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Editorial Office

University of Michigan Law School
Ann Arbor, Michigan 48109-1215
Telephone: (734) 763-0165
Fax: (734) 764-8309
E-mail: reedj@umich.edu

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THE BOSWELL QUESTION REVISITED†

Sidney Kentridge*

Some two or three years ago I was briefed to appear in the Court of Appeal in Hong Kong, on behalf of the editor of a Chinese language newspaper who had been sentenced to a term of imprisonment for contempt of court. His newspaper had lost two cases concerning nothing more earth shattering than copyright in a photograph. The newspaper's reaction had been a series of articles, day after day, attacking the judges and going considerably beyond what in 1936 Lord Atkin had called "the respectful, although outspoken, comments of ordinary men." These articles described the judges as (in translation) "scumbags." Eschewing any racial favouritism they called them "yellow dogs" and "white pigs." (I am told that in Chinese it sounded even worse.) They accused the judges and, indeed, the judiciary as a whole, of being parties to a conspiracy with the Executive designed specifically to destroy the newspaper. It was not an easy case. The English, Australian, and New Zealand precedents were against us. My main argument was that the publications, however scurrilous and vituperative, were protected by the freedom of speech clause in the Hong Kong Bill of Rights.

Fortunately, we had found a reported decision in the Court of Appeal of Ontario which gave us a little cause for hope. An attorney, having just lost a case, had made a statement to the press saying that the decision was a mockery of justice and that appeals to the courts were a charade, as the courts were warped in favour of protecting the police. While not rising to the classical level of invective achieved in Hong Kong, it was pretty strong stuff. The attorney was found guilty of that form of contempt of court known as scandalizing the court. The majority of the Ontario Court of Appeal, applying a test which I thought greatly helped my own case, held that the offence of scandalizing the court was not compatible with the Charter protection of freedom of expression. Unfortunately, and as I have already implied, there was a dissenting judgment. Doubly unfortunate, the dissenting judgment was by Mr. Justice Dubin. Trebly unfortunate, the Hong Kong Court of Appeal preferred his judgment to that of the majority. It was in that elegant and only too persuasive judgment that I first became acquainted with Mr. Justice Dubin. I

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† The Second Charles L. Dubin Lecture, delivered October 5, 2000, in Toronto, Ontario, Canada, by Sir Sidney Kentridge, in honour of Charles L. Dubin, former Chief Justice of Ontario. Published here with the kind permission of the Trustees of the Honourable Charles L. Dubin Lecture in Advocacy, who retain the copyright.

* Queen's Counsel, Brick Court Chambers, London, England.

have since learnt more of his immense reputation, both as counsel and as judge. It is indeed an honour to be invited to give the lecture instituted in his name. But it is daunting to presume to speak on advocacy not only in his shadow but in his presence.

I have been a working advocate for fifty years, in South Africa and in England, and a few other jurisdictions from time to time. Those other jurisdictions do not, I regret, include any in Canada, but I believe that the task of the advocate is essentially the same in all countries whose legal procedure and rules of evidence are ultimately derived from the English model. I had some proof of this on my first visit to Toronto. I went to court with my old friend Bert MacKinnon. This was some years before he was appointed to the Bench. He was arguing an appeal from a magistrate's court. He had not been on his feet for ten minutes when the presiding judge said "But Mr. MacKinnon, the magistrate *saw* the witnesses." I at once felt entirely at home.

As I have said, I have practised my profession for fifty years. I must confess that the longer I go on in it the less I have to say about what is sometimes called the art, and sometimes, more modestly, the technique of advocacy. So I hope that nobody has come here this evening expecting hints on advocacy. There are some basic techniques that can certainly be taught with advantage to young and not-so-young advocates. But in the end your advocacy will be a reflection of your own character and personality, and your own particular talents. Each one of us in the law has seen in a courtroom some counsel whom we particularly admire, whom we think of as a truly great advocate. But that does not mean that one should try to imitate his or her style of advocacy. It cannot be done, and the attempt may be disastrous.

There are, after all, many different styles of advocacy. Recently a retired Chancery judge in London was heard to say that in his time at the Chancery Bar they did not take much account of advocacy. In fact, he said, even audibility was regarded as an affectation. On the other hand there was Sir Hartley Shawcross Q.C. Appearing in an appeal presided over by that formidable judge, Lord Goddard, he began by saying, "My Lords, there are three points in this appeal. One is hopeless, one is arguable, and one is unanswerable". To which Lord Goddard said impatiently, "Sir Hartley, just give us your best point." "Oh no," said Sir Hartley, "I don't propose to tell your Lordships which is which."

I don't advise anyone below the stature of Sir Hartley to try that.

If I am not to speak about the art or technique of advocacy, what is there to say on the subject? I should like rather to venture a few remarks on the ethical basis of our profession. It is a profession (and not the only profes-

sion) whose practitioners face ethical problems. Some of them are old chestnuts. Most lawyers at some time in their career are asked by friends, "How can you appear for someone who you know is guilty?" That is not generally a very difficult question. Our codes of practice tell us what we must or may do if a client confesses guilt to us, but still wishes to be defended. We may not make any suggestion to a witness which we know to be untrue; we may not suggest to the judge or the jury that the crime was committed by someone else; we may not put the client in the witness box to give evidence which we know by his own confession to be false. But we may put the prosecution to strict proof of the guilt of the accused and may argue that the proof is insufficient. If the client is not prepared to proceed on that basis we must withdraw from the defence.

That is plain enough, and in any event, it does not often arise in the real world. When do we "know" that a client is guilty? I did many criminal cases in South Africa, and I can recall only one instance where a client told me that he was guilty. He explained in detail how he had committed an ingenious fraud. It then became clear that he had no intention of pleading guilty and he told me the equally ingenious defence he was preparing to put up. I explained that on that basis I could not appear for him. He was a quick study. He took the point, thanked me and went off—no doubt to another advocate, with whom he was presumably more circumspect.

That is not to say that every problem of professional conduct has a simple solution. It is a trite proposition that counsel must not mislead the court by word or deed and, as the Ontario Rule puts it, "must not suppress what ought to be disclosed." But what ought to be disclosed? A few years ago, in an English case, a plaintiff who had witnessed the drowning of his two children in an accident caused by the negligence of the defendants obtained substantial damages for post-traumatic stress disorder, and serious mental illness. The findings in favour of the plaintiff were based on the evidence of a consultant psychiatrist and a trained psychologist. Now it happened that there had been quite separate contested proceedings between the plaintiff and his wife in a different court, with different counsel, over the custody of their surviving children. In those proceedings the same psychiatrist and the same psychologist had given very different evidence for the husband, saying that his condition had improved dramatically and giving a prognosis far more optimistic than that which they gave in the personal injury action. The husband's legal advisers in the personal injury action learnt of this contradictory evidence only after the close of evidence in their case, but before the judge had given his judgment. They advised that this contradictory evidence need not be disclosed to the other side, nor to the judge, and the judge made his substantial award of damages in ignorance of it. The

defendants somehow later found out about the evidence in the custody case and appealed to the Court of Appeal. They challenged the propriety of the conduct of the plaintiff's lawyers in failing to make disclosure of what they had learned. The defendants' counsel argued that the new evidence ought to have been disclosed and that the failure to do so amounted to misleading the court. There were three judgments in the Court of Appeal. Stuart-Smith L.J. said that the counsel in the personal injury case should have advised his client that disclosure should be made. If the client had not agreed to that course, counsel should have withdrawn from the case; but, he said, it was not for counsel to make the disclosure himself contrary to the client's wishes. (What good counsel's withdrawal would have done once the hearing was over and the judge had reserved judgment Stuart-Smith L.J. does not say.) Thorpe L.J. on the other hand said that, whatever his client's attitude, counsel had a positive duty to disclose the relevant material to his opponent and to the judge. This duty to the court was paramount. But Evans L.J. said that once the evidence in the personal injury case was closed there was no duty on counsel to make any disclosure at all. So even on what may have seemed a relatively simple professional question an experienced Court of Appeal spoke with three voices.

Such specific questions of proper professional conduct, on which Law Societies and Bar Councils are constantly asked to rule, lead one on to consider more generally the moral underpinning of the profession which we practise, that is, the profession of representing clients in court. You might think that a learned profession which has been lawfully practised at least since the days of the Roman Republic, and whose right to exist is nowhere seriously challenged, should have no need to examine its collective conscience. But there are old and nagging questions which, however often answered, do not seem to go away.

In one of the best-known passages in Boswell's Life of Johnson, Boswell (himself a practising Scottish advocate) asks,

> But what do you think of supporting a cause which you know to be bad?

Dr. Johnson's robust reply was,

> Sir, you do not know it to be good or bad until the judge determines it.

But Dr. Johnson did not dispose of the question, which still lingers more than two hundred years on. His is a good enough answer if the cause is a matter of pure law, or if its goodness or badness can only be determined after all the witnesses have been heard. As I have already noted, short of a confession by his client counsel cannot be said actually to "know" that his client is guilty, whatever counsel may suspect. In the strict sense of the

word (which was Dr. Johnson's sense) we may not "know" that our client's cause is bad. But we cannot shelter ourselves behind so simple a proposition. There are many states of mind which are short of knowledge but which still, unhappily, provoke Boswell's question. Most of us, as practising lawyers, must have had the client who stoutly professes his innocence or good faith, but whom we, with our experience, our close observation of the client in conference, and our knowledge of the facts of the case, just do not believe. We may warn the client that the judge or the jury are not likely to believe him, but the client may persist in his version of events and may insist on his case going forward. We are in no position in such a case to prevent him from giving evidence. We cannot assert that his evidence will be perjured. He may even persuade the court to accept his evidence. We in our hearts and minds remain convinced that his case is a false one. In conducting that case we may have to cross-examine witnesses whose honesty we have no reason to doubt other than our client's own suspect assertion. And we will certainly be trying to persuade the court of the merits of a case in which we do not ourselves believe.

Take another case. Our client has in law a good case; the facts and the law support him. He is not acting out of malice, but we view his cause with distaste. We see it as a bad cause not because of the client's character, or his politics or reputation (all of which are irrelevant), but because it is clear to us that the action we are instructed to bring is oppressive, or in our view contrary to the public interest. For example, a large financial institution instructs us to bring a suit which will result in the ruin of a small shopkeeper and his family. A property owner has the right to evict from his land a community which will be left homeless and instructs us to take steps to do so. Or the client is a developer who is asserting a good legal right which we know will result in the destruction of the amenities of a neighbourhood. Perhaps in the course of the case we will be obliged to impugn the reputation of someone not in a position to reply to the imputation. Or we may be briefed in a criminal case for a client who has a good legal defence but whose conduct we regard as morally indefensible.

Surely a modern Boswell would be entitled to classify those as bad causes and to put his question to us?

One theoretically possible answer must immediately be rejected. It is not an option to refuse to act in such cases. There may be personal reasons why a particular lawyer may refuse to handle a particular case, but the duty of the Bar as a whole to afford representation in the type of case which I have described is inescapable. Whatever a lawyer's personal reason may be for declining a brief it may not be because he thinks that the cause is a bad one in the sense which I have tried to illustrate. It is a fundamental constitutional

principle of any country which would describe itself as free that every person accused of a crime should be entitled to legal representation. That greatest of advocates, Thomas Erskine, in his defence of Tom Paine, addressed the court in words which still resound after 200 years:

> From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practise, from that moment the liberties of England are at an end.

