legal Profession” [2012] P.L. 426.

<sup>67</sup> Blackwell “Old Boys’ Networks, Family Connections and the English Legal Profession” [2012] P.L. 426, 435.

<sup>68</sup> For a discussion of how men closed ranks against women entering the profession, see: Albie Sachs and Joan Hoff Wilson, *Sexism and the Law: A Study of Male Beliefs and Judicial Bias in Britain and America* (Robertson, 1978).

<sup>69</sup> Miller McPherson, Lynn Smith-Lovin and James Cook, “Birds of a Feather: Homophily in Social Networks” (2001) 27 *Annual Review of Sociology* 415, 416.

occur on the basis of any number of personal characteristics and attributes.<sup>70</sup> Our focus is on gender homophily, whereby contact between individuals of the same gender occurs at a higher rate than between members of different genders. Various forms of contact may be characterised by homophily. Although most scholarly effort has probably gone into studying homophilous friendship ties, there have also been notable studies of homophily in hiring,<sup>71</sup> and in team formation.<sup>72</sup>

Homophily is often treated as given in the sociological literature. To the extent that homophily is explained with reference to particular underlying mechanisms (rather than existing as a mechanism in its own right), it is explained with reference to feelings of ease and comfort. People feel more comfortable with “in-group” members and are said to “more readily offer them trust and cooperation”.<sup>73</sup> The relationship between homophily and the possession or distribution of social capital is complex. Homophily per se does not result in an uneven distribution of social capital. Homophily with respect to irrelevant characteristics, or characteristics not ordinarily associated with status, does not bestow social capital, or act as a conveyor belt for its transmission. If people formed homophilous ties with respect to their star sign, it would not matter very much. Homophilous ties formed on the basis of gender or race, however, are rarely innocuous in this way, since these characteristics are in turn associated with status within organisations or social milieux. This remains true even when dealing with generally high-status professions: high-status jobs carry power, and individuals are more willing to share power with those they trust (where such trust is facilitated by similarity).<sup>74</sup> Akinola and Thomas explain that “[i]t is well-known that the relationships that are the easiest to develop, maintain, and gain comfort from are those in which the members share common identity characteristics and similar backgrounds.”<sup>75</sup>

These homophilous ties can either constitute a form of capital in their own right, or can act as means for one party in the tie to acquire social capital at a faster rate. Woodson, in his study of black lawyers in large law firms, argues that homophily has the potential to deprive many “of equal access to critical relationship capital ... thereby reinforcing inequality”.<sup>76</sup> In a similar vein, Gorman and Kmec suggest that in-group favouritism is one of the processes that can lead decision-makers to prefer male lawyers over equally-qualified female lawyers.<sup>77</sup> Other work has shown the same to be true in certain parts of the banking sector.<sup>78</sup> Homophily is often

<sup>70</sup> Paul F. Lazarsfeld and Robert K. Merton, “Friendship as a social process: A substantive and methodological analysis” (1954) 18(1) *Freedom and control in modern society* 18. See also: Miller McPherson, Lynn Smith-Lovin and James Cook, “Birds of a Feather: Homophily in Social Networks” (2001) 27 *Annual Review of Sociology* 415.

<sup>71</sup> Mark Granovetter *Getting a Job: A Study of Contacts and Careers* (University of Chicago Press, 1995). See also: Roberto Fernandez and Isabel Fernandez-Mateo, “Networks, Race, and Hiring.” (2006) 71(1) *American Sociological Review* 42.

<sup>72</sup> Martin Ruef, Howard E. Aldrich and Nancy M. Carter, “The Structure of Founding Teams: Homophily, Strong Ties, and Isolation Among US Entrepreneurs” (2003) 68(2) *American Sociological Review* 195.

<sup>73</sup> Elizabeth H. Gorman, “Gender Stereotypes, Same-Gender Preferences, and Organizational Variation in the Hiring of Women: Evidence from Law Firms” (2005) 70 *American Sociological Review* 702, 707.

<sup>74</sup> Rosabeth M. Kanter, “Women in organizations: Sex roles, group dynamics, and change strategies” (1977) *Beyond Sex Roles* 371.

<sup>75</sup> Modupe Akinola and David A. Thomas. *Defining the attributes and processes that enhance the effectiveness of workforce diversity initiatives in knowledge intensive firms* (Harvard Business School, 2008).

<sup>76</sup> Kevin Woodson, “Race and Rapport: Homophily and Racial Disadvantage in Large Law Firms” (2014) 83(5) *Fordham Law Review* 2557, 2561.

<sup>77</sup> Elizabeth H. Gorman and Julie A. Kmec, “Hierarchical Rank and Women’s Organizational Mobility: Glass Ceilings in Corporate Law Firms” (2009) 114(5) *American Journal of Sociology* 1428.

