Gender on the Agenda: How the Paucity of Women Judges Became an Issue

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Analyzing how the virtual absence of women in high judicial office in the United Kingdom came to concern policy makers expands our understanding of agenda setting. By identifying the idiosyncratic barriers that impeded diffusion of innovation, this case suggests that an issue may get on the governmental agenda and policy change occur without a threshold groundswell of support or consensus that one sees in more typical cases. Policy change may help more to produce a consensus after the fact than reflect it. This case also seems exceptional for both feminist policy change and change driven by legal mobilization in that a very few uncoordinated actors made the difference. The agents of change in this case linked their cause to other governmental priorities as key personnel changed. Litigation provided one vehicle for this discursive work.

Why did Britain appoint its first woman to its highest appellate court, Lady Brenda Hale, in 2003 nearly 25 years after the United States and Canada? Scholars of diffusion of innovation seek to explain how ideas spread from state to state or country to country, what internal factors impede or facilitate innovation, and the mechanisms[1] by which ideas diffuse (Berry and Berry 1990, 1992; Eyestone 1977; Gray 1973, 1994; Hayes 1996; Mintrom and Vergari 1998; Walker 1969). Explaining laggard diffusers requires looking inside each country or state, as Banazcak does to explain why it took Switzerland so long to pass universal suffrage for women (1996). Gray calls this the political process model (1994, 232). At least initially, we have many reasons to expect convergence between the United States, the United Kingdom, and Canada. They share common intellectual and political heritages, they have similar numbers of women in the legal profession, women have held high political office in varying degrees in all three, and organized feminism has pressed its case in all. Ideas about policy and governance have moved between the three since the colonies were founded, be they about antislavery, suffrage, or welfare policy. Two factors explain the variance: first, law and judging is much more of a specialized domain, and senior judges in Britain are not public figures to the same extent as Supreme Court judges in Canada and the United States. Feminists have therefore not targeted judges as visible prizes to showcase women's increasing power. But more importantly, until recently, judges were chosen from a very narrow and selective pool by gatekeepers who did not prioritize a gender diverse bench. One gatekeeper, the Lord Chancellor, successfully resisted all demographic and political pressure for change and was indifferent to international comparisons.

The case of how the virtual absence of women judges in the United Kingdom came to be on the public agenda provides a good opportunity to expand and refine conventional theories of agenda setting. The difficulty in determining if the gender of judges was on the agenda and if so, when it was, led me to reexamine the quantitative component that posits a threshold and focuses on the legislative arena and mass media. My evidence will show policy change occurring without a groundswell or consensus. Theories of agenda setting, the process of transforming a condition into a problem government must act to solve, generally contain elements of magnitude and sequence: sufficient consensus is reached to produce a tipping point or identifiable moment when the issue

[1]While many scholars of diffusion recognize the importance of internal factors (explaining whether the issue passes as opposed to is considered [Mintrom and Vergari 1998] as well as external pressures to conform [Berry and Berry 1990]), Skocpol is almost unique in not only taking up a gender issue and looking at the role of women, but in showing how the presence of an organized Mother's Union was more important in explaining the spread of mother's pensions than either economic or other political variables.

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is indisputably on the agenda. Conventional accounts of public policy change treat defining an issue as a social problem as a question of quantity—convincing sufficient numbers of people by creating a groundswell or consensus that cannot be thwarted—despite recognizing that policies can also change because they are the pet project of a policy maker or an insider group, even in the face of majority opposition or indifference, sometimes precisely because they are "under the radar" or routine rather than landmark (Jacob 1988).

Moreover, I shall argue that rather than producing a tipping point of consensus, feminists succeeded by tying their issue discursively to the Labour Party's discourse of modernization. By linking their cause to the modernization discourse, feminists persuaded well-placed policy entrepreneurs that Britain needed more women judges—not so much because these players cared about gender equality, but because gender equality served their instrumental purpose of modernizing the judiciary. The case thus invites us to draw on public policy scholars who focus on discourse to build our theories of agenda setting (Rochon 1998; Stone 2002). The case also provides an opportunity to build on the agenda-setting research of legal mobilization scholars who emphasize the importance of litigation in the agenda-setting process as a key arena for discursive politics. Through litigation that received little notice, feminists deployed arguments about legitimacy, equality, and representativeness. They achieved success, however, with few members, without acting in concert, and largely without the support of the feminist policy sector (Mazur 2002; Stetson and Mazur 1995). The case also extends agenda setting beyond the U.S. context to a parliamentary system (Baumgartner, Green-Pedersen, and Jones 2006), as well as recognizing the growing importance of international influences—unflattering international comparisons were key to the argument that the judiciary needed modernizing.

I first review current theories on agenda setting and analyze the measures of agenda status and then explore how this issue came to be on the agenda in the United Kingdom. In their efforts to place the lack of women on the UK bench on the public agenda, feminists benefited from an influx of women to parliament and to the legal profession. In addition, feminists were able to capitalize on several other trends that had little to do with gender: changes in the Labour Party's philosophy toward courts and law; decline in the public's confidence in the courts and its growing sense that who judges are matters; an increasing recognition that the role and powers of the Lord Chancellor in judicial appointments were coming to be regarded as anachronistic in an environment shaped increasingly by international and supranational laws and cross-national comparisons; and the momentum of several decades worth of efforts at reforming the judiciary. I discuss these developments in detail. I then consider how this case expands our theories of agenda setting and policy change.

Agenda Setting

Kingdon asks when an idea's time has come (1995). Likewise, Cobb and Elder ask how issues move from the systemic agenda, the legitimate controversies of government, to the institutional agenda, items up for active and serious consideration by government (1972). For Kingdon, the objective measure of agenda status is that insiders know it. Kingdon's finite world of policy entrepreneurs and insiders develop solutions over time and wait like surfers to ride the wave of interest in a problem when it emerges. Baumgartner and Jones (1993) in *Agendas and Instability in American Politics* pay more attention to the media and what produces the wave, or in their terms, punctuates the equilibrium. When few are involved in an issue, a dominant interest is able to prevail by ensuring that a single, narrow arena dominated by friends sets policy for the issue, the old iron triangle. At equilibrium, the tone of media reporting is favorable. Then things shift. The number of articles in the media increases, and the dominant tone shifts to unfavorable. Players proliferate, both journalists and legislative committees, and those previously shut out of the equilibrium persuade different players to take up their cause, shifting and expanding the policymaking venues. Baumgartner and Jones's measures of agenda status are congressional hearings and the number and tone of citations in the *Reader's Guide to Periodical Literature.*

Malcolm Gladwell's (2000) book, *The Tipping Point,* uses a contagion model for a popular audience to understand the spread of ideas, describing the concepts agenda setting and diffusion of innovation policy scholars have identified—swells, punctuated equilibria, and bandwagons. Thinking of an idea whose time has come as an epidemic entails seeing the process as having a dramatic tipping point, coined from the example of racial change in neighborhoods—one nonwhite family is suddenly too many, all remaining white families leave, and the neighbourhood shifts to nonwhite—it tips. His metaphor is consistent with Kingdon's idea of the big wave and Baumgartner

and Jones's idea of the punctuated equilibrium—in agenda setting, there often seems to be a dramatic breakthrough point. For Gladwell, ideas, like viruses, are contagious; they spread from person to person. They take off dramatically, not incrementally, and little changes can have huge effects. Inherent in the idea of a tipping point is an idea of quantity or magnitude—at some point everyone has a fax machine instead of only a few, and the machine is an office staple.