Rhetorical as that may seem, I do not consider that to be in any degree an exaggeration. During the long years of apartheid in South Africa I believe that one of the things which kept the flame of liberty flickering was that opponents of the apartheid regime charged with offences including even high treason were able to find members of the Bar to defend them, and defend them with skill and vigour. This was not because they necessarily sympathised with the aims or methods of the accused, but rather because they recognised their professional duty to take on those cases.

This duty extends to both criminal and civil actions. The Canadian Charter of Rights and Freedoms provides that everyone has the right on arrest to retain and instruct counsel. The Canadian Bill of Rights of 1960 recognised the right of every person "to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations." It cannot be doubted that the right to counsel is one of the principles of fundamental justice in civil actions as well as in criminal prosecutions. This is made explicit in the European Convention on Human Rights which last Monday was incorporated into the law of England. But quite apart from these statutes the right of every litigant to engage counsel has long been recognised by judicial practise in your courts and ours. It hardly needs stating that the right to counsel would be of little value if the Bar did not recognize a moral and professional duty to make its services available without regard to any consideration of whether the client's cause be categorised as good or bad.

Some years ago Lord Pearce, in the House of Lords, re-stated this principle more prosaically than Erskine, but just as forcefully:

> It is easier, pleasanter and more advantageous professionally for barristers to represent or defend those who are decent and reasonable and likely to succeed in their action or their defence than those who are unpleasant, unreasonable, disreputable and have an apparently hopeless case. Yet it would be tragic if our legal system came to provide no reputable defenders, representatives or advisers for the latter.

If this is so, one may ask, what can be the present significance of what I may call the Boswell question? I believe that it remains a live question, but I would venture to rephrase it, in this way: How should an advocate, as a member of an honourable profession, conduct himself or herself in a cause which on rational grounds he firmly believes to be unmeritorious or morally objectionable?

I emphasise, in passing, the words "honourable profession." In England now one hears it said that we lawyers must realise that we constitute a service business; and that in a competitive world we must market ourselves. Nonetheless, I believe that we are still a profession and not merely a business. As Lord Devlin pointed out nearly 50 years ago, in a case concerning not lawyers but architects, many activities which in the business world are regarded as laudable examples of enterprise may by the rules of a profession be considered an offence. I believe that the old rules against advertising and against undercutting our colleagues have undergone some relaxation in Ontario, as they have in the United Kingdom. The professional rules may now be relaxed, but the distinction between profession and business remains. Some things permitted in the business world are not open to us.

I return to my rephrased question. One response, as robust and as simple as Dr. Johnson's, is that whether the cause be good or bad, once the brief has been accepted, the advocate has a single duty: his duty to his client. This was stated in terms of unsurpassed eloquence and power by a great English legal figure, one of Erskine's successors as Lord Chancellor, Henry Brougham. In 1820 he defended Queen Caroline against the charge of adultery brought against her by her husband, King George IV. The trial was before the House of Lords. In addressing the Lords, Brougham described the duty of counsel in these words:

> An advocate, by the sacred duty which he owes his client, knows in the discharge of that office but one person in the world—that client and none other. To save that client by all expedient means, to protect that client at all hazards and costs to all others, and amongst others to himself, is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other. Nay, separating even the duties of a patriot from those of an advocate, and casting them, if need be, to the wind, he must go on reckless of the consequences, if his fate it should unhappily be, to involve his country in confusion for his client's protection.

That statement of the duty of the advocate was not wholly endorsed by the leaders of the profession. Some even thought it outrageous, but Lord Brougham, as he became, never departed from it. It has unfortunately and, as I think, wrongly been invoked as demonstrating an absence of any moral

standards in the advocates' profession. One of the critics of our profession who did invoke it for that very purpose was able to match Brougham in eloquence.

In 1838 Benjamin Disraeli was a young Member of Parliament. Thirty years were to pass before he became Prime Minister of England. In that year, following a parliamentary election, a petition was brought to unseat one of the successful candidates. Disraeli himself was not a party to the proceedings, nor in any way concerned in them, but in the course of the court hearing a Mr. Austin, counsel for the petitioner, had in the course of his argument referred to Disraeli in what Disraeli took to be insulting and defamatory terms. In England, as in other common law jurisdictions such as your own, what counsel says in court is absolutely privileged: Mr. Austin could not be sued for defamation. (The rule is different in civil law jurisdictions such as South Africa.) So Disraeli published a letter in the newspapers. It is worth quoting at length, as a salutary reminder of an opinion of our profession which some hold to this day. Disraeli began by indicating that he would have taken action in court but, he said,

> . . . a friend to whose opinion I was bound to defer, assured me that Mr. Austin, by the custom of his profession, was authorised to make any statement from his brief which he was prepared to substantiate, or to attempt to substantiate.
>
> . . . I take the earliest opportunity of declaring, and in a manner the most qualified and unequivocal, that the statement of the learned gentleman is utterly false. There is not the slightest shadow of a foundation for it. . . .
>
> I am informed that it is quite useless, and even unreasonable, in me to expect from Mr. Austin any satisfaction for those impertinent calumnies, because Mr. Austin is a member of an honourable profession, the first principle of whose practice appears to be that they may say anything provided they be paid for it. The privilege of circulating falsehoods with impunity is delicately described as doing your duty towards your client, which appears to be a very different process to doing your duty towards your neighbour. This may be the usage of Mr. Austin's profession, and it may be the custom of society to submit to its practice; but, for my part, it appears to me to be nothing better than a disgusting and intolerable tyranny, and I, for one, shall not bow to it in silence.
>
> I therefore repeat that the statement of Mr. Austin was false, and, inasmuch as he never attempted to substantiate it, I conclude that it was, on his side, but the blustering artifice of a rhetorical hireling, availing himself of the vile licence of a loose-tongued lawyer, not only to make a statement which was false, but to make it with a consciousness of its falsehood.

Disraeli hoped to provoke a challenge to a duel. Instead, Austin had Disraeli cited for contempt. Disraeli was forced to make an apology in open court. It must be the least grovelling apology in history. After formally apologising to Austin, he said he feared that he had really been brought to court not so much for an offence against the law as an offence against lawyers. He said that while he did not persist in the expressions used in his letter he nonetheless expressed the belief that

> there is in the principles on which the practice of the Bar in England is based a taint of arrogance; I will not say audacity, but of that reckless spirit which is the necessary consequence of the possession and the exercise of irresponsible power . . ..
>
> I confess that I myself have imbibed an opinion that it is the duty of a counsel to his client to assist him by all possible means, just or unjust, and even to commit if necessary, a crime for his assistance or extrication. This may be an outrageous opinion, but my Lords, it is not my own.

He then quoted the passage from Brougham's speech which I have already read out. Brougham by then was an ex-Lord Chancellor, so this quotation was something of a knock-out blow. Disraeli, in a final thrust, appealed to the Bench to shield him "from the vengeance of an irritated and powerful profession."

The Attorney-General wisely accepted this dubious apology as "ample" and no sentence was passed. One is grateful not to have had the experience of crossing Disraeli. Of course the profession was irritated. Disraeli's attack was exaggerated, and it was unfair to Brougham. Brougham did not say that it could ever be the duty of counsel to commit a crime. Nor was it true that the ethics of the Bar permitted an advocate to utter a deliberate falsehood. It was not permissible then or now and I do not think that Brougham was saying that it was. When Lord Brougham spoke of the duty to save the client by all means and expedients, I do not doubt that he meant honest means and expedients. I have never read anything to suggest that his own conduct at the Bar was ever dishonest or improper.

Yet we cannot not dismiss all of Disraeli's harsh criticism of the profession. When we speak in court we do enjoy great latitude and great privileges. I fear that these advantages do sometimes lead to a professional arrogance, and, especially in the heat of battle, to an excessive licence in attacking the parties or witnesses on the other side. I am uncomfortably conscious in the course of 50 years in practise of having (only occasionally I hope) transgressed in this way. It is a danger which confronts all of us who call ourselves trial lawyers. I point out that it is a danger in meritorious cases as well as unmeritorious cases. Our duties to all our clients, good or bad, must be limited by ethical considerations. Moreover, taking it as a given that the

client whose cause we regard as a bad cause (as I have tried to define that concept) is entitled to counsel, the general rules of our profession should tell us how to act in those cases as in others.

I have already referred to some of the rules. There is a duty to the court not to mislead it by false statements. There is also a duty to inform the court of any relevant legal precedents, even if they are against the contentions of your client. You may not put your clients or witnesses in the witness box in the knowledge that they will give false evidence. If a client has confessed to you that he or she has committed a crime you may not suggest that someone else was the culprit. These are comparatively straightforward rules, although their application may not always be simple—as I indicated when considering the duty not to mislead the court in relation to the three differing judgments in the Court of Appeal.

There is another aspect of professional practice especially worth remembering in the context of the cause believed to be bad. As an advocate you are the legal representative of your client, not his general agent, or public relations adviser. The advocate should not identify himself or herself with the client's cause. The advocate speaks for the client in court, as a professional representative, not as a partisan. The corollary strictly applied in Great Britain, and restated in the Law Society of Upper Canada's Rules of Professional Conduct, is that it is highly improper for an advocate to assert either to a judge or a jury any personal belief in the rightness or justice of the client's cause. It is equally improper, I would suggest, to make any such assertion outside court. (One knows that they do things differently in California.) If these rules are consistently adhered to, it should and will be generally understood that the advocate is an advocate only, and that it is his client's case and not any personal view or opinion to which the advocate is giving expression. The public perception that there is this "distance" between advocate and client may make it easier for us to take on unpopular causes. But whether that is so or not, it provides an honourable basis on which we can give our professional services to a client whose integrity we doubt, whose cause we see as damaging to persons who may have our sympathy, and whose conduct we regard as contrary to the public good. Yet another 19th century Lord Chancellor (this time Lord Herschell) said, in words which may today seem pompous, but which are nonetheless comforting, that

> it is only by keeping this rule [i.e., of not identifying oneself with the client's cause] constantly in mind, and by a strict adherence to it in practice, that the risk of injury to the moral character of the advocate by his seeking to convince others by arguments which have not brought conviction to his own mind can be avoided.

In the more succinct words of another judge,

> There is an honourable way of defending the worst of cases.

I would add that there is an honourable way of prosecuting and defending all cases, the best as well as the worst. I point out that neither Lord Brougham nor Lord Herschell in their statements of our duties as advocates drew any distinction between good causes and what I have described as bad causes. In either case there are things which, even if not illegal, an honourable advocate would not do—like suggesting to a client what would be a good defence, or attempting to play on what are, or are believed to be, the racial or other prejudices of the jury or the judge, or deliberately employing obstructive and delaying tactics. So the basic answer to the Boswell question is that the advocate must conduct himself in a bad cause as in a good cause. He must in the words of Rule 4 of the LSUC Rules "represent the client resolutely and honourably within the limits of the law".

When it comes to "the honourable way" there is one aspect of practise which I have found peculiarly difficult. The rules of the English Bar state that a barrister conducting proceedings in court

> must not suggest that a victim, witness or other person is guilty of crime, fraud or misconduct or make any defamatory aspersion on the conduct of any other person or attribute to another person the crime or conduct of which his lay client is accused unless such allegations go to a matter in issue (including the credibility of the witness) which is material to his lay client's case and which appear to him to be supported by reasonable grounds.