<sup>78</sup> Lisa E. Cohen, Joseph P. Broschak, and Heather A. Haveman, “And then there were more? The effect of organizational sex composition on the hiring and promotion of managers” (1998) *American Sociological Review* 711.

related to (conscious or unconscious) bias in selection processes.<sup>79</sup> In relation to the Bar, Zimdars raises the question of whether “selectors” (in her context, those on appointment panels) “tend to default into selecting in their own image by displaying homophilic tendencies.”<sup>80</sup> In her empirical work on barristers in Australia, Hunter found that, “it appears that the reasons why women who had been at the Bar more than 10 years received fewer briefs than men at the same level were largely related to homosociality between senior male solicitors and barristers, together with stereotypical assumptions held by both solicitors and their clients”.<sup>81</sup> The selection of male barristers who got work (and the women barristers who did not) came down to “the personal preferences of the individual briefing solicitors who will be the ones working closely with the barristers”.<sup>82</sup>

Bias in selection procedures is sometimes taken to be antithetical to selection based on merit or talent, but these two concepts are often constructed in such a way that individuals who form homophilous ties with members of the dominant social group often find it easier to become (perceived or judged as) deserving or meritorious. As Ashley and Sommerlad have argued

“cultural practices represent more significant barriers to the capacity of non-normative professionals to configure themselves as merit-worthy professionals, than such tangible obstacles as long hours.”<sup>83</sup>

For Sommerlad et al, these practices in the field of law revolve around the making and sustaining of personal bonds (re-)producing a homo-social culture.<sup>84</sup> The body of sociological research on workplace interactions points to strong network homophily with respect to ties between co-workers and ties with clients.<sup>85</sup> For example, in their work on doctors, Levinson et al show how gender homophily (a patient’s preference for a doctor of the same sex) is greater where the patient’s problem involves psychological intimacy.<sup>86</sup> Equally, in his broad review of “women in the legal profession”, Michelson comes to the conclusions that, “all available evidence suggests a significant degree of lawyer-client gender homophily, that women lawyers are disproportionately likely to represent women clients”.<sup>87</sup>

This review of the literature suggests that these concepts of homophily and patronage are related, that they are ubiquitous in social life, and that they are also present in the legal profession. There are, therefore, good reasons for suspecting

<sup>79</sup> Fernandez and Fernandez-Mateo, “Networks, Race, and Hiring” (2006) 71(1) *American Sociological Review* 42.

<sup>80</sup> Anna Zimdars, “The Competition for Pupillages at the Bar of England and Wales (2000–2004)” (2011) 38(4) *Journal of Law and Society* 575, 601.

<sup>81</sup> Hunter, “Discrimination against women barristers: evidence from a study of court appears and briefing practices” (2005) 12 *International Journal of the Legal Profession* 3, 11.

<sup>82</sup> Hunter, “Discrimination against women barristers: evidence from a study of court appears and briefing practices” (2005) 12 *International Journal of the Legal Profession* 3, 13.

<sup>83</sup> Ashley and Sommerlad, “Diversity and Inclusion” in Laura Empson, Daniel Muzio, Joseph Broschak, and Bob Hinings (eds), *Oxford Handbook of Professional Service Firms* (Oxford University Press, 2015).

<sup>84</sup> Hilary Sommerlad, Lisa Webley, Liz Duff, Daniel Muzio and Jennifer Tomlinson, *Diversity in the Legal Profession in England & Wales: A Qualitative Study of Barriers and Individual Choices* (Report for the Legal Services Board 2010).

<sup>85</sup> Miller McPherson, Lynn Smith-Lovin and James Cook, “Birds of a Feather: Homophily in Social Networks.” (2001) 27 *Annual Review of Sociology* 415; Herminia Ibarra, “Homophily and differential returns: Sex differences in network structure and access in an advertising firm” (1992) *Administrative science quarterly* 422.

<sup>86</sup> Richard M. Levinson, Kelly T. McCollum, and Nancy G. Kutner. “Gender homophily in preferences for physicians” (1984) 10(5) *Sex roles* 315.

<sup>87</sup> Ethan Michelson, “Women in the Legal Profession, 1970–2010: A Study of the Global Supply of Lawyers.” (2013) 20 *Ind. J. Global Legal Stud.* 1071, 1103.

that homophily should also be present when examining team formation before the UK Supreme Court. We would not wish, however, to claim that the literature is so univocal as to make the empirical investigation of homophily redundant or obvious: after all, many “obvious” claims are false.<sup>88</sup> Indeed, there are particular features of the English Bar which may make it less suitable terrain for homophily. Barristers are self-employed, and do not work in the same sorts of organisational structures that have been the object of past studies (i.e. large law firms). Although barristers may be members of the same chambers (explained below), their relationships with other barristers, outside of their relationships in court, are more atomised than the relationships between private practice lawyers. Insofar as homophilous ties strengthen on the basis of bonding, the more limited opportunities for bonding might mean that homophily in the self-employed Bar is much less strong than homophily in law firms.

### Tackling homophily empirically

When measuring homophily, it is helpful to distinguish between baseline homophily and inbreeding homophily.<sup>89</sup> Baseline homophily is the relative frequency of in-group to out-group ties. If I have more ties with other members of my group (however defined) than I have with members of other groups, then my ties are homophilous. Though it is sometimes useful to know about baseline homophily, such depends strongly on the relative size of groups. Consider the extreme case of a population of 100 divided into two groups of 98 and two. Suppose that every member of the population talks to every other member of the population with the same frequency. In this case, the ties of the larger group will be very strongly homophilous, since they talk to many more of their own group. Conversely, the ties of the smaller group will be very strongly heterophilous, since they talk to many more members of a different group. In our context, it would be utterly unremarkable if we were to find that male barristers’ ties are strongly homophilous, since there are simply many more male barristers.