Rochon, in *Culture Moves: Ideas, Activism, and Changing Values*, uses the metaphor of an earthquake to describe our knowledge of social and political movements and their role in agenda setting: "Both are sudden events, variable in size but potentially massive, and predictable only in the loose sense that we can identify the conditions that make an upheaval highly probable at some unspecified future date" (1998, xvi). Rochon aims to do more than merely plot the event; he wants to understand what is driving it. Why is there suddenly a proliferation of popular publications on a given topic? Why do multiple congressional committees take up the same subject? "These understandings of the potential for innovation within political institutions leave untouched the question of where the impulse for rapid change comes from" (Rochon 1998, 6). Moreover, his focus on cultural change is broader than explaining passage of a particular public policy. Rochon's important concept of the critical community moves beyond Kingdon's policy community and beyond the arena of Congress to include grassroots activists and public intellectuals (1998, 24). Focusing events—9/11, the Anita Hill/Clarence Thomas hearings, Chernobyl—only lead to change when critics and activists have "softened up" the ground (to use Kingdon's term). Rochon is especially useful to this study because when he discusses social movements, he recognizes the importance of the women's movement, and when he considers important public policies, he includes gender examples such as sexual harassment. Most agenda-setting scholars ignore the women's movement (for an exception, see Flammang 1997, 253–394). He looks at courts and litigation, beyond the arena of the federal government, and outside of the United States (see also Baumgartner and Mahoney 2004). His measures of cultural change are also much more expansive, ranging from opinion polls, to fragrance ads, to sitcoms—seeing effects beyond the *Reader's Guide*, congressional hearings, or the assessments of political insiders.

My case seems to be an exception to the idea that agenda setting and the subsequent policy change are based on consensus in the policy community or magnitude of support of legislators, the media, or the public in all cases. Just as Jacob's case study of divorce reform distinguished the case of landmark legislation (which agenda-setting theories currently explain well) from what he calls routine policy change, so, too, do we need a slightly different account for this case. To return to Rochon's metaphor of the earthquake—measuring the fault does not tell us when an earthquake will occur, but a fault must be there to produce an earthquake. To extend the metaphor to my case, the size of the fault may not be the most important factor in predicting an earthquake. Very small, almost undetectable faults may produce earthquakes, and an earthquake may seriously widen the fault—leading us to explore how earthquakes created faults as well as how faults create earthquakes. To understand this process, we need to understand discursive logic not just magnitude, a process much more familiar perhaps to legal scholars studying the development of doctrine than policy scholars. Both Kingdon and Baumgartner and Jones recognize the importance of discursive politics. Kingdon recognizes ideas can spill over from one sphere to another and recognizes, for example, the uphill battle for universal health care in the American context. Baumgartner and Jones's media measure recognizes the circulation of ideas and the importance of tone. My case study joins those who draw on social movement theories of framing (Verloo 2007). Sociologists Ferree et al. (2002) have employed social scientific techniques to analyze what Gladwell calls the stickiness of ideas by evaluating the discursive field in which abortion activists make arguments in Germany and the United States. In Germany, justifying access to abortion by arguing it enhances women's autonomy is a framing that fails to resonate—feminists make the arguments, but they get no traction. In the United States, pro-choice activists get traction with arguments about the dangers of intrusive government but not by pointing out the hardships of lack of access for poor women. Those who want to understand agenda setting must consider these discursive aspects of politics, even if they may be difficult to measure (Edelman 1967; Stone 2002).

I join policy scholars who emphasize policy as an input not merely an output (Gray 1994). Too much emphasis on plotting agenda status by measuring interest group demand or public policy preferences may obscure the importance of causality running the other way. Just as policy scholars have long recognized feedback loops, the research which calls itself the "new politics of public policy" (Landy and Levin

1995; Shapiro 1995) as well as the new institutionalism suggests we reverse our conventional understanding of policy change (Leech et al. 2002; Mahoney 2204). Government activity may spark social movements rather than merely respond to them; the creation of rights, such as the creation of the right to special education, was a catalyst for the movement rather than a policy success of it (Melnick 1995); AARP arose after the government passed Medicare; the women's movement gained enormous strength from the creation of the Commissions on the Status of Women (Costain 1992; Meyer 2004; Meyer and Rohlinger 2005, 16); the UN World Conferences on Women galvanized international feminism. Other examples abound: the social movement campaign for redress for Japanese Americans (Naito and Scott 1990) or comparable worth (McCann 1994) may well have been precipitated by government actions rather than merely responding to group demands. Public policies may cause, or catalyze social movements, rather than merely be a reflection of social movement and interest group demands. Kingdon of course, like others, would be quick to admit that moving from agenda status to policy change includes many serendipitous, as well as patterned, components in addition to the magnitude of the demand. Surely a minimum threshold of demand must exist, but it is much less than the *Tipping Point* metaphor of the epidemic would suggest, or rather, not all policy change conforms to the contagion model. Policy change could occur without much groundswell of consensus behind it or without clearly puncturing an equilibrium. Rather, as new institutionalists would encourage us to recognize, the policy itself may be a key component in creating such a consensus, if it ever exists.

One of Kingdon's chief contributions was rejecting an orderly or sequential account of the agenda process, instead describing it as the chaotic convergence of many factors. Accounts have assumed that policy change requires some minimal level of agenda setting, but we have tended to infer it from the fact of policy change itself rather than identified the elements that enable diagnosis at the time. While policy analysts tend to assume that agenda setting is necessary, all recognize agenda setting is not sufficient for policy change (Bevacqua 2000; Gornick and Meyer 1998).

Determining Agenda Status

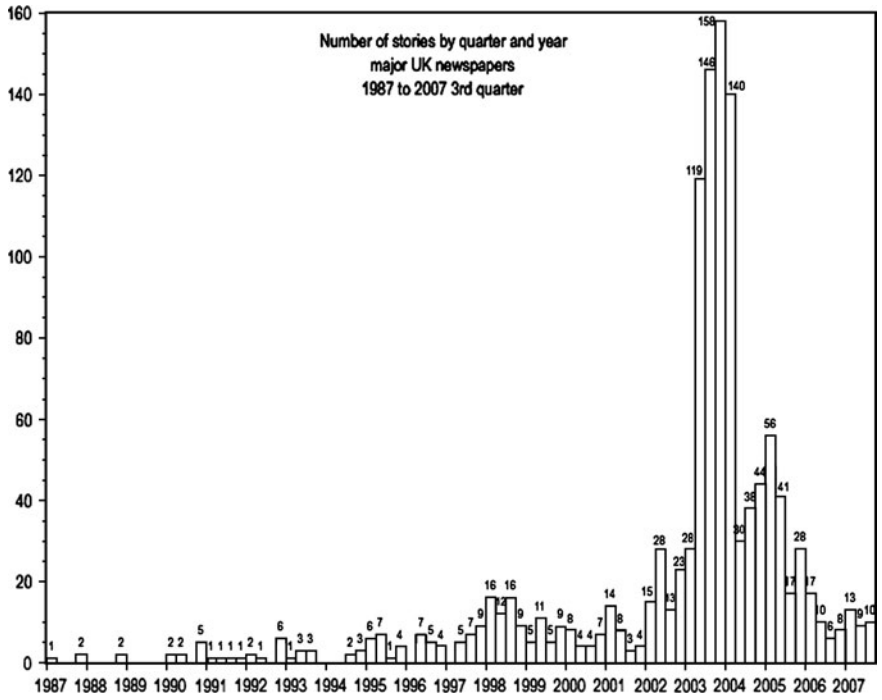
How do we go about measuring, demonstrating, and plotting the agenda status of something like the gender of women judges in Britain? Following Kingdon, I interviewed both policy makers and activists and asked them if the issue was on the agenda. Unlike Kingdon's subjects, my interviewees, such as the legal correspondent for *The Guardian*, were not convinced that it was in 2002. Kingdon noted that policy makers often tried to attach a preferred policy solution to a problem that was on the agenda, and that is what happened in my case: feminists succeeded in firmly tying the gender issue to general proposals for constitutional reform. Emulating Baumgartner and Jones (1993), Ferree et al. (2002), and John (2006), I read and coded every national newspaper article in the last 20 years (n=1,227) and plot the emergence of this issue over time in Figure 1.[2] What is striking about Figure 1 is how little coverage certain momentous events receive, such as the appointment of a new judge to the House of Lords, or even parliamentary hearings about judicial selection. It is hard to imagine a U.S. Supreme Court appointment garnering only three or four news stories. In the political version of the media convention of "if it bleeds it leads," what does earn attention is dramatic clashes with the government of the day: a cabinet reshuffle or a vote against the Government in the House of Lords, evidenced by the surge of stories in 2003.