Your Law Society's Rules do not state it in the same way, but I believe that in essence they are no different. But consider this case. Your client's version of events may require you to cross-examine a witness who gives a materially different version damaging to your client. Your client's own evidence may under these professional rules constitute reasonable grounds for impugning the witness and thus permit you to challenge the veracity of the witness. The rules certainly permit you to challenge that witness. Indeed some would say it is your duty to do so. But having seen and heard that witness, and understanding the facts of the case, you are convinced, however contrary to your client's instructions, that the witness is certainly an honest witness giving truthful evidence. Would you still find it morally permissible to cross-examine so as to suggest that the witness should not be believed? How far do you feel able to go in such a case? Anyone with long trial experience has faced this problem. I have, on several occasions; and all I shall say is that, looking back, I am not satisfied that my solutions were invariably right.

This situation was graphically, and disturbingly, illustrated in Trollope's great legal novel, *Orley Farm*. A young and idealistic barrister is junior counsel for a lady who is the defendant in a perjury prosecution arising out of a disputed will. A simple, ill-educated serving woman who was one of the witnesses to the will, is called by the prosecution. Her straightforward evidence contradicts that of the barrister's client and is seriously damaging to the client. To the young barrister it is plain beyond dispute that this witness is giving her evidence with complete honesty. Chaffanbrass Q.C., the elderly leader who cross-examines her, also sees this, but that does not deter him. As the author puts it,

> He could not make a fool of her, and therefore he would make her out to be a rogue.

At the end of the cross-examination, the author continues,

> [The Q.C.] knew well enough that she [the witness] had spoken nothing but the truth. But had he so managed that the truth might be made to look like falsehood? If he had done that, he had succeeded in the occupation of his life.

The young barrister is appalled and cannot conceal his distaste. He thereby incurs the scorn of his leader. At the end of the trial (the whole of which makes enthralling reading), the old Q.C. says to the younger man sarcastically, "You are too great for this kind of work . . .. If a man undertakes a duty he should do it . . . especially if he takes money for it".

Which of them was right? I content myself with suggesting that *Orley Farm* be a set-book in any course on legal ethics.

I am conscious that to many of the questions I have raised I have been able to give no clear answer. You may be thinking that my reformulation of the Boswell question and my examples of bad causes were too bland. There are bad causes and bad causes. What if a client comes to counsel with a cause which seems not merely unappealing or unmeritorious, not merely contrary to the public good, but which is utterly revolting to counsel's conscience? Whatever the general rule requiring counsel to provide their services to clients willing and able to pay their fees, are there not occasions when counsel should be entitled to follow his conscience and refuse to act?

At this stage I shall embark on a South African digression, by way of an admittedly extreme example of what I mean by a case revolting to one's conscience. Under the laws of apartheid every inhabitant of the country was classified according to race. Your race classification dictated where you might live, what jobs were open to you, what schools your children might attend. Government inspectors were employed to investigate reports that, for

example, somebody classified as white was according to the criteria laid down by law not white. A tribunal existed to hear cases in which the Government contended that some individuals should be racially reclassified. Counsel were briefed to prosecute such cases before the tribunal on behalf of the government. The tribunal, aided by these counsel, would subject what I can only call the victim to the most humiliating physical and verbal examination. If the case for reclassification was made out, the economic ruin of a family would be the inevitable result, and not the only result. I was, of course, not on the Government's list of counsel, and was happily never asked to act for the Government. There were fortunately or unfortunately any number of proapartheid members of the Bar who would take on those cases without, apparently, any qualm of conscience. The rules of conduct of the South African Bar may perhaps have compelled any counsel to accept such a brief if offered. The issue never arose. If it had arisen I believe that many of us would have been unable to obey the rule. That is to say, in more general terms, that no rule of conduct can be an absolute rule. There may be times, fortunately rare, when one's own conscience rather than the general rule must govern one's conduct.

I return to the words of Lord Brougham. Properly understood they are rather splendid. "To save that client by all expedient means, to protect that client at all hazards and costs to all others, and among others to himself." That phrase "to himself' is the key to the whole passage. What Lord Brougham was asserting was not a licence to lie and cheat. What he was asserting was that the highest qualities demanded of an advocate are independence and courage in defence of the client. The duty to show those qualities to the best of our abilities remains. What Lord Brougham was saying was that in accepting a brief and in pursuing the lawful interests of the client we must put aside all consideration of pleasing or displeasing others or of benefiting or harming ourselves. What you say or do in court may displease powerful interests, a government, a trade union, a corporation with much legal business at its disposal, an influential section of the community. It may be unwelcome to another of your important clients. It may offend your friends, perhaps even your own family. It may harm your career. All such considerations, Brougham is telling us, must be put aside. That may be an ideal not all of us can attain. But it is an ideal we should all strive for. And it is the ideal, I believe, which motivates Rule 4 of your own Rules of Professional Conduct.

Forty years after his defence of Queen Caroline, Lord Brougham made a speech at a Bar dinner. He ended it in these words:

> In this country the administration of justice depends principally on the purity of the judges; but next on the prudence, the discretion and the

> courage of the advocate. No greater misfortune can befall the administration of justice than an infringement of the independence of the Bar or the failure of courage in our advocates.

What better ending can there be to a lecture in honour of one who was both great judge and great advocate, who in both capacities enhanced and adorned the administration of justice, and for whom above all "The Honourable Charles Dubin" is no mere courtesy title.

THE LAST CLASS: LIVING A GOOD LIFE AS A LAWYER†

Roger C. Cramton*

Roger Cramton is a leading thinker about matters of professionalism. At the last meeting of his Cornell Law School class on Lawyers and Clients, his last class before retirement at the end of forty-three years as a law professor, he offered the following counsel to his students. We publish his remarks in the QUARTERLY *because they are as relevant to the mature lawyer as they are to the student at the threshold of a career at the bar.*

A last class is a ceremonial occasion and calls for the kind of rhetoric commonly found in other events that mark beginnings and endings. That is, lots of aspiration, some nostalgia, perhaps some hypocrisy. Hypocrisy is a bad thing, of course, but there are many things worse than having ideals we don't fully live up to—such as not having ideals.

This last class is different from the usual one in that it is also a celebration of my last class. As you know, I have decided to join the ranks of the emeritus professors after this term. It is an appropriate time to reflect on living a good life as a lawyer.

After law school, what? That must be a question on your minds these days. Presumably you want to be a good lawyer. What do we mean when we say someone is a "good lawyer"? An effective one? A successful one? Or do we have in mind a person of good character who strives for the good and the right, for whom truth and justice, however elusive and difficult to pin down, are central commitments?

GOOD LAWYERS

One of my mentors, Karl Llewellyn, had a favorite refrain about lawyering: "Technique without compassion is a menace; compassion without technique is a mess." You need more than knowledge, skill, and technique. You need compassion and aspiration and a hunger for truth and justice. Good lawyers who are also good people have those qualities.

Some years ago the National Institutes of Health did a large study of the quality of medical care delivered to patients by a large group of general prac-

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* Robert S. Stevens Professor of Law Emeritus and former Dean, Cornell Law School.

tice physicians. The study was designed to shed some light on what factors were highly correlated to the delivery of high-quality medical care. Thousands of bits of information about the physicians and the circumstances of practice were fed into computers along with objective determinations of the quality of care provided by each physician studied.

On almost every item examined, the study came up with a null hypothesis. The differences among physicians—age, ethnicity, race, gender, medical school, size of practice, and the like—didn't seem to matter. None was significantly correlated with the routine delivery of high-quality care.

But there were tantalizing items that seemed to say something about what it takes to be a good physician. The physicians who always delivered good medical care subscribed to and read medical journals; they attended out-of-town medical education meetings (attending local ones wasn't a significant variable); they responded to their patients' emergency needs and requests; and they worked long hours.

What do these fragments tell us? Good physicians care about medicine; they have an intellectual interest in and curiosity about it. They care about their patients. And they care about their image as a physician. They possess an internalized value system that knows what good work is, takes pride in it, and is ashamed of sloppy work.

I think the same things are true of good lawyers. They care about the law, maintaining throughout their careers an intellectual interest in it and a desire to improve it. They care about their clients and suffer with them if they suffer. And they care about themselves as true professionals. They are skilled and committed craftspeople who deliver honest work for honest pay. Every day when they look into the mirror, living up to their own ideals is on their minds, and they feel a terrible regret whenever they know they have failed. All of us, of course, fail from time to time, and good lawyers treat professional failure appropriately: They forgive themselves, vow to do better, and learn from their prior failures.

MORAL PERSPECTIVES

To what extent should moral perspectives enter into one's practice? I believe, first, that the moral and political aspects of law practice cannot be avoided, even if one tries to do so. Some lawyers and law students want to put moral issues aside and operate under some assumed variant of hired-gun adversarial ethics. Lots of them have achieved worldly success by being good at serving clients' desires in that way. But moral issues are not avoided by being ignored. Pretending to avoid them merely puts in place default rules that themselves represent a moral choice, and often a bad one.

Second, I believe that you stand beside your clients—and put their true interests ahead of your own—not because the state or the adversary system tells you that you should, but because they are there, you have agreed to represent them, and no matter who they are, they were made in the image of God, with the uniqueness and value that the image suggests.

What you can and should do for clients is a complicated question that turns on many considerations: your clients' objectives; what you have agreed to do for them; the requirements of substantive, procedural, and ethics law governing the situation; and the resolution of issues of means and costs you arrive at with your clients. The representation should be carried out, in consultation with your clients, as more than an attempt to "win" without clearly violating the law. The central moral tradition of lawyering involves a respect for law, legal institutions, and other factors that cannot be reduced to what you can get away with.

A third belief of mine is that lawyers and clients can learn from each other how to be good. It is a mistake to say either that lawyers corrupt clients or that clients corrupt lawyers. Particular clients, of course, may corrupt a lawyer by offering temptations that are difficult to resist, just as individual lawyers may corrupt clients by leading them to do immoral things. Litigation in particular tends to bring out the worst in people. Lawyers should treat clients, in my view, the way good friends treat each other: pointing out moral issues when they arise, discussing them, and attempting to resolve them in a mutually agreeable manner. Lawyers should not control clients, but neither should clients ask their lawyers to act without conscience or moral scruple.

REWARDS FOR VIRTUE

Will observing those principles leave you without clients? Will it be damaging to your chances of getting ahead in the world? There is that risk. Being virtuous may be rewarded in heaven, but here on earth goodness doesn't always come out ahead. Nevertheless, there are satisfactions in attempting to lead a good life. And the lawyer who treats clients as friends acquires friends—people whom it is enjoyable to help.

Yet virtue is sometimes rewarded. Many (perhaps most) clients do not choose lawyers for their moral insensitivity. Indeed, clients return to lawyers whom they have found trustworthy and worth conversing with and listening to—lawyers of judgment, moral sensitivity, and compassion, as well as skill and technique. And consider the alternative: Clients who want to cut corners and renege on obligations aren't trustworthy. Such clients are likely to find lawyers who are willing to help them in their activities. But will client and lawyer like each other? Will they trust each other? If the going gets really

tough and the question of who must take the rap arises, won't they be the ones who are pointing the finger at each other? Is that the life you want to live, with that kind of client?

LEGAL ETHICS

Legal ethics, William Simon states, is a "disappointing" and "dispiriting" subject, because the prevailing conceptions of the subject fail to respond to the normative aspirations that drew most of you to study law. The moral appeal of the lawyering role rests on the ideal that "lawyers, not just in exceptional moments of public service, but in their everyday practice, participate directly in furthering justice." Yet the most common conception of legal ethics equates being an ethical lawyer with conforming to the minimal requirements of the ethics codes (or at least those parts of the codes that the profession takes seriously and enforces).