For these reasons, it is helpful to move beyond baseline homophily to measure inbreeding homophily, which can be defined as “a deviation from what a ... model of random assortment would predict”.<sup>90</sup> Here, the “model of random assortment” acquires a particular importance. In the example used at the start of the article, the “model” was random assortment between all lawyers who had appeared before the UK Supreme Court. As we shall demonstrate, other models are possible. The point is not to assert a model as a true description of assortment—that would be paradoxical indeed. Rather, it gives us a benchmark against which to evaluate the degree of homophily which does not depend on relative group size in the way that baseline homophily does.

In this article, we focus on inbreeding homophily. Because we do this, everything we say about homophily in team formation applies equally to men and women. It does not make sense to talk about homophily being stronger or more marked

<sup>88</sup> Duncan J. Watts, *Everything is Obvious: How Common Sense Fails* (Atlantic Books, 2012).

<sup>89</sup> Miller McPherson, Lynn Smith-Lovin and James Cook, “Birds of a Feather: Homophily in Social Networks.” (2001) *27 Annual Review of Sociology* 415, 419.

<sup>90</sup> McPherson, Smith-Lovin and Cook, “Birds of a Feather: Homophily in Social Networks” (2001) *27 Annual Review of Sociology* 415, 419.

amongst female barristers. Suppose we find that female barristers team up with other female barristers at a particular rate. How would we know that rate was a high or a low rate? We would know by comparing it with the rate at which male barristers team up with female barristers. But in teams composed of only two genders,<sup>91</sup> the rate at which male barristers team up with female barristers is simply one minus the rate at which male barristers team up with other male barristers. For these reasons we can only ever identify homophily *simpliciter*, and cannot identify a particular male or female tendency to homophily.

### *Data on counsel and chambers*

We collected information on the counsel who appeared before the Supreme Court in cases decided by the court between its establishment in 2009 and the summer of 2015. We did this by consulting the lists of lawyers which feature on the second page of each judgment handed down by the court. Altogether, we identified 1,292 individual lawyers in 470 cases. We then identified the gender of each individual lawyer. As a first approximation, we used software which suggests the most likely gender for an individual given their first name. Because this software recommendations were neither infallible (“Lindsay” is generally a female first name, but the housing lawyer “Lindsay Johnson” is male) nor complete (there is no recommendation for the first names “Deok Joo” or “Pushpinder”), we manually checked these names. Of the 1,292 lawyers who appear in our data, and who appeared before the Supreme Court between 2009 and 2015, 23.6% are female.

When manually checking the gender of each individual lawyer, we also attempted to record the chambers to which they belonged. We did so using internet searches and the Bar Directory online. However, it was not always possible to identify the chambers to which each barrister belonged. This is the case, for example, with barristers in Northern Ireland. Nevertheless, we identified chambers for the vast majority of the barristers featured in the data. In total, we identified 155 unique chambers (known as “stables” in Scotland). This data was collected in the autumn of 2015. Since some cases were argued some years before, it is possible that current affiliations may not accurately represent the situation at the time the case was argued.<sup>92</sup> Having identified these chambers, we then counted the number of female and male members of each chamber, enabling us to calculate the current proportion of male members in each chamber. We did so largely on the basis of chambers’ own websites, which were generally more complete and up-to-date than the Bar Directory online. In counting the number of female and male members, we excluded pupil barristers and door tenants (someone who is affiliated with the set, but does not conduct business from chambers’ premises). Just as with the affiliations of counsel, these gender breakdowns were collected in the autumn of 2015, and so may not reflect the gender breakdowns in each chamber at each point in time where one of their members appeared before the Supreme Court. Figure 1 is a funnel plot which plots the size of each chambers against the proportion of males in the chambers. The solid red line indicates the weighted average proportion (70.25%).

<sup>91</sup> We have not identified any non-binary or transgender barristers who have appeared before the Supreme Court during this period. On the presence of transgender lawyers within the profession, see Catherine Baksi, “Transgender zeitgeist is now reaching law’s mainstream”, *The Times*, 31 March 2016.

<sup>92</sup> Although, and as we note above, barristers are said to have low turnover.

The dotted line indicates 95% confidence intervals, such that a chamber which was recruiting barristers in line with the weighted mean should fall within the confidence interval on 95 of 100 occasions.<sup>93</sup> Outlying chambers are named.

Having calculated for each chamber a measure of the proportion of male barristers, we sought to do the same for areas of law. We assigned each case to one of eight broad areas (administrative law; criminal law; family law; tax and chancery law; Scots law; Northern Irish law; cases falling under the jurisdiction of the Queen's Bench division; and all other cases).<sup>94</sup> We did so on the basis either of the first instance court, or the court from which appeal lay. To calculate the percentage of male barristers in each practice area, we simply calculated the proportion of male barristers averaging across all UKSC cases belonging to that area.<sup>95</sup> These proportions are shown in fig.2. These proportions are in line with the available evidence, discussed above, on areas of the law where female barristers are more likely to practise.