I coded stories as to whether they discussed the gender composition of the bench. Figure 2 bolsters my argument that feminists attached their policy issue to a larger wave of activity around constitutional reform rather than firmly put it on the public agenda in and of itself. As I shall show, they put gender on the agenda in 2003 only because the larger issue of constitutional reform was also on the agenda. The surge we see is for the issue of constitutional reform in 2003 not the issue of gender per se.

If you want to understand why it took so long for the gender composition of the judiciary to be on the public's agenda in the United Kingdom and understand why the first woman was appointed to the highest appellate court in 2003, not in 1982 or 2010, you need to know the basics of several parallel stories, stories that seem to have little to do with gender or the women's movement. Kingdon talks about policy change as the result of a convergence of three separate streams; similarly, the story of the placing of the absence of women from the bench on the agenda is the result of a convergence of changes in the Labour Party and consequence of the election of a Labour

[2]Beginning in 1987, I searched the major national newspapers for the terms Lord Chancellor (and the names of the individual Lord Chancellors), judicial selection, judges, House of Lords (appellate committee), and women judges.

FIGURE 1. **Number of stories by quarter and year major UK newspapers 1987 to 2007 3rd quarter**



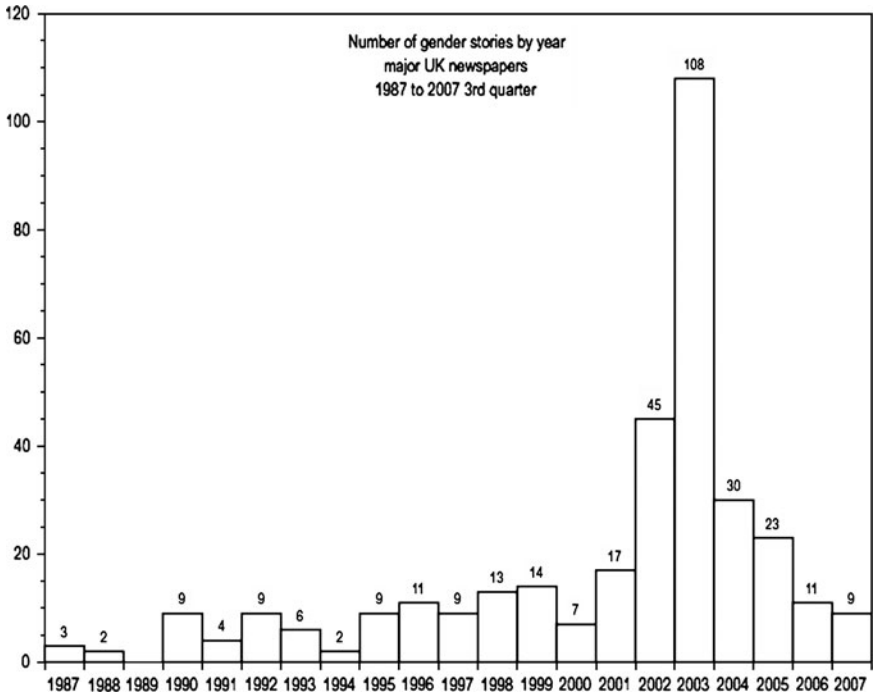
Government, changes in how the public perceives the judiciary, constitutional reform and changes in the United Kingdom's position in supranational organizations, and changes in women's roles, equality policy, and the approach to nondiscrimination. But first, I must describe the judiciary.

The Structure of the Judiciary in the United Kingdom

In the United States, both at the federal and state level, feminists targeted the composition of the judiciary in the early 1970s (Cook 1982), not only because lawyers actively used constitutional litigation to bring about policy change and not only because they recognized that legislative policy successes were meaningless if they were implemented by a hostile or even indifferent judiciary, but also because judges were powerful visible public figures. Breaking the gender barrier for high judicial office would be a powerful symbolic victory—akin to blasting a woman astronaut into space (Kenney 2002). British feminists face a bigger hurdle in seeking to diversify the bench than Americans because, until very recently, the issue of who sits on courts was not on the political agenda more generally. Judges are not recognizably powerful public figures. In the past, with virtually no parliamentary scrutiny and little overt political influence (Stevens 1993), the Lord Chancellor chose judges from a narrow pool of distinguished barristers. Because Parliament does not confirm judicial appointments, because what judges do is framed as carrying out rather than making policy, because Parliament is supreme, and because law is seen as the province of learned experts, even most legal practitioners and scholars would be hard pressed to identify by name the members of the highest appellate court, the House of Lords, or name more than one or two high-profile judges. Unless they chair a major public inquiry, for the most part English judges are not public figures. For these reasons, feminists seeking visible symbols do not tend to target judicial appointments. And because of the bright line between law and politics, those feminists outside of the legal profession are unlikely to see integrating the courts as a political objective.[3] Given this state of affairs, the puzzle is not why the gender of judges came to be a political issue so late, but why it ever emerged as an issue at all.

[3]It was not until 1999 that the European Union Commission's equality unit did a study on women in the judiciary (Anasagati and Wuiame 1999). Although a call for women to serve as judges was part of the UN Beijing Platform for Women, routinely when European Union bureaucrats call for women in decision making, they are referring to women elected officials and civil servants and not the judiciary (Kenney 2002).

FIGURE 2. **Number of gender stories by year major UK newspapers 1987 to 2007 3rd quarter**



Perhaps the simplest answer to the question of why do so few women hold high judicial office is the restrictive pool from which the Lord Chancellor has chosen judges. One becomes a senior judge in England by first becoming a barrister.[4] Second, one also needed to be a Queen's Counsel, the top 10% of the Bar, until recently chosen by the Lord Chancellor utilizing the same system of consultation as for judges (Kennedy 1993, 59). Only 8% of QCs are women (Gibb 2004). The Lord Chancellor suspended the process in 2002. The Law Society, the professional organization of solicitors, distinguished academics (Malleson and Banda 2000; Stevens 1993), the Association of Women Barristers, the campaigning group JUSTICE (1992), and Sir Colin Campbell, the commissioner for judicial appointments, had all criticized the system as discriminatory. Moreover, the Office of Fair Trading had declared it to be a restraint on trade. In the end, the Government opted to retain the system of Queen's Counsels under a reformed system (Gibb 2005). Whether the newly constituted Judicial Appointments Commission will continue to see earning the designation of Queen's Counsel as a prerequisite for high judicial office remains to be seen. Lastly, the British reject the idea of a career judiciary. Instead, before the 2003 changes, the Lord Chancellor appointed barristers to the High Court bench after 25 years of distinguished advocacy and a select few rose to the Court of Appeal and the House of Lords. The Lord Chancellor generally chooses judges for the House of Lords from among judges on the Court of Appeal and chooses judges for the Court of Appeal from among High Court judges. High Court judges are chosen mainly from QCs with years of experience in oral advocacy. Thus, although a judicial progression exists, it is only in the High Court; judges from lower courts generally do not move up the rungs of the judicial ladder in the way that a state court judge in the United States might aspire to the federal bench. Few of this elite group are women, although if one goes farther down the hierarchy, more women serve.[5]

Changes in the Labour Party

Many of the changes in Britain that render the time ripe for women on the bench have little to do with

[4]The legal profession is bifurcated into two groups. Solicitors interact directly with clients while barristers are the oral advocates in the higher courts. Although Parliament removed the barrier to the appointment of solicitors to the bench by passing the *Courts and Legal Services Act 1990*, solicitors with judicial aspirations face many obstacles, and few are appointed to high judicial office.