A second conception, also embodied in the professional codes, "conflates legal ethics with the private or personal moralities of individual lawyers," allowing lawyers to express their personal values in representation by exercising the discretion conferred on them by such rules as those governing choice of client and withdrawal. As Simon states:

> The ethically ambitious lawyer comes to the profession attracted to the idea that she will contribute to justice in her day-to-day practice but then finds that her practice is governed by norms that frequently oblige her to do things that, if she dares to consider the issue, she believes are unjust. Moreover, even when she has the autonomy to do what she thinks would contribute to justice, the profession often treats her decision as a personal, subjective concern for which it accords her immunity but neither guidance nor support.

CREATING JUSTICE

The profession's only answer to the lawyer's frustration is the claim that in the long run the current conceptions of the lawyer's role serve public values by producing socially desirable and just decisions. Justice is equated with the outcomes of the process.

At the governmental level, justice depends primarily on two things: first, institutions, laws, and procedures that produce reasonably fair outcomes through elections, lawmaking, and dispute resolution; and second, a reasonably fair distribution of opportunities. We still have a long way to go in those respects, even though, compared with other societies, our situation is relatively favorable.

But there's more to justice than what the state does. Justice can be furthered or hampered by the state, but justice is not limited to, or defined solely by, the institutions and actions of the state. Each of us as individuals, by acting justly, creates justice. Justice is a gift that people give to each other by what they do in dealing with each other. Justice is created or destroyed in countless ways every day: by our actions, by how we treat others, by how we adapt to, or shape, or blindly conform to, the familiar routines of our workplace.

My good friend and coauthor, Susan Koniak, draws on her Jewish faith to explain why lawyers should view themselves as a chosen people who have a special responsibility to practice justly. One tradition in Judaism explains the Jews' place as the chosen people with the following story: God's presence in the world, the *Shekinah*, was once whole in the form of a giant crystal globe. The globe was shattered into millions of pieces of glass. The Jews were chosen as the people whose responsibility it was to collect the pieces of glass to try to restore God's presence in the world. In Hebrew that responsibility is captured by the phrase *tikkun olum*, which means "to repair the world." The story explains that the Jews were given the Torah, the law, at Mount Sinai as the means to fulfill that responsibility. The moral of the tale is that by living a life dedicated to studying and living the law, one helps repair the world.

I hope, for you and for all those whose lives you will touch, that you will have the passion, commitment, and courage to strive in your practice to repair the world.

IN PRAISE OF THERMOSTATS†

John W. Reed*

Fifty years ago, a famous book was published that chronicled the sea change then occurring in society. David Reisman's *The Lonely Crowd*[1] made us aware of the decline of concern for the common good and the rise of the search for individual meaning. What was going on at that time was one of the most profound cultural changes that has ever taken place in such a short time. It was not just the beginning of the Me Generation but, it turned out, the beginning of the Me Culture, which continues to this day.

To consider those changes fully would require a semester-long seminar. (Incidentally, there is no crisis to which academics will not respond with a seminar.) But in a nutshell, the changes grew out of a quest for meaning and purpose in life and, in the process, a substituting of peer values for tradition as a cultural and ethical guide. Those of us who had teenage children in the 'sixties well remember the feeling that our families' values were often at odds with the values of our children's peers, and, in broad bands of society, the peers won. We listened with keen understanding to that haunting lament from *Fiddler on the Roof*: "Tradition." On the other hand, many of you, especially among the newest Fellows, were yourselves those very children who resonated with the new culture to the sometimes dismay of your parents. You drove them up the wall with the Beatles—music that now seems so innocuous.

Although we may differ as to the causes, it's clear that as we moved into the 'sixties and beyond, we were ripe for the search for purpose. The psychiatrist Carl Jung called the widespread feeling of meaninglessness the "general neurosis of our time." No longer were our children content simply to follow conventions. They wanted to know whether their lives had meaning and purpose. That sounded like a good question to ask; and indeed to ask the question might be thought to be the first step toward an answer. But the quest, rather than easing the feeling of meaninglessness, actually increased it. It is one thing to feel dissatisfied with life when you've simply followed the tradition. It's another thing altogether to have sought for something more to life and come up empty-handed. The failure to find that meaning and purpose led inexorably to new sets of mores and cultural patterns. With tradi-

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* Thomas M. Cooley Professor of Law Emeritus, University of Michigan; Academic Fellow, Editor, and Administrative Secretary, International Society of Barristers.

[1] D. RIESMAN, THE LONELY CROWD (1950).

tion discounted and nothing profound to take its place, the rule became "Anything goes." Old dos and don'ts fell by the way.

That is not to say that no good came out of the upheaval. To offer just one example, we became a more open society, and in consequence a more open profession. Think about the legal profession in the past half century. When I graduated from law school, my Jewish and Catholic classmates were largely foreclosed from employment in the big firms, and I understood why many of the best plaintiffs' lawyers were Jews and Catholics. That wasn't a big problem for black law graduates, but only because there almost weren't any. In my time as a teacher there were law schools that would not accept black applicants. Indeed I was a young faculty member at the University of Oklahoma Law School when the Regents denied admission to Ada Lois Sipuel on the sole ground that she was black. Now, a half-century later, much of that has changed. Not entirely, but greatly. So I do not say nothing good has happened. It has.

But I think it is undeniable that socially, culturally, and also professionally, we are more materialistic, more hedonistic, more self-absorbed than at any time in recent history. And in many ways the bar has become, in Riesman's phrase, a lonely crowd. Our profession historically has been tradition-bound. We are trained to look at precedent. As a profession, we used to have a relatively secure sense of meaning and purpose. We rather easily and familiarly referred to Magna Carta, the Declaration of Independence, the wisdom of Oliver Wendell Holmes. Unself-consciously we employed eloquent, even flowery, language that reminded us of our commitment to justice and to service. Now we seem to be reluctant to speak confidently and forcefully of our roles in the justice system. We leave it to others to say good things about us. Hear these words from a 1996 book:

> The strength of our nation today does not reside so much in our Congress, or in the vast apparatus of the executive branch, because all seem to be so lacking in vision, and we seem not to have the resources to rebuild those visions. Our real strength is in our Constitution, the court system that our legal profession has (so far) been watchful to maintain, and the legions of free institutions that flourish under the umbrella of these two powerful protectors. Feeble as so many of these free institutions are, they are the main sinews of strength we have to bind over to our children and grandchildren.[2]

That's a powerful statement of our profession's service. Did it come from a lawyer? No, it is the statement of the late Robert Greenleaf, a Quaker who

[2] R. GREENLEAF, SEEKER AND SERVANT 238 (1996).

taught leadership skills to both profit and nonprofit corporate personnel. Not enough lawyers are making such ringing endorsements of our opportunities and the service we perform.

We tend to neglect the importance of our independence and freedom as advocates in an adversary system. Multidisciplinary practice—which Meredith Hellicar mentioned on Tuesday[3]—may or may not work in the commercial field and in office practice, but when it comes to conflict between citizens and government, the traditional independence and professional responsibility of the lawyer is a well-nigh indispensable bulwark of individual freedom.

Alternative dispute resolution—lauded by Robert Smith, also on Tuesday[4]—may not be an unalloyed blessing. There are undeniable advantages of economy in many ADR modes, especially in commercial matters. No one—least of all I as a procedure teacher—can deny that there are great benefits in arbitration and mediation and the like. But sometimes there also are disadvantages, to the party and to the judicial system, that impose unacceptable costs, and trial lawyers do not make that point often enough.

The jury has been dismembered in many venues. Jury trial seems to be sliding away. The trial bar needs to fight harder to preserve that institution that is so central to our freedoms. (On the point of preserving the jury, I think it was George Burns who said, "We got married by a judge. I should have asked for a jury.")

Globalization of the profession—offices around the world—is occurring. Here, there are inevitable process dangers that we must guard against. I refer to the fact that the independent judiciary and free bar that are, in Greenleaf's terms, so vital to our strength as a nation are almost nonexistent in those other countries with which we will engage. You may remember Newton Minnow's little list:

> In Germany, under the law everything is prohibited except that which is permitted.
>
> In France, under the law everything is permitted except that which is prohibited.
>
> In [Russia], everything is prohibited, including that which is permitted.
>
> And in Italy, under the law everything is permitted, especially that which is prohibited.

Lawyers, especially trial lawyers, will have to be vigilant and pro-active in maintaining the essential core of our system of justice.

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[3] M. Hellicar, *The Practice of Law and Generation X*, 35 INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY 357 (2000).

[4] R. Smith, *Mediation: Fast, Flexible, Creative, Cathartic*, 35 INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY 369 (2000).

Will it be easy to maintain our commitment to first principles? Not likely. But hear the words spoken by Antrobus to his wife Maggie in Thornton Wilder's *The Skin of Our Teeth*:

> Oh, I've never forgotten for long at a time that living is struggle. I know that every good and excellent thing in the world stands moment by moment on the razor-edge of danger and must be fought for, whether it's a field, or a home, or a country. All I ask is the chance to build new worlds and God has always given us that.

In our profession as in the nations, the battle for freedom is never won; it must be fought continually. And God has always given us that chance.

In the same years that our society has lessened its reliance on tradition, there has been a loss of grounding by the legal profession. We look for guidance not to first principles but to our peers, and we take on their coloration. We resemble the child who, when reproached for his behavior, says, "But everyone is doing it." In short, we have become other-directed.

There clearly was a time when there was camaraderie, if not a unity, among the bar. You may have noted the item I included in a Barristers Newsletter about the well-known 19th century lawyer who volunteered to argue both sides of an appeal when his adversary could not afford to stay in town until the case came up in the Illinois Supreme Court. Here is his letter informing the adversary of the result:

> My dear Mr. Bishop:
>
> The Supreme Court came in on the appointed day and I did my best to keep faith with you. Apparently I argued your case better than my own, for the court has just sent down a rescript in your favor. Accept my heartiest congratulations.
>
> Very sincerely yours,
> A. Lincoln

To the extent that there were associations of lawyers, they were not specialized—as, indeed, lawyers themselves were not specialized. But, like the lonely crowd, each member following his own interest, his own quest for meaning, lawyers began gathering in clumps to pursue the particular self-interests of their category of clients—plaintiffs' lawyers, defendants' lawyers, railroad lawyers, insurance lawyers, admiralty lawyers, criminal lawyers. Each group had its own agenda, and that agenda often included hostility to lawyers on the other side. Loyalty to a tradition of service in the quest for justice took on the color of particular client interests, and the profession was fractured. And we went along—everybody's doing it.

In short, much of what Riesman observed and described—the lessened importance of tradition and the increasing influence of peer values—did indeed shape our society and our profession in the fifty following years, in many ways not for the better but for the worse.

To understand the past and the present is indeed to predict the future. To be truly responsible, we ought to look around us at the seeds of what will happen in our profession in the next fifty years, and to cultivate those seeds that give the most promise of a vital profession that will best serve the cause of justice in our rapidly changing society. I suggest that Riesman's book offers a clue to what we need in order to do that.