<sup>93</sup> David J. Spiegelhalter, "Funnel Plots for Comparing Institutional Performance." (2005) 24(8) *Statistics in Medicine* 1185.

<sup>94</sup> As Blom-Cooper and Drewry note, "any subject-classification we construct is essentially arbitrary"—but it is worth noting that this classification is not too dissimilar, in number or in content, to the subjects found in Blanes-Vidal and Leaver, and in Paterson. Our classification differs from the classification in Paterson insofar as we lack a separate category for human rights cases, and because we keep chancery cases alongside tax cases rather than merging them into a civil or commercial category. See: Louis Blom-Cooper and Gavin Drewry, *Final Appeal: A study of the House of Lords in its judicial capacity* (Clarendon Press, 1972), p.244; Jordi Blanes-Vidal and Clare Leaver, "Are tenured judges insulated from political pressure?" (2011) 95 *Journal of Public Economics* 7; Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing, 2013).

<sup>95</sup> Ideally, it would be possible to assign each practising barrister or advocate a predominant practice area, and calculate area averages on the basis of this information. Even supposing this Herculean task were possible, we doubt it would provide a picture which is very different from that shown in fig.2.

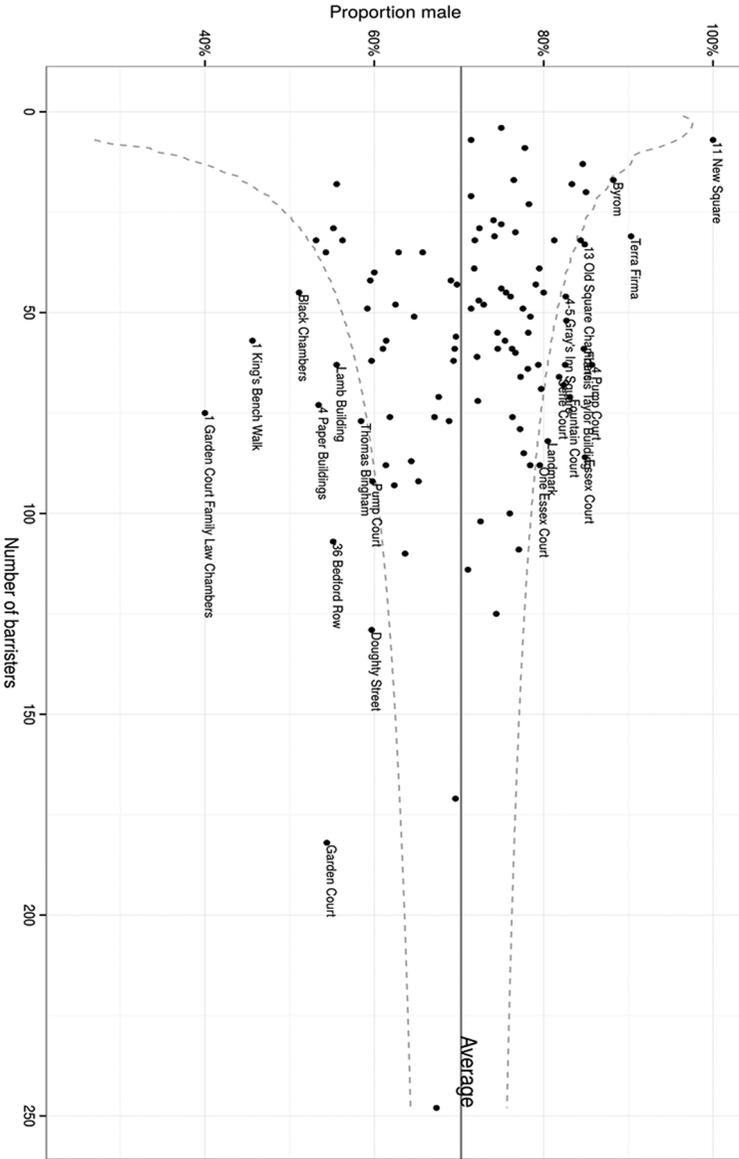
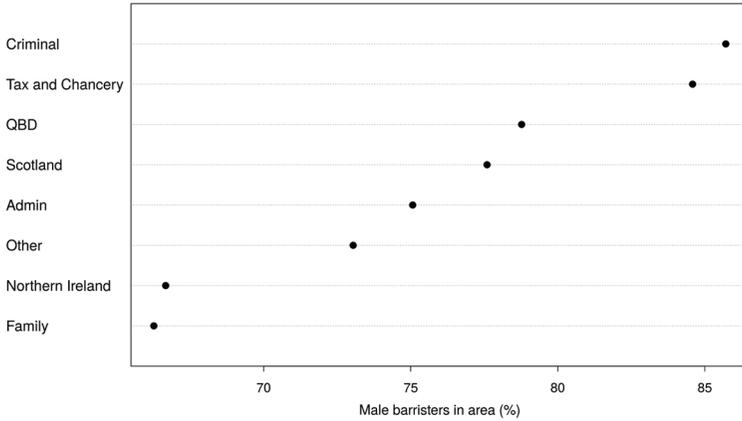