[5]http://www.judiciary.gov.uk/keyfacts/statistics/women.htm. (February 27, 2008). The overall 2007 numbers are 18%.

gender or the women's movement. Instead, other trends have produced what Kingdon would call ''spillover effects.'' These developments made it easier for feminist policy entrepreneurs to attach their solution to nongender policy problems. One of the most significant developments has been the Labour Party's changed position on the Constitution in general and judicial selection in particular. Agenda-setting scholars in the United States correctly focus on chairs of congressional committees, Presidents, and powerful interest groups to identify agents of policy change. In Britain, as in most parliamentary systems, one must look instead to political parties and the Government.[6] Historically, Labour had been very suspicious of courts because judges historically interpreted the common law as restricting strikes and trade union organizing and Labour therefore regarded judges as class enemies. In debating a Bill of Rights in the 1980s, many on the left were skeptical of giving more power to judges who were seen as upper class, from privileged educational backgrounds, and politically conservative (Griffith 1977).

Three factors, however, eroded Labour's historical opposition to transferring more power to courts. First, most interviewees identified the experience of 18 years in opposition, helpless to slow or prevent sweeping Conservative policy changes, as convincing many left-wing constitutional thinkers that Britain, too, needed to strengthen courts as a check on government. Second, courts and judicial power are on the rise from Russia to France to South Africa, explained by Mauro Cappelletti as a functional response to the rise of executive power. Not just judicial power, but supranational judicial power, is on the ascendance, from the European Court of Human Rights to the World Trade Organization's ''Court,'' to the International Criminal Court. Britain has had the experience of relinquishing more and more of its sovereignty to international courts through international treaties. Third is the experience within the European Union since 1973. Employment tribunals normalized labor law and worker's protection at the same time as the power of trade unions diminished and workers became more dependent on legal protections. The European Court of Justice's rulings are directly applicable in courts in the United Kingdom, and the power of the courts has grown as they have become the interpreter and applier of European Community law (Kenney 2003).

As the Labour Party called for a greater role for courts in checking government and for passage of a human rights bill, it began to consider a different method of selecting judges. The 1992 Labour Manifesto called for reducing the powers of the Lord Chancellor and creating a judicial appointments commission. By 1997, however, as Labour was about to come to power, that proposal mysteriously vanished from the manifesto, and Lord Chancellor Irvine disavowed it once in office and effectively blocked reform for six years.

But it was not just Labour's changed constitutional policy that is relevant for thinking about the agenda status of the gender composition of the judiciary. Labour's victory in 1997 doubled the number of women members of parliament. In addition to doubling their numbers from 60 to 120, women also took up leadership roles in the Government. Women leaders of the Labour Government, now ministers, include many longstanding feminists, such as Harriet Harman, QC. Moreover, Labour's endorsement of a policy of women-only shortlists in some open seats, and its subsequent legislation to amend sex discrimination law to permit such positive action, legitimated arguments about gender and representation even if those arguments had not yet been explicitly extended to courts. Labour created the Women and Equality Unit, a cabinet-level office to advocate for equal opportunities policies. Moreover, the former Prime Minister Tony Blair's wife, Cherie Booth, a QC and part-time judge, is an outspoken advocate of women's greater political participation, including more women on the bench.

Changes in the Public's Perception of Judges

Outside of Labour Party Policy, a number of incidents in the 1990s, that once again had nothing to do with gender, diminished public confidence in the judiciary. The courts overturned several high profile convictions of alleged IRA murderers: the Guildford Four, the Maguire Seven, and the Birmingham Six. Although in many cases the fault lay with the police who faked evidence or forced false confessions when the public demanded swift justice following an IRA bombing, many (including Labour in its manifesto) faulted the judiciary for not scrutinizing policing practices sufficiently and for taking so long to rectify

[6]In parliamentary systems, the Government refers to those of its members Parliament chooses to head the Executive Branch, from the Prime Minister to the heads of cabinet departments. It is less expansive than the American usage which tends to speak monolithically of the legislature and bureaucracy at both the state and federal level as constituting the Government.

errors resulting in many innocent people serving long jail sentences. The public perceived judges to be out of step with ordinary life—they were elderly, from a narrow social stratum, and disconnected from popular culture. In short, they were fallible and did not adequately represent the British people (Berlins and Dyer 2000, 71; Genn 1999, 240; *The Guardian* 1995). According to sociologist Hazel Genn, the opinion polls showing little public confidence in the judiciary came as a huge shock to judges, who regard the English judiciary as the best in the world.

Perhaps the most important turning point was the Pinochet case[7] which showed judges to be individuals who reached different conclusions about matters of law (perhaps because of their politics) rather than expert followers of legal rules. A Spanish magistrate granted a motion to seek to extradite 82-year-old General Pinochet to stand trial in Spain for his alleged crimes against humanity. Pinochet, having left Argentina to obtain medical treatment in London, appealed extradition. The House of Lords permitted Amnesty International to intervene in the case. On November 25, 1998 the House of Lords ruled (3–2) that Pinochet did not enjoy immunity for his alleged crimes while in office (Malleson 2000, 119). After the ruling, however, it emerged that one of the five judges, Lord Hoffman, was a chairperson and unpaid director of Amnesty International, and his wife worked for the organization. Pinochet asked the House of Lords to set aside its decision because of a conflict of interest, which it did. The next panel found the same result (6–1), although by different legal grounds. Ultimately, Home Secretary Jack Straw refused to extradite on health grounds. The Pinochet case, like no other before it, highlighted the importance of who sat on the bench. Judges were not merely legal technocrats deductively deciding cases according to arcane legal rules but people with political positions. Moreover, the Lord Chancellor's reconstituted panel raised the specter that the outcome of the case hinged on the luck of the draw, determined by which judges the Lord Chancellor assigned to the case. The new panel might decide differently from the previous panel. Not only did Lord Hoffman's name become widely known, and the composition of the highest appellate court openly discussed, but the global effects of Britain's signature on international treaties, such as *The UN Convention against Torture,* significantly affected outcomes in English courts and gave English judges more power.

That same year, the role of judges and who they are became an even greater matter for public consideration as Parliament at last passed the *Human Rights Act*, requiring courts to interpret domestic law so as to be compatible with the European Convention on Human Rights so far as is possible. The power of judicial review that it gives to the courts is a limited one, but still greater than before the Act. Higher courts have the power to declare a legislative or administrative act incompatible with the Act, but then it returns the issue to the government to remedy. Nearly every news article discussing the Human Rights Act mentioned the resulting increase in judicial power (Lester and Pannick 2004, chap. 1).

The second major constitutional change Labour instituted, in addition to the *Human Rights Act*, has been devolution, granting greater powers to regional governments in Scotland, Wales, and Northern Ireland. Using their new powers to create different institutions, both Scotland and Northern Ireland created independent judicial nominating commissions to choose judges well in advance of the announcement of such a policy in England. Scotland, which elected many women members to the Scottish Parliament, has also made the diversity of the bench a priority; in Northern Ireland, a new commissioner for judicial appointments began to study the issue (Brown et al. 2002; Feenan 2005; Malleson 2004a).

Players in Position: The Lord Chancellor

In interviews with legal and political insiders, the two most important reasons they gave for the few women in high judicial office were the narrow pool from which judges are chosen and the concentration of power to choose them in the hands of one person, the Lord Chancellor. Although Lord Irvine led Labour's other constitutional reforms, feminists saw him as the principal obstacle to more women on the bench. Given that he had the power to appoint all members of the higher judiciary without parliamentary approval, Lord Irvine could have diversified the bench, just as reforming appointers in the United States such as President Jimmy Carter or Governors Jerry Brown (California) and Rudy Perpich (Minnesota) had done. Instead, Lord Irvine drew even more heavily from a narrow elite than had his Conservative Party predecessor (*Labour Research* 1999, 13–14). When

[7][1998] 3 WLR 1456. *R v. Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte.*

challenged to explain the absence of women from higher judicial office, Lord Irvine repeated the mantra, shared by many judges, casting demands for a more diverse and representative bench as incompatible with and a serious threat to merit selection (Malleson 2006).