Even as he clearly described the oncoming peer culture, which he characterized as other-directed, Riesman suggested that a new psychological mechanism was emerging that is appropriate to the more open society. He called it a "psychological gyroscope." "This instrument, once it is set by the parents and other authorities, keeps the inner-directed person 'on course' even when tradition . . . no longer dictates his moves. The inner-directed person becomes capable of maintaining a delicate balance between the demands upon him of his life goal and the buffetings of his external environment."[5]

Riesman hastened to point out that the metaphor of the gyroscope shouldn't be taken literally—that the inner-directed person may well be capable of learning from experience and can be sensitive to public opinion in matters of external conformity. In short, the gyroscope is not an automatic pilot. But, details aside, the author offered little gloom and no doom. Rather, he saw hope in the survival of a core of inner-directed individuals who would build on the new forms that emerge from the anguish and turmoil created by the conflict of values—a conflict clearly visible when he wrote in 1950 and continuing even today in our increasingly diverse and fractured society.

What is called for, obviously, is the presence of men and women whose characters are firmly grounded in the humane values of service, and caring, and a passion for justice, and who are sufficiently inner-directed that they can withstand the buffeting of what Kipling called "foul circumstance." These are the men and women who have a psychological gyroscope.

As I reread *The Lonely Crowd*, I thought about other metaphors I have heard used to describe the same or similar phenomena—the metaphor of the thermometer and the thermostat, for example. The world is filled with people who merely record the temperature of their environment. They do nothing to change it; they just report it. They may not make it worse, but they certainly don't make it better. They just "go along." They do what everybody else is doing. They are the classic group that is "other-directed." Their polestar is

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[5] RIESMAN, *supra* note 1, 16-17.

their peer group. They are the thermometers of this world. The thermostat, on the other hand, sets the temperature, controls the temperature. It certainly is aware of the temperature; it senses it, but then it works to change it as necessary to reach the desired setting. People who seriously seek to set and to improve the temperature of their environment are the thermostats of this world, and their number is all too few.

Another metaphor derives from a story I heard in my childhood. It is the story of the schoolboy who approached his science teacher after a class about dinosaurs. He said, "Miss Friedman, you told us about dinosaurs and showed pictures and stuff, but there aren't any of them any more. Who killed the dinosaurs?" "Nobody," she said, "nobody killed the dinosaurs. The climate changed and they all died." The lesson, the moral, is clear, of course. We may not be valiant slayers of dinosaur-size problems. But we can be men and women who help change the climate, and the problems then die.

These somewhat glib metaphors of gyroscope and thermostat and dinosaur-slaying climatic change are not intended to oversimplify the complexity of the problems we all face in our profession and the difficulty of solving them. Though an academic, I do have some perception of how difficult it is out there in the trenches. But I offer one important basis for hope among the trial bar.

Riesman's book title, *The Lonely Crowd*, suggested a sense of alienation, a loss of common bond and common values, and, as I said, his characterization has been borne out by the experience of these fifty years. Indeed, it seems to have been borne out with a vengeance in this day of the Internet and virtual reality. In recent weeks there have been several press commentaries on the findings of a Stanford University study of the lives of Internet users. That study suggests that the lack of face-to-face contact is making for an increasingly lonely populace. That's as true in our profession as it is in society at large. Yet we all know there is strength when people of purpose band together. Each member is made stronger, and the whole is greater than the sum of the parts. Indeed, the whole becomes a source of strength for its various parts. I ask you to entertain the possibility that this organization, this International Society of Barristers, may be such a source of strength for each of you. Although as individuals all of us are beset with imperfections, the fact is that you were made a part of the Barristers because of your integrity, your professional excellence, and your amicable relationships with others. You obviously are inner-directed; your ethical standards obviously are balanced by a psychological gyroscope. You are thermostats in your profession. You affect the professional climate that can cause the dinosaurs to die.

Each of us knows, however, that such tasks are difficult when tackled alone. It is like the simple advice in the little book entitled, *All I Ever Really Needed to Know I Learned in Kindergarten*. The child's advice recorded

there is: "It is best to hold hands and stick together." In this good company, there is support and strength. In this good company there is hope and promise. You are no longer alone. And the Barristers Society, whose influence is greater than the sum of all of us individuals, can and must support us and remind us constantly of who we are, and what we are, and what we are about. That is why I am grateful that you and I are part of this body of trial lawyers which is faithfully fulfilling the premise and the promise of its founders thirty-five years ago. In the words of the poet, "For this good company, good God, we give Thee thanks."

WINNING AT ANY COST ISN'T WINNING †

Alan G. Greer*

Winning at any cost seems to be the motto of more and more lawyers and law firms. But it isn't winning. It's the destruction of our positive professionalism without regard for the bitter legacy we are leaving behind for future generations of attorneys—our children in the law. And it is wrong.

Like it or not, we, as attorneys, set the example and tone that is often followed by the rest of society. If we say by our words and deeds that winning at any cost is the way to go, laymen and future lawyers will follow us. Instead, we have the obligation and duty to bequeath to both the public and future lawyers a justice system that has not been shredded into a tattered mockery of what it could be by "win at any cost" tactics and mentality.

Despite that duty, an ever increasing number of our brothers and sisters at the bar are apparently driven by either a disdain for the law as a noble profession, fear, greed, or maybe just the belief that money is the way to keep score. They are adopting an "I don't give a damn about ethics and justice, let's win" approach to the practice. To them, the law is not something they love. It's just a vehicle for gain.

Endless examples of their attitude seem to come at us from all sides. Recently, judges have censored lawyers for things like exclaiming to their clients in open court, "Let's kick ass!" Or in the middle of a heated deposition flinging hot coffee at an opponent to distract her from a dangerous line of questions.

In another case, an attorney was cross-examining a witness about his business practices while holding a folder up in the air. Shaking it, he said he had the man's personnel file. When asked by the court to see the records, the attorney had to admit that the folder he was holding wasn't it but claimed it was back in his office. The judge told him to bring the records to court the next day. Of course, the file was never produced.

I can go on and on. There are countless examples of attorneys cursing other attorneys to intimidate them. Like NFL linemen trying to psyche the other side into mistakes, they seem to think that trading "locker room trash" descriptions of the other lawyers' legal skills and family is the way to win. So where does it all end?

Too many lawyers view their cases and negotiations from the polar extremes of either life-or-death wars in which the fate of nations hangs in the balance or

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* Richman, Greer, Weil, Brumbaugh, Mirabito & Christensen, Miami, Florida; Fellow, International Society of Barristers.

as nothing more than a professional sport. In either case, for them, anything you can get away with is justified so long as you "win, baby, win."

But with rare exceptions, our cases do not rise to the level of national survival or fall to the spectacle of sport. Instead, they are a search for justice and fair accommodation in which all sides should be represented in an ethical and professional manner. It has taken centuries to build up the public's respect for our judicial and legal systems. But that can all be destroyed in the few short moments it takes for "win at any cost" lawyers to pull unforgivable stunts like the ones described above.

Unfortunately, these attitudes seem to be carrying over into our firms as well. Recently, an anonymous lawyer and syndicated columnist writing under the pen name "The Rodent, An Associate's View of the Firm" published an article titled "The friendly destruction of one's peers." In order for associates to make partner, he advocates a ruthlessly diabolical approach of survival of the meanest and dirtiest. "Each lawyer should select at least one other person at The Firm whose career he or she will set out to destroy" in the hopes of enhancing his or her own chances for advancement, he writes. To do so, the Rodent recommends "spreading rumors of sexual escapades," "tampering with a hated rival's documents" or "whistle-blowing" of suggested improprieties to state bars, and "distribution of (damaging) bogus correspondence."

We have to say to the Rodents of the practice, "What is it that you are winning?" A house divided against itself will surely fall. If you sabotage your fellow associates as the way to get ahead and "win" a partnership, we know you will sabotage your new partners if and when they are fools enough to give you the chance to do so. It is the Rodent's kind of thinking that, year in and year out, ruins law firms and lives. From the courtroom to the firm and back to the courtroom becomes a closed cycle of self-destruction.

There is no doubt that winning is important, excruciatingly important. But as professionals we must deal with our fears of losing, no matter how overwhelming they may become, as we force ourselves to stay within the ethical rules. We must resist our natural inclinations to agree with race car driver Dammond Hill when he said, "Winning is everything. The only ones who remember you when you come in second are your wife and your dog."

While the universe of a race car driver may be limited to himself and his press clippings, we must not let the same become true for attorneys. It is natural for us to fear that our clients will forget us if we lose. It's letting that fear drive us past professional boundaries that we have to fight. We can't chuck our ethics overboard every time our insecurities or clients' unacceptable demands stare us in the face.

How many of us have found ourselves chuckling to a partner or an associate about the sharp practices of some lawyer we don't particularly admire but who

always seems to win? We have to stop applauding those people or giving them even tacit approval. To paraphrase George Orwell, victory-worship blurs ethical judgment because it leads, almost unavoidably, to the belief that objectionable practices will continue to be accepted. Whoever is winning at the moment will always seem invincible.

It's like the story of the principal chatting with the parents of some of his students and telling them the worst thing that could happen to one of their children was to be caught cheating. "No," one mother shot back, "You're wrong. The worst thing would be for them not to be caught."

The worst and most harmful thing we can do is to not call the Rodents of the world on their practices. We cannot reward them, be they associates, partners, trial lawyers, or negotiators. We cannot give them admiration or respect. We must let them know they will be caught and exposed for what they are. They must be made to understand that there is a price to pay for their conduct. We must tell them, the courts, and our bars what we truly think of their conduct and insist that professional ethics be enforced.

If we aren't willing to risk losing in order to stay within our profession's ethical bounds, we should give up the practice of law. And we must collectively demand the same standard from our fellow members of the bar. Peer pressure works. Let the Rodents go through life branded by all of us as pariahs in front of the courts and among their fellow lawyers. When we do that, the number of Rodents in the world will fall off dramatically.

Too many of us seem to be playing the game typified by the remarks of the boy who was asked by his father's friend how his brother was. "He's in the hospital," he replied.

"Oh," came back the response, "That's too bad. What happened?"

"We were trying to see who could lean out of the window the farthest and he won!" was the answer.

Instead of falling out of the wrong windows as we grub only for money, we should be setting positive examples for the future. There is something more important than our own personal win-loss records, and that's the perpetuation of a fair and viable system of justice. We can't be afraid to draw personal lines for ethical violations, making ourselves and others accountable when they are crossed.

The happiest and most fulfilled people I have ever met were those who had discovered a mission greater than themselves that made them grow morally, spiritually, and intellectually. They were usually trying to help others who truly needed help, not just becoming rich or winning without meaning. In the words of the great modern day lawyer and former ABA president, Chesterfield Smith, "They were doing well by doing good." Let's do the same.

REFORM OF THE LEGAL PROFESSION: AN ALTERNATIVE "WAY AHEAD"†

Roger Kerridge and Gwynn Davis*

INTRODUCTION

In this article we consider the future organisation of the legal profession in the light of government proposals intended to promote solicitors' take-up of higher court rights of audience. It is our contention that in focusing upon rights of advocacy the current debate is framed too narrowly. We take this view partly on the basis of a recent empirical study, which we briefly review. In the light of that evidence we suggest an alternative approach to distinguishing legal expertise which would, if implemented, convey a more accurate sense of lawyers' skills. Our research has convinced us that if there is to be reform of the legal profession, then proposals for change should encompass all aspects of the delivery of legal services. The debate should be not only about rights of audience, but ought also to encompass legal education, the organisation of court hearings, and the role of the judiciary. Accordingly this essay includes some consideration of the degree to which these other aspects of the legal environment influence the way the profession is organised.