Figure 1—Proportion of male barristers in selected chambers



**Figure 2—Proportion of male barristers in eight legal areas**

*Evidence from cross-tabulation*

In order to demonstrate that team formation before the UKSC is characterised by homophily, we carry out simple bivariate analyses, before moving on to more complicated multivariate analysis. We begin by cross-tabulating, for each legal team appearing before the Supreme Court with two members, the gender of the lead counsel against the gender of the first-listed junior counsel. We assume that the lists of counsel included by the UKSC in its judgments reflect seniority, and therefore describe relationships between the gender of “lead” counsel, “first-listed junior”, “second-listed junior”, and so on. The distinction between lead counsel and junior counsel is fundamental; the distinction between “second-” and “third-listed junior” is much less important.

**Table 1: Gender of lead counsel by gender of junior counsel**

<b>Junior counsel</b>			
	<b>Female</b>	<b>Male</b>	<b>All</b>
<i>Senior counsel</i>	n (%)	n (%)	n
Female	44 (22%)	50 (10%)	94
Male	160 (78%)	454 (90%)	615
All	204	504	709

Table 1 shows the gender of the senior counsel (in the rows) against the gender of the junior counsel (in the columns). The table shows that there were 44 teams where both the lead and the first-listed junior were female, and 454 teams where both the lead and the first-listed junior were male. Are these frequencies greater or lower than we would expect if team formation were not characterised by homophily, but were instead gender neutral? To answer this question, we start by considering the total of the first column, which refers to female junior counsel. If team formation were gender neutral, then these 204 female junior counsel would be distributed proportionately between the male- and female-lead teams. The vast bulk of them would end up working with male senior counsel, since most senior

counsel were male. Start by considering the proportion of all senior counsel who are men (615 out of 709, or 86.7%). Then multiply this proportion (86.7%) by the number of female junior counsel (204) to give a notional total of 177. By following the same procedure, we can calculate the number of female junior counsel who would be expected to end up working with female senior counsel. The proportion of all senior counsel who are female is 13.3% ( $100\% - 86.7\% = 13.3\%$ ). Multiply this proportion by the number of junior counsel (unchanged at 204) gives a notional total of just 27 female junior counsel who end up working with female lead counsel as part of a same-sex team.

This notional total is much lower than the actual figure of 44 same-sex teams of female lawyers. Through a necessary complementarity, the number of male junior counsel working with male senior counsel is also greater than what one would expect if team formation were gender neutral. Thus, there is evidence that team formation is not gender neutral, and is characterised by homophily (rather than the much less likely case of heterophily, which would have resulted had the number of same-sex teams been lower, rather than greater, than expected). The magnitude of the homophily also seems large. It is not strictly necessary to test whether the degree of homophily is statistically significant. Statistical significance testing (usually) presumes a distinction between a population and a sample drawn from that population. A statistically significant finding is one which we can be confident would also be found were we to collect new samples from our population. In the present case, we have almost all of the cases decided by the UKSC, or the entire population; there are no as-yet-undiscovered new samples waiting to disconfirm our findings. Nevertheless, for the sake of completeness, we note that these differences are indeed highly statistically significant ( $\chi^2 = 16.12$  on 1 d.f.,  $p = 0.0001$ ).

### *Evidence from logistic regression models*

The simple bivariate analysis reported above is insufficient in two respects. First, it does not lend itself to easy interpretation of magnitudes. The table above presented counts of different types of legal team (male-male, male-female, female-female, female-male, etc.), and compared these to the counts that would have resulted had team formation been gender neutral. This difference in counts is not intuitive, and does not really help gauge the magnitude of the homophily. It is helpful to have a method which produces such estimates of magnitude directly. Secondly, a simple bivariate analysis cannot account for confounding or moderating variables. Homophily is a common characteristic of team formation, but its ubiquity does not mean that it operates in every situation with equal force. In particular, there may be recognisable conditions under which members of one type may feel a particularly strong inclination to team up with those whom they resemble. Where those conditions can be quantified, we can investigate the degree of homophily as moderated by those conditions.

Both of these deficiencies can be remedied by using logistic regression. Logistic regression can be used to model any dichotomous outcome as a function of other variables. In this case, we can use it to model the probability that a junior member of the team will belong to a particular gender, as a function of the gender of the senior counsel. Here, we model the probability that a junior member of the team

will be *male*, conditional on the senior counsel being male. The stronger the positive effect of the senior counsel being male, the greater the degree of homophily. Because “female” and “male” are (in this application) mutually exclusive categories, it is immaterial whether we investigate the probability that junior counsel will be male as a function of the senior counsel being male, or the probability that junior counsel will be female as a function of the senior counsel being female: a significant finding under one formulation necessarily implies a significant finding under the alternative formulation.