On June 13, 2003, Prime Minister Blair fired his current Lord Chancellor, Derry Irvine, and appointed an interim, Lord Falconer, while the Government explored abolishing the office of the Lord Chancellor altogether. However, Lord Irvine's failure to diversify the bench played little part in his demise. The announcement of major constitutional reform in the haste of a cabinet reshuffle without consultation or a white paper struck many as bungled, and the circumstances of the announcement plagued Labour's subsequent efforts at constitutional reform. Many speculated that the timing of Lord Irvine's departure had more to do with worsening conflicts within the cabinet between himself and Home Secretary David Blunkett over asylum and less with a desire for Prime Minister Blair to accelerate the speed of constitutional reform and the appointment of women.[8] Because Lord Irvine was the architect of constitutional reform (if also the impediment to further reform), critics have linked constitutional reform with Blunkett's hostility to judges and the rule of law, and the Government's growing illiberal position on human rights post-9/11 and after the July 7, 2005 London bombings.

The blending of these three issues is unfortunate, since it complicated the growing consensus that some reform of the Lord Chancellor's powers was necessary. His position had been under attack as an unacceptable concentration of powers. He exercised legislative functions as the leader of the second legislative chamber, the House of Lords, and as a sitting member, as well as serving as a member of the cabinet and an advisor to the Prime Minister. He exercised judicial functions as one eligible to sit himself in the House of Lords and the person who appoints and disciplines all sitting judges. (His ability to sit as a judge in cases was becoming untenable as violative of the European Convention on Human Rights.) He exercised executive functions as the head of a 12,000-person civil service department that administered the judiciary. The parliamentary debates after Prime Minister Blair announced he was abolishing the position stressed the theme of modernization. Feminists and others were thus able to frame and defend both separation of powers and a gender diverse bench as serving the goal of modernizing and becoming consistent with what other nations do.

The effect of pressure from the Council of Europe on constitutional reform in the United Kingdom is hard to measure—in journalistic accounts, it seems almost an afterthought. Only the occasional newspaper reports on it. As the Council of Europe and the European Union enlarge their membership, it is hypocritical to hold new members to a higher standard of gender integration than existing members (Malleson 2004b, 130). Both bodies question prospective members about women in legislatures and judiciaries when the U.K.'s numbers, as well as some other member states, are low. The Council recommends that member states use judicial commissions to select judges, which appears to be an emerging European norm (Jurgens 2003, 36). The United Kingdom did follow a strict procedure of advertising and interviews for its last appointment to the European Court of Human Rights, and the nominee faced interrogation from a legislative committee concerned about diversity. Perhaps the most significant pressure that the Council of Europe brought to bear on the United Kingdom, however, has been over the separation of powers issues and the Lord Chancellor. Should the Lord Chancellor have exercised his power to sit as a judge, the European Court of Human Rights would have surely struck it down as a failure to constitute an impartial tribunal. Erik Jurgens, a Dutch member of the Council of Europe Parliamentary Assembly and Rapporteur of the Committee on Legal Affairs and Human Rights, issued a report highly critical of the Lord Chancellor in 2002. He presented testimony to the Lord Chancellor's Departments Select Committee on March 27, 2003.

If Prime Minister Blair thought his Lord Chancellor was no longer moving forward on Labour's constitutional reform agenda, why did he not force him to resign sooner? Lord Irvine was not only one of the architects of Labour's election victory (vanquishing the left of the party and negotiating a pact with the Liberals), but he was the barrister who hired Cherie Booth and Tony Blair fresh out of law school and one of the most politically powerful Lord Chancellors in modern times. He spearheaded major

[8]The Home Office dealt with matters of criminal justice and immigration. In 2007, over the virulent opposition of judges, the Government created a new Ministry of Justice with responsibility for both courts and criminal justice with Lord Chancellor Falconer as Minister. Because Falconer had no seat in the House of Commons (among other reasons such as the change of Prime Ministers to Gordon Brown), Jack Straw succeeded him as Minister of Justice. The previous Home Secretary, David Blunkett, had blocked the creation of such a Ministry as a diminution of his powers.

constitutional reforms (Lester and Pannick 2004, 1.43, 1.69) but he effectively vetoed changes in the judicial selection process.

Reforming the Judicial Selection System

Before what Baumgartner and Jones might call a punctuated equilibrium of dramatic change in the summer of 2003, the precursors of evolutionary change were clearly present.[9] In Kingdon's terms, the issue was clearly on the horizon although it was not on the agenda in the sense of very likely to see governmental action. Critics of the Government repeatedly focused on the precipitous nature of the proposed constitutional changes and the absence of consultation or a white paper, yet the seeds of these proposals had long been sown and germinated under several governments. Margaret Thatcher's Lord Chancellor, Lord Mackay, set in motion incremental reforms paving the way for Labour's current proposals. In 1990 he removed the ban on solicitors holding judicial office. He began publicly advertising judicial positions and interviewing candidates. He actively encouraged women to apply for Queen's Counsel and junior judicial posts. Thatcher saw the issue as one of free market competition, thwarted by a monopolistic Bar, rather than modernization per se, and certainly not gender diversity. For his modest reforms, the Bar viciously castigated Mackay.

The campaigning group JUSTICE called for a judicial nominating commission in 1972 (Malleson 2004b, 120), but the gender of judges came to Parliament's agenda for the first time in 1996. The House of Commons Home Affairs Committee released its report, *Judicial Appointment Procedures*, after receiving many submissions, including from women's groups. The Committee, however, did not call for a radical overhaul of the judicial selection system or for abandoning the use of consultation (the so-called secret soundings whereby the Lord Chancellor confidentially polls the views of senior judges about the abilities of prospective judges) but advocated making the existing system fairer. Although women's groups were disappointed, Parliament's hearing in 1996, like the insertion of the issue in Labour's manifesto, is an important indicator that the selection system itself and the absence of diversity were on the agenda of the profession, women's professional groups, the Labour Party, and Parliament, even if Parliament rejected proposals for reform at that time.

Lord Irvine initiated many procedural reforms, developing equal opportunities policies, arranging for lay members to be involved in the initial short listing of candidates and interviews, and allowing lawyers to spend a day shadowing members of the judiciary, but he did not significantly increase the percentage of women judges. And nearly all the reforms were confined to lower judicial office. After the Peach Commission recommended in December of 1999 that there be a continuing independent audit of appointment procedures, the Lord Chancellor appointed Sir Colin Campbell to be the first Commissioner for Judicial Appointments (*The Lawyer* 2001). His three annual reports, special investigations, and responses to consultation bolstered criticisms of the existing system (Malleson 2002).[10]

The next Lord Chancellor, or Secretary of State for Constitutional Affairs, Charles Falconer, dramatically changed the discourse about gender and judicial appointments, marking a turning point on this issue perhaps more so than a tipping point. In sharp contrast to his predecessor, he no longer framed diversity as the enemy of merit (Malleson 2003). In October of 2004, the Department for Constitutional Affairs issued a consultation paper *Increasing Diversity in the Judiciary*. Parliament created a Judicial Appointments Commission to recommend to him candidates for high judicial office (and then to the Prime Minister and the Queen) as part of the *Constitutional Reform Act of 2005*. Other components of the Constitutional Reform Bill ran into difficulty in the House of Lords, which delayed it by sending it to a Lords Select Committee, and Lord Irvine had threatened to speak against it. Significant compromise ensued. Parliament did create a new Supreme Court, but the court will not convene until its building is renovated (Le Sueur 2004). Members of the Supreme Court (the highest appellate court, or the new Law Lords) will not also serve in the legislative chamber of the House of Lords. *The Constitutional Reform Act* transfers the judicial functions of the Lord Chancellor to the President of the Court of England and Wales; the President is the head of the judiciary and represents its interests to the Government. The title "Lord Chancellor" remains, although he no longer sits as a judge nor

[9]For accounts of this process geared to an American audience, see Maute (2007) and Resnik (2007).

[10]http://www.dca.gov.uk/judicial/ja_arep2001/00fore.htm (February 27, 2008).

represents the judiciary. He no longer must be a lawyer or a peer. *The Constitutional Reform Act* enshrines a duty of governmental ministers to respect judicial independence. In a dramatic move signaling his determination to diversify the bench, Lord Falconer named a woman of Indian descent, Baroness Usha Prashar, the first chair of the Judicial Appointments Commission in October of 2005 (Maute 2007, 419–22; *The Times*, October 11, 2005, 15). Early reports suggest some progress on women, little progress on minorities, and significant administrative problems.