First, a brief history. The legal profession in England and Wales has always been divided into branches or sub-professions. Apart from scriveners and notaries, there have in the past been attorneys, solicitors, proctors, conveyancers, special pleaders, equity draughtsmen, advocates[1] and barristers. But there have been two principal branches, solicitors[2] and barristers. The relationship between these two branches had become settled by the end of the eighteenth century and changed relatively little between about 1790 and 1990. During the course of the nineteenth century the other sub-professions were swallowed up or amalgamated into the two principal branches. Attorneys amalgamated with solicitors; proctors joined them; special pleaders and advocates became barristers. There was a real possibility during the middle years of the nineteenth century, the age of reform, that the final fusion might come about. But it did not, and the two branches of the profession remained separate.

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* Department of Law, University of Bristol (England). We are grateful to our colleagues Jonathan Hill, Julia Pearce, and Chris Willmore for their comments on an earlier draft of this article, and to Pat Hammond for secretarial support. We alone are responsible for the views expressed.

[1] Members of the College of Advocates, known as Doctors' Commons, i.e., those who practised before the Court of Admiralty and the ecclesiastical courts before 1875.

[2] Using the term 'solicitors' in the wider sense—to include attorneys.

Solicitors have always dealt directly with lay clients and, until recently, had a monopoly of conveyancing[3] and of the conduct of litigation other than advocacy. They also had rights of audience in the lower courts.[4] Barristers have not been permitted to deal directly with lay clients,[5] but they have always enjoyed full rights of audience in all courts, including until recently an effective monopoly of rights of audience in the higher courts.[6] Decisions as to rights of audience, who could appear in which courts, were left by and large to the judges (who had themselves all been recruited from the Bar[7]). It was they who, de facto, created or maintained the Bar's monopoly[8] in relation to rights of audience in the higher courts.

The distinction between the two branches of the profession has never been confined to these matters of access by lay clients, conveyancing, and rights of audience. It was clear during the latter part of the eighteenth century and throughout the nineteenth century that barristers were in general better educated than, and socially superior to, solicitors. Even in the 1870s only five per cent of those admitted as solicitors were graduates,[9] in contrast to some seventy per cent of those practising at the Bar in 1885.[10] Barristers were all based in London and had good access to libraries. Solicitors were more scattered and generally did not have such access. Barristers were the senior branch of the profession, and solicitors, who were regarded as general legal practitioners, went to them for advice as well as for advocacy. As to their relative positions in society, it can be discerned from the novels of Jane Austen that solicitors, at least at the start of the nineteenth century, were "not socially acceptable."[11]

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[3] The art of creating and transferring rights in or over land by deeds. Solicitors obtained their conveyancing monopoly during the early nineteenth century as a quid pro quo for paying stamp duty on practising certificates and duty on articles, i.e., they were granted the monopoly in exchange for paying tax. R. Abel, *The Legal Profession in England and Wales* (Oxford: Basil Blackwell, 1988) 141.

[4] Principally, the magistrates courts and the county courts. In fact, for solicitors to be granted rights of audience in the newly created county courts in 1846 was thought at the time to be a step on the road to fusion.

[5] Since 1989, members of designated professions (other than solicitors) have been allowed to approach barristers directly for *advice*. This is "DPA" (Direct Professional Access). At the time of writing (June 1999) the General Council of the Bar is preparing to launch BarDirect, a new scheme which will enable some other organizations to consult barristers directly, and not via solicitors. This scheme is now in its pilot stage.

[6] The Crown Court, the High Court, the Court of Appeal, and the House of Lords.

[7] There were no solicitor judges before 1949. The Justice of the Peace Act 1949, § 29, enabled solicitors to become stipendiary magistrates. Under the Courts Act 1971, solicitors became eligible to become circuit judges but were *not* eligible to be promoted to the High Court bench. Under § 71 of the Courts and Legal Services Act 1990, solicitor circuit judges became eligible for promotion to the High Court bench—at the time of writing, one solicitor has become a deputy High Court judge.

[8] As Parke B said in 1831: "No person has a right to act as an advocate without the leave of the Court, which must of necessity have the power of regulating its own proceedings in all cases where they are not already regulated by ancient usage." *Collier v Hicks* (1831) 2 B & Ad 663, 672. See also D. Pannick, *Advocates* (Oxford: OUP, 1992) 175.

[9] Abel, n. 3 above, 143.

[10] *Ibid*. 47.

[11] G.H. Treitel, "Jane Austen and the Law" (1984) 100 LQR 549, 550. The vulgarly effervescent Mrs. Bennett in *Pride and Prejudice* was an attorney's (i.e., a solicitor's) daughter.

There was a gradual change over the course of the twentieth century, to the point where the solicitors' profession became almost entirely graduate. As solicitors formed larger partnerships, specialisation within partnerships increased, again facilitated by improved access to libraries. It was no longer true that most solicitors were general practitioners. Many of the best graduates chose to become solicitors rather than barristers,[12] and it could no longer be asserted that solicitors were, as a group, socially inferior to barristers.[13]

The Case for Fusion

Over a hundred years ago, Bagehot described the division of the profession as "an artificial hedge which cramps and hurts clients."[14] There have always been, within the solicitors' branch of the profession, some who have favoured fusion with the Bar, but the Bar, jealous of its status, has resisted. Members of the Bar have argued that a divided profession gives a service which is both better and cheaper than could be offered by a merged profession with, in effect, in-house advocates. The claim that the divided profession provides the lay client with a *better* service is of course difficult to test. The assertion was made, for example, by Lord Shawcross thirty years ago[15] when he said, "It is this very division [of the legal profession into barristers and solicitors] which has perhaps contributed more than any other single factor to the great prestige which English justice enjoys throughout the world."

A divided profession almost certainly delivers a better service some of the time, and it no doubt delivers a cheaper service in some contexts. But there are also occasions when the divided profession delivers a "Rolls Royce" service at very considerable cost. Two questions then follow: First, is this cost greater than would be incurred if the profession were fused; and second, if the cost is greater, is it nonetheless a reasonable cost given the quality of service which is delivered?

Calculating the cost of a divided legal profession is not a straightforward matter. One problem is that circumstances vary from case to case, and across different spheres of litigation. It will generally cost more to employ two lawyers than it costs to employ one, but if two lawyers are needed to carry out a task, it may well be cheaper if one of them is self-employed and, so to speak, on stand-by rather than in some sort of permanent link with the first.

This brings us to the question of overheads. Solicitors in general incur higher overheads than do barristers. But it does not follow from this that

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[12] P. Reeves, *Are Two Legal Professions Necessary?* (London: Waterlowe, 1986) 101-103.
[13] Abel states, n. 3 above, 170, that as late as the Second World War barristers were automatically granted commissions; solicitors were not.
[14] "Bad Lawyers or Good," *Literary Studies* (1898 ed) Vol VIII, 278.
[15] *The Times*, 21 June 1966.

solicitors who are regularly involved in advocacy incur higher overheads than are incurred by those barristers with whom they may reasonably be compared. It is fair to assume that a litigation solicitor, particularly one who appears in court, has lower overheads than a solicitor engaged in, say, conveyancing or probate. It may have suited solicitors, as a group, to take no account of this when attempting to justify their charges to the taxing authorities, or to those responsible for fixing legal aid rates. And it may have suited barristers too. They could justify their own charges as being less than solicitors' charges, without needing to delve too deeply into how either set of charges was calculated.

Recent Developments

Although the middle part of the nineteenth century was a period when fusion appeared to be a real possibility, by the end of the century the mood had changed. Solicitors were generally prosperous and content with their lot. In the decade after the end of the First World War the case for fusion was again argued,[16] but the expansion of the mass conveyancing market between the 1930s and the 1960s vitiated pressure for reform. However, when the solicitors' conveyancing monopoly came under threat in the 1970s some solicitors began to think seriously about challenging barristers' exclusive rights of audience in the higher courts. The Royal Commission on Legal Services, the Benson Commission, was appointed in July 1976 and reported in October 1979.[17] It recommended, in effect, no change to the status quo: no change to the solicitors' conveyancing monopoly and no breaching the Bar's monopoly on higher court advocacy rights. One might have been forgiven for thinking that the Benson Commission's Report would sound the deathknell of reform for another generation.

Not so, as it turned out. Only four years after the Benson Commission's Final Report, Austin Mitchell MP introduced a private members' Bill[18] providing for licensed conveyancers—in effect, a full scale attack on the solicitors' conveyancing monopoly. The Bill had broad public support and, to the lawyers' surprise and dismay, passed its first reading in Parliament. The government then promised that if the Bill were withdrawn, its provisions would be enacted in government-sponsored legislation. Part II of the Administration of Justice Act 1985 provided for the creation of licensed conveyancers, and the first to obtain their licences did so in 1987. The Law Society, the solicitors' governing body, now began to push for extended rights of audience for

[16] Reeves, n 12 above, ch I, esp 6-8.
[17] Cmnd 7648.
[18] The Home Buyers' Bill 1983.

its members, partly at least to make up for the prospective loss of conveyancing work.[19]

The Courts and Legal Services Act 1990 changed the legal basis for the exercise of rights of audience.[20] Under Part II of the Act, the General Council of the Bar and the Law Society were *both* authorised to grant to their members rights of audience before the higher courts. Barristers would continue to enjoy higher court rights of audience, but solicitors could now be granted rights of audience before the higher courts under the Higher Courts Qualification Regulations 1992. Under these Regulations, solicitors could qualify as higher court advocates provided:

(i) they had practised for at least three years and *either*
(ii) they could demonstrate a sufficient level of advocacy experience over a two year period and show also that they had taken an appropriate Higher Courts Advocacy Training Course and passed a Qualification Test in Evidence and Procedure; *or*
(iii) they could show that they had recent advocacy experience before appropriate courts *or* that they had appropriate judicial experience *or* that they had a combination of advocacy and judicial experience.[21]

A solicitor could be granted a higher courts qualification as a civil *or* as a criminal advocate *or* as a combined (civil and criminal) advocate. By September 1998, 689 solicitors had obtained this higher courts qualification, 138 as civil advocates, 428 as criminal advocates, and 123 "combined." Of the 689 who had qualified, 502 had done so by exemption and only 187 by taking the training course and passing the test.

RESEARCH

In 1994, two years after the 1992 Regulations came into force, the Lord Chancellor's Advisory Committee on Legal Education and Conduct (ACLEC), a body established under the 1990 Act, decided to commission research in order to determine the extent to which the granting of rights of audience under those Regulations had contributed to the development of legal services and, if possible, to identify any problems or benefits arising from the changes which were then under way. With colleagues at the University of Bristol[22] we were one of

[19] The Marre Committee was appointed by the Bar Council and The Law Society in 1986 and reported in July 1988. The majority on the Committee, including all of the solicitors and most of the independent members, wanted to extend solicitors' rights of audience; the barrister representatives did not.
[20] See n. 8 above. The 1990 Act removed from judges the right to decide who could appear before them.
[21] This latter is known as the "exemption route."
[22] Ruth Annand, Julia Hasler, and Tim Press.

two successful bidders for this research commission.[23] We conducted our study amongst Bristol solicitors and members of the Bristol Bar, reporting to ACLEC in 1996.[24] In all we interviewed 61 solicitors, 11 barristers, five barristers' clerks, and two judges. All those interviewed were given assurances of confidentiality and anonymity.