**Table 2: Logistic regression of male junior**

	<b>Model 1</b>
<i>(Intercept)</i>	0.128 (0.207)
<i>Male senior</i>	0.915*** (0.226)
<i>Nagelkerke R-sq.</i>	0.032
<i>Log-likelihood</i>	-417.197
<i>N</i>	708

Table 2 shows the results of a logistic regression model which uses exactly the same data as used in Table 1. The intercept shows the baseline risk of junior counsel being male. The coefficient attached to “Male senior counsel” shows how the risk changes when the senior counsel is male. Specifically, it shows the *log-odds ratio*: when senior counsel is male, the odds of having a male junior counsel are  $e^{0.915} = 2.497$  times higher.<sup>96</sup>

**Table 3: Logistic regression of male junior, full dataset**

	<b>Model 2</b>
<i>(Intercept)</i>	0.322 (0.172)
<i>Male senior</i>	0.695*** (0.186)
<i>Nagelkerke R-sq.</i>	0.016
<i>Log-likelihood</i>	-695.343
<i>N</i>	1177

<sup>96</sup> Logistic regression works in terms of *odds*, rather than in terms of probabilities. The reason for this is that probabilities can change considerably depending on baseline risk, which is not true for odds. The odds of having a male junior counsel in general is a ratio of probabilities, and can be calculated from Table 1: it is the probability that a male junior counsel will be selected, divided by the probability that a female junior counsel will be selected. The probability that a male junior counsel will be selected is simply the male share of junior counsel, or  $504 / 709 = 71\%$ . The probability that a female junior will be chosen is  $100 - 71 = 29\%$ . The odds are therefore  $71\% / 29\% = 2.47$ . Contact the authors for further analysis.

Table 3 goes on to show the results of the analysis when we incorporate third- and fourth-listed counsel. The degree of homophily is smaller when we include three and four-member teams, but it remains positive and statistically significant.

### *Control variables*

With the basic logistic regression model in place, we can move on to more complicated models, which incorporate additional variables. As these additional variables are included, the coefficient associated with “Male senior counsel” will change. Were it to be found that the inclusion of an additional theoretically-justified variable caused the coefficient associated with “Male senior counsel” to shrink to zero, such that same-gender pairings were no more likely than mixed-gender pairings, *controlling for* that other variable, we might be said to have “explained away” the apparent homophily that exists. Team formation might then be said to be gender-neutral, conditional on some other feature (characteristics of the particular area of law, say).

Recall that earlier we discussed both the study of homophily, and the literature on gender equality in the English Bar. The literature on homophily discussed the importance of a model of random assortment, against which homophily could be evaluated. In the logistic regression model used above, the (implicit) model of random assortment is random assortment between lawyers who have appeared before the Supreme Court. However, a more appropriate model might involve lawyers randomly assorting *within their chambers*, or alternately, *within their predominant area of law*. By adding additional control variables, we can allow for this kind of assortment. If, say, lawyers randomly assort with other lawyers in their chambers, and assort with no other lawyers, then the influence of the gender breakdown in their chambers will be significant and positive, and the effect of the gender of senior counsel will be zero. Here, we might explain away homophily through controlling for the fact that (as set out above) that certain chambers and/or certain areas of law have a greater or less prevalence of male and female barristers.

Accordingly, we have undertaken logistic regression models with additional control variables: the percentage of male barristers in the relevant area of law (calculated in the fashion described above), and the percentage of male barristers found in the senior barrister’s chambers. The results of these are set out in Table 4 in the Appendix. Homophily is present and significant across all of these models. Although the coefficients for both of the control variables are both positive, suggesting that more male areas are more likely to feature male juniors, neither coefficient is statistically significant, which means that we would not expect more male areas to feature more male juniors as a matter of course.

There is a significant effect of the percentage of male barristers in the senior barrister’s chambers. Thus, the more male the senior barristers’ chambers, the more likely he is to work with a male junior. We test whether the size of the chamber moderates this relationship (see the third column of Table 4 in the Appendix). There is some evidence to suggest that the effect of the gender composition of the senior barrister’s chambers is smaller in smaller chambers (perhaps because barristers are forced to look outside their own chambers), but this effect is not significant at standard levels of statistical significance (see the third column of Table 4, and Figure 3 in the Appendix). In any case, the effect of

homophily is almost unchanged, and same-sex teams are still  $e^{0.602} = 1.83$  times more likely to form. Consequently, homophily cannot be explained by other characteristics commonly cited in discussions of gender stratification within the legal profession.

## Discussion and conclusion

We have shown that there is evidence of considerable gender homophily in the formation of teams of barristers appearing before the UK Supreme Court. Same-sex teams of barristers are over-represented compared to the number we would expect if barristers paired up randomly: where the senior barrister is male, the odds of the junior barrister also being male are 2.5 times higher. We have also shown that this gender homophily remains when we allow for the possibility that lawyers pair up randomly within their chambers, or within their area of law. Finally, we have shown that the gender breakdown of chambers has greater bite when chambers are small. As such, the formation of teams of barristers in the Supreme Court is governed by practices and preferences which make same-sex legal teams more likely than they would be if team formation simply involved a gender-blind draw from a pool of lawyers. Barristers appearing before the Supreme Court prefer, for whatever reason, to work with other barristers of the same sex. What then do these findings mean?