Women in the Legal Profession

So, how did feminists ride this wave of a mood change for judicial reform and attach their preferred policy solution, a gender integrated bench, to this issue? The answer is by creating their own tidal wave of changes in the roles of women. Although Parliament outlawed the exclusion of women from the legal profession in 1919, the Lord Chancellor did not appoint the first woman English High Court Judge, Elizabeth Lane, until 1965. The next 20 years saw only five more women added to the High Court bench. The numbers of women in the legal profession, however, were rapidly changing. In 1973, only 13% of newly admitted solicitors were women and 10% of those called to the Bar (McGlynn 1998, 95). Since then, women have flocked to legal studies and are now more than half of all law students. As of 2006, 40% of solicitors were women, up from 19% a decade and a half ago. Women have been the majority of new admissions each year since 1992–93 (*Equal Opportunities Review* 1999, 9). As of 2006, women make up 30% of the practicing Bar (Maute 2007, 407). Although they are no longer formally excluded from the practice of law, women face many obstacles to full participation. Not only are women paid much less than men (*Equal Opportunities Review* 1999, 9), they also leave the profession in much higher numbers (Sommerlad and Sanderson 1998). One in three reports sexual harassment (*Equal Opportunities Review* 1999, 8–9). Studies report barriers to women's success at each point in their careers, from obtaining a pupilage to getting clerks to assign them work (Berlins and Dyer 2000, 41; Kennedy 1993, 32–64).

Lord Irvine, like Lord Mackay before him and many judges, had argued that the problem was simply the pipeline. Once women became more than half of all law students, it would only be a matter of time before they trickled up to QCs and judges. But no trickle occurred, despite a torrent in the pipeline. The percentage of women appointed to the bench did not grow, despite the size of the judiciary in England and Wales increasing tenfold from 300 in 1970 to 3,000 in 2000 (Malleson 2002, 3). Agenda-setting theorists, like sociologists who study social problems, are quick to distinguish a condition from a problem. The pipeline creates pressure, to be sure. It creates a large group of interested parties whose ambitions are thwarted. And as the pool of qualified candidates diverges more sharply from the judiciary, critics can more easily raise questions of legitimacy and discrimination. But the case of Britain shows clearly the composition of the judiciary will not change seamlessly as a matter of course merely because of the changing pool. To the contrary, Lord Irvine's tenure demonstrated that he could resist appointing women, seemingly indefinitely.

Reframing the Debate. Making Gender the Issue: Raising the Issue in the Media

Kingdon highlights the role policy entrepreneurs play in linking their preferred solutions to problems. The three kinds of policy entrepreneurs in this case, however, are not only less strategic and purposive than Kingdon's, but less so than those in accounts of legal mobilization and feminist policy change. They fit better with Rochon's concept of the critical community. Rochon distinguishes the work of the critical community from social movement mobilization, recognizing that many of the players cross over, but that they have two distinctive roles. Rochon warns that a critical community operating without a mobilized movement will generate little cultural change. And that is exactly what we see. Reading the handful of stories each year shown in Figure 2 shows how a feminist critical community raised the issue in the media. Individuals, from Polly Patullo (1983) to Helena Kennedy (1993), documented instances of sexism in *obiter* and off-the-bench comments as well as in holdings, most notably in remarks about rape cases. Occasional demonstration and single essays did little to sustain movement for policy change. Such incidents did, however, contribute to the wider public perception that judges were out of touch. The overwhelmingly male composition of the judiciary became a target in 1996 when some high court judges

forced women to undergo Caesarian sections without their consent, and commentators noted that none of the decision makers had given birth (October 4, 1996). In October of 1997, Labour MP and Social Security Secretary Harriet Harman linked the Government's determination to tackle domestic violence to steps to increase the number of women judges, producing a sharp rebuke from the Lord Chancellor (*The Daily Telegraph*, October 23, [1993]).

Kingdon dismissed the media as followers rather than leaders, arguing that their only role in agenda setting was choosing among which public figures to cover, some of whom, like the President or Prime Minister, were always worthy of coverage. Rochon, however, recognizes their role in following critical communities (1998, 178–79). Newspaper coverage of the gender of judges over the last 20 years shows that legal correspondents have served more as agenda setters and public intellectuals than scribes of other important people.[11] Because the papers in the United Kingdom have clear political lines, journalists are freer to take clear positions, such as arguing for the appointment of more women judges. And they have. Clare Dyer and Marcel Berlins in *The Guardian* and Frances Gibb in *The Times* have regularly placed the issue front and center as opposed to merely commenting when others raised the issue. These writers regularly observe the low numbers of women on the bench and the absence of women from the House of Lords and make that point in nearly all of their articles on the judiciary. Leading barristers such as Cherie Booth, Vera Baird, and Helena Kennedy receive serious attention rather than ridicule from these journalists when they criticize the composition of the judiciary; the journalists also quote the heads of the Association of Women Solicitors and the Association of Women Barristers. One need only read the coverage of Brenda Hale's appointment to the House of Lords (Kenney 2005) or responses to Vera Baird's article in *The Times* (Davis 2005; Jeffreys 2005), or anything in the *Daily Telegraph* to see the difference these correspondents make.

[11]Nor should one neglect the role of academics. Just as Beverly Blair Cook's pioneering work on women judges sparked the creation of the National Association of Women Judges and legitimated an entire field of inquiry in public law, committed legal academics have championed this issue. Most notable is Professor Kate Malleson, conducting research reports for the Lord Chancellor's Department, submitting testimony to Parliament and to consultations, and working with the U.K. Association of Women Judges. More recently, Dermot Feenan has reported on Northern Ireland.

Litigation

In addition to raising the issue in the media, feminists used litigation, but it had a low profile, a low-probability of success, and was uncoordinated litigation compared to the kinds of litigation one saw in the equal employment opportunity field more generally (Kenney 1992, Leonard 1987). The goal was more to advance an argumentative point than win for a plaintiff or change a legal interpretation in the short term (Kenney 2004). Litigation provided one vehicle for making discursive linkages—a vehicle that required little concerted pressure group activity. A male defendant charged with rape countered that the rape shield law violated his right to a fair trial under the *Human Rights Act*.[12] The Fawcett Society, founded to garner the vote for women and now campaigning for women's equality, filed an application for permission to intervene in the case, which the Lords rejected.[13] Fawcett argued that without women on the panel the court would not comprise an "impartial tribunal" as required by human rights treaties. It argued that an impartial tribunal is essential for the public to have confidence in the courts in a democratic society (21). The application received little press coverage nor did the Law Lords mention it in their opinions.

Feminists gained little purchase litigating within the discursive frame of representation, but they did manage to put the gender of judges on the agenda, at least for a select few elites, through litigation on equal employment opportunity. This litigation received little publicity and required little by way of legal mobilization. Nevertheless it put the Lord Chancellor and others on notice that litigants would apply equal employment opportunity norms to the hiring of governmental legal advisers (deploying arguments that could easily be applied to the method of selecting judges). Appointers who ignore them risked further public embarrassment. Ironically, the incremental alterations the Lord Chancellor's Department had made to the process of selecting lower level judges—advertising the posts, writing job descriptions, convening an interview panel that includes lay members, using strict criteria to solicit comments on candidates, conducting an interview and hiring personnel experts to develop a one-day series of tests and exercises that go beyond the limits of an interview panel's ability to assess ability to be a good judge—all seem to affirm the norm that modern employment practices should apply to the selection of judges.

[12]*R v. A.*, [2001] 3 All ER 1.

[13]http://www.fawcettsociety.org.uk (February 27, 2008).