Economic Barriers to Solicitor Advocacy

Many solicitors told us that the economics of their business militated against in-house trial advocacy. One partner specialising in defendant personal injury work remarked of trial advocacy:

> It takes time. I can get a couple of lever arch files together or get the clerk to do it and send it off to counsel. I can get a clerk to sit behind counsel. In the meanwhile I can be getting through all this stuff here on my desk. Now if I have to do advocacy I need to prepare for it and because I do not do it very often I probably have to prepare for it more fully. . . . So all that preparation and all that attendance is stuff which can be done by someone else and is preventing me from doing work which my clients want me to do to progress the cases.

For the most part solicitors argued that there would be no cost advantage to the client in their doing trial advocacy—their fees could well exceed those of a barrister—and there would likewise be no cost benefit to the firm. This was a recurring theme:

> Most solicitors are under different pressures during the day. Barristers can say: "I have a trial tomorrow and I need to prepare." On an average day in the office the phone is going, clients are coming in, people are pestering me, whereas barristers do not have that, or their clerk manages it. You have to take into account the time spent in preparation—if a solicitor specifically wanted to do [advocacy] they would have to reduce their caseload . . .. I am conscious of my fee target and the need to put in the chargeable hours.

Another factor which deterred solicitors from doing their own advocacy was that they might waste several hours waiting for their case to come on. The choice of advocate was seldom dictated by any consideration of "rights," but

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[23] The other was a team from the University of Westminster led by Professor John Flood.

[24] R. Annand *et al, The Impact of Solicitors' Higher Court Rights upon the Advocacy Market in Bristol* (Bristol: University of Bristol Press, 1998); G. Davis *et al*, "Solicitor Advocacy and Higher Court Rights" (1997) *New Law Journal* 212-216; G. Davis and R. Kerridge, "Opportunities for multidisciplinary work in the market for advocacy" *Proceedings from the Law Society's Annual Research Conference 1997*, The Law Society.

essentially rested on a judgment of profitability (as far as the solicitor personally was concerned) and cost (viewed from the perspective of the client). This in turn led some barristers to regard the question of solicitors' rights of audience as of academic interest only. As it was put to us by one senior figure in the Bristol Bar:

> Extended rights of audience [for solicitors] are an irrelevance. This is why, in a sense . . . this survey . . . is an irrelevance. I shall tell you why. [Take] the Family Bar. For the last 25 years solicitors have been able to do precisely the same work [as barristers]. [But] there has been a flourishing Family Bar. [Again take] Personal Injury work. For years . . . solicitors have had rights of audience in the County Court. [But] none of the insurance companies, none of the big Union firms, use solicitors in the County Court [as advocates]. They use the Personal Injury Bar.

Our informants generally based their assessments (and their predictions for the future) on an appraisal of the economic self-interest of solicitors, but they tended do this without identifying the various key assumptions which contribute to the costs of litigation (and specifically advocacy) under present conditions. For example, many of those interviewed, solicitors and barristers alike, claimed that it costs less to employ barristers than to employ solicitors because barristers' overheads are lower. They treated this as axiomatic—with need neither for discussion nor proof. One former barrister, who was now working for a firm of solicitors, said that he was charging clients more now for the work which he did on their behalf and yet he was, himself, receiving less:

> I have noticed that when I have done cases of a substantial nature—a two week big industrial tribunal case a few months ago—I tend to bill (or "record," as I am now in the "recording" business) a lot. Far more than it would cost if I were doing it as barrister. Far, far more.

Another barrister informant observed:

> Solicitors have to employ more staff than we do. . . . Most assistant solicitors still have their own secretary . . .. So [in solicitors' firms] you get this high ratio of employed staff [to fee earners].

Yet, why should this be? If the work is the same, why should different lawyers incur different overheads in respect of it?

Our Bristol interviews revealed that it can be extremely difficult to calculate the cost of a decision to brief a barrister given the many complicating factors. But in general employing freelance counsel adds to the cost if he or she is asked to undertake a relatively straightforward task, such as drafting

pleadings. Experienced clients, such as insurance companies, develop an appreciation of the additional costs which are likely to be involved and so discourage resort to counsel unless absolutely necessary. One solicitor specialising in insurance work put it as follows:

> Insurers tend not to like us to run off to counsel for every jot and tittle, and again that is driven by cost considerations, because obviously our insurers are very mindful of what it is going to cost them and they expect to get a service out of us in a cost-effective way.

This same solicitor acknowledged that when representing the plaintiff rather different considerations came to the fore:

> Plaintiff [work] is entirely different, because in plaintiff [work] the motivation, unfortunately . . . is maximising costs, ultimately, at the end of the day. And the way you maximise costs, it is entirely cynical to say it, but the way you maximise costs, because of the way the taxation system is set up, is by doing as much work as possible on the case . . . So in those cases you are encouraged to go to counsel more because you know that you will be paid for counsel's work and you cannot be criticised if you rush off to counsel and get counsel to settle all pleadings and to advise you at all appropriate stages.

It seems from this that there may be occasions where the demands of effective workload management, and of profitability, cut across the client's economic interest. This is not of course to deny the value in some instances of having a second opinion, or of counsel's role in "managing" a difficult client in that client's own interest.

Looking to the Future

Reviewing our study, we were struck by the extent to which practitioners were preoccupied with their day-to-day tasks and responsibilities. There was a general reluctance to become involved in long-term planning, let alone to calculate, or even to consider, the long-term effects, and cost, of any root and branch reform of the profession. Most of our informants thought that change was inevitable: the problem was that they could not be sure of the form which any change might take, and it was difficult to plan for changes which might or might not occur.

A key dimension of this uncertainty, for all those practitioners who undertook work which was paid for out of public funds, concerned the possibility of change to this funding base. For example, an equalisation of the rates payable to solicitors and barristers (particularly, as would almost certainly be the case, a *downward* equalisation) would influence the allocation of

legal work in an immediate and decisive way. One can imagine that changes in the type of contract offered by the Legal Aid Board to firms of solicitors will also have a major impact. At the time we interviewed them, practitioners were all too aware of possible changes in public funding arrangements. They knew that these might prove crucial, but felt that they had no option other than to wait until the changes were upon them before attempting to respond to the new funding environment.

We conclude from this that piecemeal reform of rights of audience, or in any way tampering with the existing, two hundred year old system, will not work. If we are to have reform, then the entire structure needs to be examined. The debate should not be focused exclusively upon advocacy rights, but instead needs to be about the whole shape of the legal profession, about employed and self-employed lawyers, about advocates and non-advocates, about generalists and specialists, about legal education, and about judges.

"THE WAY AHEAD"

Thirty years ago another Labour Lord Chancellor, Lord Gardiner, when setting out to attack the idea of a fused legal profession, poured scorn on the idea that the profession could remain divided while at the same time solicitors obtained full rights of audience. Having tried to make fun of Michael Zander for being young, and Robert Stevens for being American,[25] he dismissed higher court rights for solicitors in these terms:

> I have met one or two solicitors who have said: "I am all against fusion. All I want is that solicitors should have a right of audience in the higher courts and be eligible for High Court and county court judgeships." This, of course, is nonsense. It would mean that solicitors could do everything a barrister can do, while the barrister would remain unable to do most of the things solicitors do. On those terms, what possible object would anyone have in being a barrister? Every lawyer would be a solicitor—then he could do everything.[26]

Now we find that an earlier Lord Chancellor's "nonsense" has become the present government's core proposal.[27] In June 1998, a little more than a

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[25] Lord Gardiner's treatment of Zander and Stevens is an example of the way in which some members of the Bar, and their supporters, have seen fit to conduct this debate. In fact Stevens was not an American, but an Englishman who at the time taught in America. It is not clear why his views should have carried less weight because he resided outside the jurisdiction.

[26] (1970) 23 *Current Legal Problems* 1, 3-4.

[27] This is, presumably, an example of "modernisation."

year after the general election and change of government, the Lord Chancellor's Department published *Rights of Audience and Rights to Conduct Litigation in England and Wales: The Way Ahead* (hereinafter referred to as *The Way Ahead*). This document sets out the government's proposals in respect of rights of audience. It claims that the 1990 Act "achieved virtually nothing,"[28] and at another point refers to its having had "a disappointingly limited effect."[29] It suggests "the time has come for more radical change."[30]

In fact, *The Way Ahead* is not a radical or far-sighted document. The core proposal is contained in paragraph 3.2: "All barristers and solicitors, including those in employment, should obtain full statutory rights of audience on call to the Bar or on admission to the Roll of solicitors." It is envisaged (paragraph 3.3) that the professional bodies will impose appropriate additional training requirements, such as pupillage or a higher court qualification, on those admitted to the profession before they be allowed to exercise their full rights of audience.

It is not clear whether the government expects the removal of formal barriers to higher court advocacy to open the floodgates to solicitor advocates in those courts. That is the tenor of some of the document, although at other points, for example paragraph 2.16, it would seem that the government does not expect granting solicitors full rights of audience to have a dramatic impact. Nowhere is an explanation offered as to *why* the 1990 Act has resulted in such a modest take-up of higher court rights, or why things should be different in the aftermath of these proposed reforms.

The Response of the Professional Bodies

In September 1998 the Law Society and the General Council of the Bar each responded to *The Way Ahead*. The Law Society clearly felt that it was swimming with the tide of government intentions, while the Bar felt itself to be swimming against. So it is that the Law Society's response runs to just five pages. The authors of the Law Society's response take it as read that it is the "cumbersome statutory machinery" which has effectively prevented solicitors from taking up their higher court rights. They endorse the government view that all barristers and solicitors should acquire full rights of audience on qualification, with any additional training requirement being a matter for the relevant professional bodies.

The Bar in its response adheres to the well-established courtroom princi-

[28] *The Way Ahead*, i.
[29] *Ibid*. 4.
[30] *Ibid*. ii.

ple that a weak case needs to be argued with the same vehemence as a strong one, but at greater length.[31] There is also a tendency to rely upon unsubstantiated assertion. For example, it is stated that:

> In Belgium, the Public Prosecutor's Office conducts prosecutions on behalf of the State . . . The Public Prosecutor's Office is regarded by the private profession as attracting second rate lawyers and each profession distrusts the other . . .. The Danish and Italian criminal justice systems provide similar examples.

Whoever wrote the Bar's response did not confine himself to traducing foreigners. The document contains the following passage:

> Indeed, some firms of solicitors have made no secret of their determination to exclude barristers from advocacy on behalf of their lay clients wherever and whenever possible, and without any regard for the need of the lay clients for advocacy of a specialist quality and at a lower cost from the Bar, including some of the largest law firms.

Then there are the allegations about over-charging. Thus:

> Solicitor Advocates tend to be much more expensive than barristers. By way of example, there was a recent arbitration, in which a team from a large firm of solicitors incurred costs said to be more than seven times the costs incurred by the opposing traditional team of leading and junior counsel and solicitors.

"Said" to be? Said by whom? If a team of solicitors incurred costs seven times higher than the opposing lawyers, then, in the absence of special circumstances (and the Bar document is worded in such a way as to imply that there were none), the solicitors in question were either staggeringly incompetent or a bunch of fraudsters. This, with due respect to the Bar, is not an "example."

The main thrust of the Bar paper rests on the claim that the present limitations upon rights of audience, far from being anti-competitive, are necessary to ensure fair competition between advocates. Secondly, it is claimed that to remove the Bar's monopoly (or near monopoly, as it now is) of advocacy in the higher courts would be to increase the power of the executive. Sidney Kentridge QC has described the proposal that the Lord Chancellor effectively determine rights of audience as a "quiet constitutional revolution."[32] For 700 years, he says, authority over advocates has resided in the

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[31] Nine times the length, in this instance.
[32] (1998) *New Law Journal* 1346.

judges; the government's proposals would erode that authority and would likewise erode the independence of the Bar. Kentridge, a South African, draws a comparison with the apartheid regime in South Africa which, he says, repeatedly sought to place the Bar under its control; this was resisted in the knowledge that the independence of the bench was inextricably linked with the independence of the Bar.