There is no literature of which we are aware which discusses how teams of barristers are formed, and which might therefore be able to provide greater insights into the causal processes which sustain homophily in team formation. We suggest four possible routes. First, junior barristers might choose the senior who will lead them. This may arise either because the case was due to be argued by a single barrister, but has now reached the level where “double-manning” is appropriate, or because the case was always due to be handled by two barristers, and it is the junior barrister who was first instructed. In either case, it would be appropriate to talk of homophily, but it would be more difficult, particularly in the later case, to describe such homophily as an example of patronage. We raise the question whether, in non-homophilous situations where junior female members of the Bar choose to be led by more senior male barristers, they are actively opting for “safer” career bets (given the larger numbers of male barristers at the top end, and the potential linked opportunities for advancement).

Secondly, senior barristers may choose the junior who will follow them. This route is the route implicit in our statistical model, where the outcome is the gender of the junior barrister, and where the causal (or at least correlative) factor is the gender of the senior barrister. Team formation through this route might well be considered to involve both homophily and patronage. Thirdly, barristers’ clerks may choose which senior or junior works with which junior or senior from their own chambers. In this instance, the homophily would be engineered by a third party. The third party may be acting from a preference for barristers of a particular gender (a preference which plays out in the choice of both junior and senior), or may act under the belief that barristers prefer to work with others of the same gender. Although much has been written on the power of clerks in allocating work

between barristers,<sup>97</sup> we are inclined to discount this route on the grounds that if homophily were solely or principally the result of choices made by clerks, we would be less likely to see homophily in cases involving barristers from multiple chambers. However, additional analyses do not bear this supposition out.<sup>98</sup>

Fourthly, instructing solicitors and/or lay clients may dictate which senior or junior is to be used to accompany the existing junior or senior. Whilst we lack information on the gender of instructing solicitors, we were able to code the genders of natural persons pursuing cases before the Supreme Court: here we found no connection between the gender of the client and the gender of the senior counsel, still less a connection between the gender of the client and same-sex barrister teams.<sup>99</sup> In practice, teams are likely to form as a result of a combination of these four routes. We mention these routes not to identify one route as the most likely (we leave that task to future research), but because remedies for homophily depend on which route operates. The more homophily operates through the actions of clerks, the easier homophily may be to remedy (through raising awareness of the phenomenon, or by asking clerks to have due regard for diversity when constructing teams and the monitoring ex ante how diverse the teams that they create are). The more homophily operates through the (disaggregated) decisions of juniors who seek to curry favour with senior barristers and QCs, the harder the remedy. Other cases represent intermediate points.

What we are unable to show is whether homophily in barrister teams appearing before the Supreme Court comes about as a result of conscious and/or unconscious decisions. For example, the power of women mentoring other women has been a recurrent theme in existing work on the legal profession<sup>100</sup>: where we have all-women barrister teams, is part of what is going on a conscious form of mentoring? And, if so, is this objectionable in a discipline where, as we have already shown, women at the Bar face a series of hurdles across their careers? It may be. If, as discussed above, difference makes a difference, and having different voices in teams of barristers before the UK Supreme Court is a potential strength (for clients and the advancement of their arguments, for development of the law, etc.) then the homophily that we have shown should be of concern. It may also be that women and men choosing to work with (respectively) women and men do so for different reasons: more senior women might choose to work with more junior female members of the Bar for greater political and/or strategic reasons than their senior male counterparts (who may subconsciously gravitate towards junior male barristers to work with). That is, the preferencing of junior women by senior women

<sup>97</sup> Hunter, "Discrimination against women barristers: evidence from a study of court appears and briefing practices" (2005) 12 *International Journal of the Legal Profession* 3. See also: Martin Chalkley, *Momentum Measures: Creating a Diverse Profession — Summary Findings* (Report for the Bar Council of England & Wales, July 2015).

<sup>98</sup> We have not presented these analyses here due to reasons of space, but they are on file and are available on request.

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<sup>100</sup> See, for example: Margaret Thornton, *Dissonance and distrust: Women in the legal profession* (Oxford University Press, 1997); Deborah L. Rhode, "Gender and the Profession: The No-Problem Problem" (2001) 30 *Hofstra Law Review* 1001; Deborah L. Rhode and Lucy Buford Ricca, "Diversity in the Legal Profession: Perspectives from Managing Partners and General Counsel" (2014) 83 *Fordham Law Review* 2483. In their recent research into women at the Bar, the Bar Standards Board found that mentoring schemes were the most common source of support experienced by women barristers, but that the presence of such schemes varied widely between chambers. See: BSB, *Women At The Bar* (Bar Standards Board Research Report, July 2016).

may be more active than the preferencing of junior men by senior men at the Bar. Further work would be needed to unpick this.