The first case was brought by Liberal Democratic barrister Josephine Hayes, a barrister who challenged the Attorney General John Morris's appointment of Philip Sales as an advisor. Hayes claimed that using the system of secret soundings to appoint Sales was discriminatory, especially since Sales worked at Irvine's former chambers. The Lord Chancellor settled and the Attorney General contributed an undisclosed amount to charity (*The Independent* 1999). The Irwin Mitchell firm's web site claimed:

> The Attorney General acknowledged in the settlement that the system of 'secret soundings' tended to disfavor women appointees. As a direct result of this case, the Lord Chancellor established the "Peach Enquiry" to investigate the use of secret soundings in appointments to Silk and the Judiciary.[14]

Jane Coker and Martha Osamor brought a second action against the Lord Chancellor challenging his appointment of a special adviser without advertising the post.[15] The employment tribunal found that the women had been indirectly discriminated against; to hold otherwise would have been to permit employers to evade discrimination law by not posting a vacancy (400). Both parties appealed, and the Equal Opportunities Commission (EOC) supported Coker and Osamor and linked the case to what was wrong with the judicial selection system more generally.[16] The Employment Appeal Tribunal held that the requirement that the person be well known to the Lord Chancellor was self-evident and that word-of-mouth recruiting did not constitute gender bias.[17] The Court of Appeal[18] castigated the EOC for supporting Coker and Osamor and concluded that, because the Lord Chancellor considered only one person, he did not recruit "by word of mouth," and so its opinion was not an endorsement of this as a practice.[19]

[14]http://www.irwinmitchell.com (June 2002).

[15]*Coker and Osamor v. Lord Chancellor and Lord Chancellor's Department*, [1999] IRLR 396.

[16]EOC Press Release, November 6, 2000.

[17]*Coker and Osamor v. Lord Chancellor and Lord Chancellor's Department*, [2001] IRLR 116, [2001] ICR 507.

[18]*Coker and Osamor v. Lord Chancellor and Lord Chancellor's Department*, [2001] EWCA Civ 1756, [2002] IRLR 80.

[19]*The Sex Discrimination Act* had been understood to exempt the judiciary from the demands of equal employment opportunity. However, Karon Monaghan argued the European Union's *Revised Equal Treatment Directive* (2002/73/EC) does not exempt the judiciary. She argued requiring judges to have previous experience in high courts and to be known to the higher judiciary as well as the system of secret consultation were discriminatory (2002).

Thirty years of engagement with the norms of employment discrimination have had their impact on how people regard the judicial selection process in the United Kingdom, regardless of whether a plaintiff could prevail in a sex discrimination lawsuit. Conventional discrimination analysis leads to suspicion when a huge discrepancy exists between those qualified to serve and the numbers in office, especially when the number is what Justice O'Connor referred to as "the inexorable zero."[20] The practice of secret soundings and the clubbiness of the insider circuit of senior barristers and male-dominated Inns of Courts and Bar Council committees resemble practices of what sociologists call homosocial reproduction long recognized in other contexts to disadvantage women. The breakthrough, however, came in the form of Sir Colin Campbell's scathing first report. The new Commission for Judicial Appointments brought the scrutiny of outsiders to the process, and the process did not appear to be the meritocratic system touted by Lord Chancellor Irvine. Instead, bringing equal employment opportunity norms to bear, the Commission found "a picture of wider systemic bias" (2003, 4) and "evidence of narrow and inappropriate views about who is suited." It rejected the claim that women would naturally "trickle up."

Organizing Women

Both the Association of Women Barristers and the Association of Women Solicitors organized as independent groups. Together, or with other partners, they organized regular women and the law conferences, beginning in 1995. At each event, Lord Chancellor Irvine was called to account for the low numbers of women judges and QCs, something he was rarely, if ever, called to account for in Parliament or even the press. The media covered these events, and they thus provided an opportunity to keep the lack of progress in the public eye. On the occasions when groups such as the International Bar Association or the World Women Lawyers Congress met in London, well-known public figures such as Cherie Booth and Helena Kennedy would use the platform and the ensuing media attention to call for more progress. Events in 2002 are illustrative. At the one-day Women Lawyer's Forum, Booth issued her most hard-hitting criticisms of the system yet, saying that "an old boys' network" is to blame for women's

[20]*Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987).

underrepresentation at all levels of the legal profession. The small number of women judges, she argued, undermines public confidence in the judiciary. The Lord Chancellor's Department replied in the press that it would be unfair to "lower" standards to produce such a result and that he has done much to promote equal opportunity. As you can see in Figure 2, however, such publicity was at a low level and never reached any kind of crescendo until the constitutional reform crisis.

Compared to the United States and Canada, women judges in England have been slow to organize (Martin 1993). Led by Lady Brenda Hale, women judges formed an association in 2003. At the 2002 meeting of the International Association of Women Judges in Dublin, only five English judges attended, and several were clearly prodded to do so from above at the last minute (Hale 2002). The U.K. delegation was smaller than Canada's and the United States', as well as Uganda's, Taiwan's, and Nigeria's. But with Lady Hale's leadership, the U.K. Association of Women Judges has now held two national conferences and has over 100 members. The group responded to the Lord Chancellor's consultation papers on increasing judicial diversity and constitutional reform. The difference between Lord Irvine and Lord Falconer on the issue of a gender diverse bench is paralleled in the difference between Lady Hale and the heretofore senior woman jurist, Dame Elizabeth Butler-Sloss.[21] Butler-Sloss does not believe in gender as a category and believed, along with Lord Irvine, that everything was being done to find qualified women to appoint to the bench (interview with author, June 2002). In contrast, Hale wrote the first textbook on women and the law, calls herself a feminist, and has written about why it is essential to have more women on the bench. Butler-Sloss came from a distinguished legal family (her brother was the Attorney General); Hale rose as a legal academic, receiving the highest scores in competitive examinations. Having Hale, not Butler-Sloss,[22] as the head of women judges is as significant a turning point as replacing Lord Irvine with Lord Falconer. Women judges now have a leader, as well as in effect permission to organize as a group; they have an articulate spokesperson who has a scholarly career studying the significance of gender; and they have someone determined to speak out and act to promote social change, working from within the judiciary and without concern for career advancement. Thinking of Hale as a catalyst for organizing fits the model of policy change and governmental action as perhaps in some cases a cause rather than merely an effect. More public consensus for women on the bench may exist after her appointment to the House of Lords than before.

A key reason the United Kingdom lagged behind the United States and Canada is that this issue was not covered by a policy sector as Mazur defines them (2002). Although women have mobilized around women's issues (Epp 1998), no organization in the United Kingdom has made a priority of campaigning for more women judges. Only very recently did the equal employment sector (in the form of litigation by the EOC) and the political representation sector (Fawcett and Labour women MPs) take up the issue of appointing women judges. Campaigning for women judges falls outside even the "velvet triangle" identified for the women's policy community (Woodward 2003, 84). That network is much more institutionalized and coherent than the one I just described. This case, however, investigates agenda setting and policy change at the margins of these sectors and perhaps even outside of them. Neither the equal employment opportunity sectors, nor the academics who study them, had linked the discourses of employment equality or representativeness to the issue of women judges (Mazur 2002; Norris 1997; Stetson and Mazur 1995; Stokes 2003). A lesson for activists from this case might be to take heart because small uncoordinated efforts of a critical community may yield significant results. For success, groups need not achieve consensus, but only persuade decision makers such as Falconer. Moreover, they may not even need to persuade such targets as to the desirability of their cause—integrating the judiciary—but rather that advancing their cause serves the target's other interests—modernization.[23]

[21]Ironically, their specialization in family law harmed both women's careers. From pupilage on, women report that it is difficult to get criminal and civil work, particularly from insurance companies, and that they are forced into family law to make a living because of the briefing practices of others (Feenan 2005). The fact that they specialize in a devalued area of law is then used as an argument to disqualify them for higher judicial office.

[22]Dame Butler-Sloss is the organization's patron. The strong support of the highest ranking woman judge and the absence of opposition from the second highest-ranking woman was crucial to other judges feeling comfortable to join.