Our research has implications for how the presence of women at the upper reaches of the Bar can be improved. Let us suppose that our findings generalize from the UK Supreme Court to other levels of the judicial hierarchy. There is a certain Catch-22 logic to our findings. Women do better as juniors when other women are in senior positions (because the seniors can grant the juniors access to more complex cases and litigation in the highest courts); but women only reach senior positions after first being juniors. If half of senior barristers were women, then gender homophily would not be so objectionable. However, given that the Momentum Measures report above suggested that gender parity at the Bar as a whole is unlikely to *ever* be achieved (and parity at the top end of the Bar is unlikely in the foreseeable future), further progress towards gender equality at the Bar relies, essentially, on exceptional women breaking through. This then impacts on judicial diversity, in two ways. The first is whether (or to what extent) litigation team diversity could be a complement or a substitute for (a lack of) judicial diversity. That is, whether difference in the administration of justice can be a composite of who the judge is (or judges are) and who appears before the judge(s). The second is the extent to which diversity among litigators appearing before the Supreme Court impacts on those entering the judiciary from the Bar. If, as Lord Sumption has suggested, the judiciary is an option “at the end of a successful career at the Bar”,<sup>101</sup> we need diversity at the top end of the Bar. Paterson and Paterson argue that, “diversity in senior judicial appointments is not simply a desirable goal, but a fundamental constitutional principle. At the very heart of the legitimacy of an independent judiciary are its claims to be able to deliver fairness. A senior judiciary whose composition reflects an apparent lack of fairness runs the real risk of undermining its own authority.”<sup>102</sup> Lord Sumption has also previously suggested that, “The main reason for the lack of diversity in the English bench is the undiverse character of the upper reaches of the legal profession,”<sup>103</sup> and Lady Hale has suggested that women judges should think about offering themselves as mentors to other women seeking entry to the judiciary.<sup>104</sup> As we set out earlier, Lord Neuberger, President of the Supreme Court, has said that, “it is simply unjust and incompatible with elementary justice that people should have fewer opportunities in life because they are women, because they are not white, or because they come from a background which is socially or economically under-privileged.”<sup>105</sup> Given these acknowledgments by serving UK Supreme Court Justices, and given our data, perhaps the next time a Justice of the UK Supreme Court notices an eight-handed, all-male, four-person team appearing before them, they might ask

<sup>101</sup> See Martin Bentham, “Rush for gender equality with top judges ‘could have appalling consequences for justice’”, *Evening Standard*, 21 September 2015.

<sup>102</sup> Alan Paterson and Chris Paterson, *Guarding the Guardians? Towards an Independent, Accountable and Diverse Senior Judiciary* (Centre Forum Report, 2012), p.5. Lord Sumption’s views run somewhat counter to this: “The call for more members of particular groups on the bench is a symptom of the fragmentation of our society. It is influenced by a widespread belief that judicial decisions are vitiated by the social ignorance of judges, or by their tacit loyalty to their class, gender, race or other constituency, or by inescapable social conditioning. I regard this belief as profoundly mistaken.” See Sumption, “Home Truths About Judicial Diversity” (2012), p.10

<sup>103</sup> Sumption, “Home Truths About Judicial Diversity” (2012), p.10

<sup>104</sup> Lady Hale, “Women in the Judiciary” (Fiona Woolf Lecture for the Women Lawyers’ Division of the Law Society, 27 June 2014), p.17.

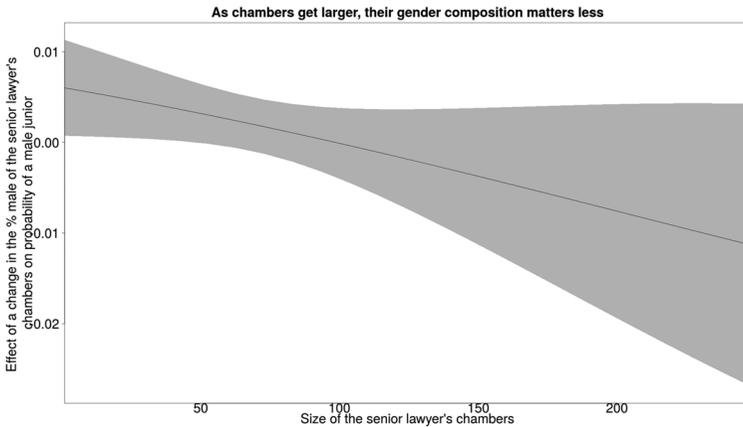
<sup>105</sup> David Neuberger, “Diversity and the Legal Profession” (2014).

why this is the case and why there were no equally meritorious female barristers to join them. It would be, in our opinion, a question well worth asking.

## Appendix

**Table 4: Logistic regression of male junior counsel as a function of male senior counsel and other variables**

	Model 3	Model 4	Model 5
<i>(Intercept)</i>	-2.076*	-0.705	-3.658**
	(1.042)	(0.521)	(1.384)
<i>Male senior</i>	0.642***	0.673***	0.602**
	(0.188)	(0.187)	(0.189)
<i>Percentage male in area</i>	3.175*		2.372
	(1.361)		(1.425)
<i>Percentage male in senior counsel's chambers</i>		0.014*	0.033*
		(0.007)	(0.015)
<i>Size of senior counsel's chambers</i>			0.022
			(0.013)
<i>Percentage male in senior counsel's chambers times Size of senior counsel's chambers</i>			-0.022
			(0.013)
<i>Nagelkerke R-sq.</i>	0.023	0.022	0.030
<i>Log-likelihood</i>	-692.612	-693.172	-689.818
<i>N</i>	1177	1177	1177



**Figure 3: The effect of a one percentage point change in the proportion of men in a senior lawyer's chambers on the probability of a male junior, as this effect changes with the size of the senior lawyer's chambers**