[23]Comparative research on women and public policy warns us that even when feminist policies emerge from feminist actors, their implementation by state bureaucracies does not always yield feminists results, most notably in the field of gender mainstreaming (Verloo 2007). We should pay close attention to how this policy unfolds in practice.

Agenda Setting Revisited

On Thursday, June 12, 2003, during a major cabinet reshuffle when Prime Minister Blair announced that he would abolish the office of Lord Chancellor and reform the constitution, the new Secretary of State for Constitutional Affairs, Lord Falconer, emphasized that no woman had ever served on the House of Lords. The Prime Minister's defense of the hastily announced reforms, however, seemed to place more weight in the House on the anachronism of the Lord Chancellor wearing women's pantyhose as part of his regalia.[24] A new Lord Chancellor has steered through major constitutional reforms and instead of framing gender diversity as the enemy of merit, designated it to be a priority. Feminists accomplished this goal mainly by riding the wave of judicial reform and attaching their policy solution to the problem rather than creating a wave in and of themselves. Most importantly, they have removed the major obstacle of the Lord Chancellor himself. In a 2002 interview, Cherie Booth despaired that women would make any progress on the bench under Lord Irvine. As Kingdon noted, changes in personnel, most often resulting from elections (the politics stream), can dramatically alter the governmental agendas.

This case provides insight into the internal factors that explain a late diffuser of policy change. It shows how political structures permit individuals to resist the cultural change diffusing from elsewhere. Had the Lord Chancellor decided himself that he wanted more women on the bench, he could have easily appointed them, without being forced by Parliamentary committees, journalists, or feminists and or even over the objections of opponents. Instead, he blocked the issue, and his monopoly of power allowed him to do that until Prime Minister Blair decided he had to go. Similarly, Dame Butler-Sloss could have actively campaigned internally for the promotion of women judges and used the consultation process to champion them. Moreover, the case invites us to consider policy cases that fall outside of Kingdon and Baumgartner and Jones's important models—cases more akin to the policy change Jacobs documents whereby policy seems to change without clear evidence that an issue is really on the agenda defined by Kingdon as all players knowing action will be taken on that issue soon. Figures 1 and 2 clearly show that it was the firing of the Lord Chancellor that created the surge of media reports; 2002 was not necessarily the clear moment when *gender* came on the agenda. The pressures I identified did not make the policy change inevitable.

This case invites us to pay more attention to the discursive aspects of politics as we explain changes in agendas and policies, even though such factors may be difficult to measure. Feminists seized the opportunities provided by three powerful emerging discourses. First is the discourse of representation. Already, the legitimacy of party policies that do not ensure significant numbers of women candidates has been called into question. The EU has issued statements on the importance of women participating in decision making and, at last, this discourse has spilled over to the bench (Kenney 2002). Second is the question of equal employment opportunity. Even though equal employment laws may not apply to judicial appointments, or even hiring legal advisors, the norms of fairness are increasingly being applied to them as a discursive rather than a legal matter. If the pool of eligible women differs vastly from the numbers of women on the bench, increasingly commentators will draw the inference that discrimination has occurred. Moreover, these laws have produced norms about employment practices that call into question the process of consultation. Lastly is the discourse of legitimacy. Rightly or wrongly, women are perceived as more in touch with people's everyday life, perhaps because they, as a group, perform the lion's share of household labor and child rearing. Furthermore, many policies, such as rape laws, are now widely recognized to have a gender dimension. Having these sensitive policies made without any women's participation is increasingly regarded as illegitimate.

Focusing on the discursive aspects of politics and the uncoordinated actions of individuals who litigated and constituted a critical community highlights the third important contribution of this case to our understanding of agenda setting and policy change: such changes are not really agentic in the sense of being part of a coherent group's strategic plan. Cherie Booth, Helena Kennedy, Josephine Hayes, Harriet Harman, Colin Campbell, Kate Malleson, Brenda Hale, JUSTICE, the EOC, Fawcett, and others are not necessarily acting in concert plotting a social movement strategy akin to the NAACP's litigative strategy in *Shelley v. Kramer* (Vose 1959), *Brown v. Board*, those McCann and Epp document, or even feminist policy advocacy more generally (Barnard 1995). They share the same values and policy

[24] *The Times* speculated on October 11, 2005 that the Lord Chancellor's appearance for the swearing in of the new Lord Chief Justice might be the last time either appeared in full regalia. Legal dress, i.e., wigs, pantyhose, etc., is under review.

objectives, to be sure, but the effects of their actions are more serendipitous, random, and chaotic than conventional heroic retrospective accounts of policy change. The policy sectors created the strong discourses on equality and representation but, until very recently in the case of the EOC, had not themselves extended these discourses to women judges. It was the disparate group of actors I described who did so, through comments to the media, letters to the editor, speeches at conferences, and litigation.

Parliament began to examine judicial appointments in 1996, and the Lord Chancellor began consultations. Figure 1 arguably shows a punctuated equilibrium worthy of Baumgartner and Jones, as does Figure 2. Closer inspection, however, reveals that while gender stories increase dramatically in 2003, they are a part of the larger story of constitutional reform, and a mere 26% of the stories on constitutional reform mention gender. What Figure 2 shows, rather, is that there has been a feint, but steady drumbeat of stories on gender issues and not a great groundswell of consensus. Moreover, the punctuated equilibrium of Figure 1 may say as much about media conventions as demonstrate a consensus for constitutional reform. The political media's equivalent of murder is a cabinet reshuffle and the peak in 2003 gives us the body of Lord Irvine and a battle between Irvine and Blunkett. Moreover, the second peak reflects a miffed House of Lords delivering a rejection of the Government's asylum policy, a policy that castigates and attempts to sideline the role of judges and, arguably, the rule of law. New appointments to the House of Lords, hearings in Parliament over judicial reform, reports by the Commissioner of Judicial Appointments, these receive some but little coverage—though they may be of comparable legal and political importance—they are not as newsworthy as the other two events.

The turning point in the United Kingdom was definitely the appointment of Lord Falconer. Policy change, however, seems more incremental until that dramatic point. But that is not the same thing as saying a dramatic new national consensus emerged about constitutional reform in 2003. That consensus, if it existed at all, had been building more incrementally. Moreover, describing it as either a consensus, tipping point, or punctuated equilibrium would be inaccurate. Feminists linked their cause instrumentally to Lord Falconer's goal of modernization rather than persuaded policy makers or the public that women judges were necessary. Lord Falconer's rhetoric and policy changes may do more to create a consensus for women on the bench than necessarily be a function of it, suggesting a reversal of our understanding of the policy process consistent with new institutionalism.

Ironically, agenda-setting theories have tended to ignore the role of courts even though they focus on the American political system where courts clearly shape policy. But courts provide an important arena of contestation even in the United Kingdom. Moreover, a focus on courts should lead us to think more deeply about the influence of discourse in shaping the direction of policy change. Litigation has provided British feminists with the opportunity to frame the debate as one of legitimacy, representation, and equal employment opportunity. The confluence of judicial and public concern about Governmental power and civil liberties with criticisms of constitutional reform threatened to derail the gender issue altogether and resulted in significant compromises. Feminists are not, by any means, setting the discursive agenda by framing the issues on their own terms. As Rochon observes, ''movement influence declines sharply at the water's edge of agenda setting'' (1998, 243). They have for the moment, however, benefited from the Government's framing of the issue as one of modernization.

Lastly, scholars of agenda setting and diffusion of innovation will want to pay more attention to the international aspects of domestic public policy. Nations compete with one another for leadership of the international arena on a wide variety of issues and policies diffuse across national boundaries. Britain's membership in the Council of Europe, the European Union, and the United Nations have led to outside pressure and make it possible to construct the United Kingdom as an outlier. Perhaps most importantly, the cross-national campaign to appoint women to the International Criminal Court may have bolstered the campaign to appoint women to domestic courts and helped to extend the discourse on representation to courts (Spees 2003). Focusing on these international elements bolsters the saliency of a diffusion model of policy change and calls for expanding our understanding of a possibility of multiple paths to agenda setting and policy change.

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