The constitutional point is worthy of debate, although if the government is intent on delivering a State-controlled judiciary, surely it will not be sufficient for the purpose simply to permit lawyers employed by the Crown Prosecution Service to act as advocates in the Crown Court. It seems to us therefore that the constitutional argument is slightly contrived. Obviously the Bar is worried about the economic threat which will accompany any decision to grant employed lawyers full rights of audience, and concerned also that this may in due course affect the whole structure of the legal profession. It is for this reason, we suspect, that the Bar is inclined to confuse arguments relating to employed lawyers with consideration of the rights of audience of solicitors in private practice. As far as the former are concerned a revealing footnote to the Bar's paper reads: "It is only fair to observe at this point that the employed Bar does not agree with much of what is argued in this and the succeeding chapter." In other words, the Bar was unable to present a united front on this issue.

AN ALTERNATIVE APPROACH

The problem with *The Way Ahead* is that its focus is too narrow. It appears itself to be an attempt at tinkering, rather than a well thought out plan of reform. What is needed at this point is for the various dimensions of change to be looked at together. This should not be a debate solely about advocacy rights, but rather it should encompass the future organisation of the legal profession, including self-employed lawyers, employed lawyers, advocates, non-advocates, general practitioners, specialists, and of course judges. It is about whether there should be restricted access by the public to certain classes of lawyer. And it cannot help including a discussion of legal education.

The current debate has started in the wrong place. There appears to be an assumption that advocacy is, and should be, at the centre of things. There is no reason to assume this. Advocacy is not the only specialism within the legal profession—it may not even be the most important specialism. Of course advocacy is a special skill, but it may or may not be combined with other specialisms; and the legal profession as a whole needs to consider not only how it treats specialist advocates, but how it treats all the other spe-

cialists, as well as the practitioners who are to some degree generalists. What is missing from the present discussion is any consideration of the place of the specialist who is not an advocate, or of the advocate who is not a specialist (other than in advocacy).[33]

If we take advocacy, in the broad sense of the term, to be one specialism within the profession, but a specialism which cuts across many others, it is possible to divide lawyers into four groups:

(i) general practitioners, with no claim to specialise in any particular field of law, or in advocacy—although they may do some advocacy;
(ii) specialists who are not advocates—specialist insolvency lawyers, company lawyers, tax lawyers, and so on;
(iii) specialist advocates—not confining themselves to any one branch of the law, but skilled in pleading and forensic advocacy; and finally
(iv) specialist advocates who also specialise in a particular branch of the law—for example, specialist insolvency or company lawyers who are also forensic advocates.

Two questions follow from this four-fold division. The first is:

> What requirement, if any, should there be upon a lawyer claiming to be a specialist (whether a specialist who is not an advocate, or one who is *only* an advocate, or one who is both an advocate and a specialist in a particular branch of the law) that he be able to demonstrate or prove that he is a specialist?

And the second is:

> Should access by the lay client to any of the specialists be by way of referral only, or should the lay client be able to obtain direct access to any or all of the specialist lawyers?

The rules which now govern the relationship between barristers and solicitors appear to assume, tacitly, that all barristers are not only specialist advocates but are also capable of giving advice on any branch of the law. Yet this cannot possibly be true. Obviously most barristers, after they have qualified, specialise to some degree, but there is no requirement upon solicitors to brief a barrister who is expert in the area of law in question; nor is there

[33] We recognise that most lawyers, both barristers and solicitors, claim to specialise in particular fields of law. But it is very difficult at the present time to decide how much weight to attach to these claims. The cynic might say that the true test of specialisation is a refusal to take on cases other than in a narrow area. Meanwhile it seems probable that the vagaries of court listing, and economic considerations generally, will encourage many barristers to be "flexible."

any objective way of testing whether a given barrister is expert in a particular field.

The debate which is taking place at the present time is a debate about the relationship between specialist *advocates* and other lawyers. It appears to assume that lawyers in categories (i) and (ii) above should be treated as one group and those in categories (iii) and (iv) should be treated as another. Yet some of the lawyers in group (ii) may have much more in common with group (iv) than they have with group (i); and some members of group (iii) may be more akin to group (i) than they are to group (iv).

Those who argue that the legal profession should remain divided into two branches often cite the medical profession by way of analogy. For example, in the Bar's Response to *The Way Ahead*, a footnote states: "There is nothing unique about the legal profession in this division of specialisation. The analogy of the medical profession comes readily to mind." It is not clear what this is supposed to mean. The medical profession is *not* divided into two. There are it is true general practitioners and specialists, but these specialists are specialist in something in particular: "specialist" is not a meaningful label in itself. There are a whole series of specialisms. Furthermore, a doctor may be at the same time a general practitioner and a specialist. This is perfectly acceptable provided he has qualified as both, provided he keeps up with the necessary continuing education requirements in both, and provided he abides by the referral rules.[34]

The closer the medical analogy is examined, the less support it gives to the notion that medical and legal practitioners organise themselves along similar lines (the implication being, one assumes, that if the two professions behave in similar ways this organisational arrangement is bound to be in the best interests of the patient/client). Would-be lawyers, whether intending barristers or solicitors, can begin their training by taking degrees in disciplines other than law, followed by the Common Professional Examination, the course for which takes one year. Then they must decide which branch of the profession they wish to enter. They have a further year before they take their (separate) professional exams. After that the barrister must undertake a year's pupillage[35] and the solicitor a two years' training contract. Once a barrister has qualified, he is deemed to be learned in all branches of the law and when in court he wears a wig, the uniform of the eighteenth-century gentleman.

If these rules were transposed from law to medicine, would-be doctors would be able to begin by taking degrees in disciplines unconnected with medicine, and would then take a one-year Common Medical Examination. At

[34] A doctor who is both a GP and a specialist is not able, as a GP, to refer patients to himself as a specialist.
[35] The barrister qualifies *before* his pupillage and can even appear in court half-way through the pupillage.

the end of that year they would decide whether they wanted to be specialists or general practitioners. They would then pursue separate courses, each of which would last a year. They would then undertake apprenticeships, one year for specialists and two years for general practitioners. When they had qualified, the specialists would, at least in theory, be specialist in everything and, in order to demonstrate their status, would, when in hospital, wear some item of eighteenth-century clothing or carry something which would have been carried by an eighteenth century doctor—perhaps a jar of leeches.

It is not our intention in this article to discuss whether the minimum period of training for lawyers in England at the end of twentieth century is sufficient. There is good reason to suppose that it is not, but that debate can be conducted elsewhere. What does fall to be discussed here is (a) whether there should be any formal division in the legal profession; (b) if so, what sort of division it should be; and (c) at what point practitioners need be assigned to one or other group.

We want to pursue our suggestion that the natural division within the legal profession, if there is to be a division, is into four: (i) general practitioners; (ii) specialist lawyers who are not advocates; (iii) specialist advocates not choosing to specialise in any particular branch of the law; and (iv) specialist lawyers who are also advocates. Specialist lawyers must, of course, subdivide because each is a specialist in his own particular sphere. And it is no good lawyers simply *asserting* that they are specialists—they must somehow be able to demonstrate it.

What is surprising about the Bar's input into the present debate is its emphasis on advocacy and its apparent unwillingness to recognise the above divisions. The Bar's response to *The Way Ahead* contains the following statement: "It [the Bar] is a referral profession, essentially of specialist advocates." It is as though doctors were to suggest that there is only one specialism in medicine, and that specialism is surgery (and that there is no need to distinguish between different kinds of surgeons). What about all those at the Bar who are not, essentially, advocates? Specialist advocates may outnumber those barristers whose primary role is drafting or giving advice, and Rumpole may make better television than a day in the life of a tax silk, but the advisory role must at least be considered.

If it is accepted that the legal profession sub-divides naturally into four, rather than into two, how ought it to be organised? It would seem reasonable for *all* lawyers to be educated together, and to remain unified until there is good reason for them to sub-divide. The current division is an historical leftover from a world in which barristers and solicitors came from different social backgrounds and did not mix. It has become a means of keeping the two branches of the profession separate, but the two-fold division has

become more and more difficult to justify. Indeed, it may well not survive the reforms which have already been proposed. If the legal profession is in reality already sub-divided along the lines we suggest, then it makes sense for *all* lawyers to undertake a common training, in effect to enable them to become members of group (i). Thereafter, those who wish to become members of groups (ii), (iii), or (iv) would undertake further training. This might include specialist practical experience, or the taking of exams, or some combination of the two. So someone who claimed to be a specialist advocate would have to show that he had a certain amount of experience of forensic advocacy, and someone who claimed to be a family lawyer would have to demonstrate special knowledge of family law.

The question then arises as to which group(s) should grant direct public access to their members and which should give access by referral only. Clearly, access to members of group (i), the general practitioners, must be direct. Access to members of groups (ii), (iii), and (iv) could, in theory, be direct or by referral. At present, access to members of these three groups depends on whether they are solicitors or barristers. Most, but not all, members of group (ii), the non-advocate specialists, are solicitors. Most, but not all, members of group (iii), the non-specialist advocates, are barristers. Almost all members of group (iv), the specialist advocates, are barristers. Access, whether direct or by referral, can only be considered in the light of any proposed change to the formal divisions within the profession. There could be a four-fold classification with different titles for the four sorts of lawyer, but this seems over-complicated. Our suggestion would be that lawyers in categories (ii), (iii), and (iv) be permitted to choose whether or not to grant direct access to the lay client. We would expect that almost all of those in category (iv) would choose to restrict themselves to referral only, but that those in categories (ii) and (iii) might choose either direct access or referral. It does not necessarily follow from this that those who chose to be members of the referral profession would be called "barristers," or that they would have to be organised as barristers are now organised, but it might be simplest if they were.

To sum up, the profession would be divided into four groups and members of three of these groups would be able to choose whether to be (direct access) solicitors or (referral only) barristers. Apart from the question of labelling, we envisage at least four key differences from the present arrangements. First, all lawyers would undertake an initial common training—this would promote freedom of movement within the profession. Second, a lawyer could *only* enter category (ii) if he had demonstrated (by examination or otherwise) special expertise in some branch of substantive law; he could only enter category (iii) if he had demonstrated (by examination or otherwise) special expertise in forensic advocacy; and he could only enter category (iv) if he had demon-

strated (by examination or otherwise) special expertise in some branch of substantive law *and* in forensic advocacy. Because of this, there would be a clear distinction between categories (ii), (iii), and (iv). A lay client, or another lawyer, could easily discover whether lawyer X was in (say) category (iii) or category (iv). A lawyer could not pretend to be an expert in an area of the law of which he knew little. Third, those who had entered categories (ii), (iii), or (iv) would have a choice. They could become members of the referral Bar or they could remain as direct access solicitors. The distinctions within the profession would be easier to understand, both for the public and for other lawyers. The pretence, in so far as it still exists, that a newly qualified barrister outranks a long-qualified specialist solicitor would be gone. The distinction between members of the profession would be one of substance. Fourth, it would be easy for someone in categories (ii), (iii), or (iv) to move from the direct access part of the profession to the referral part, and vice versa. This should promote economic efficiency.

It is almost certain that if the profession were (formally) divided into four, rather than two, a major effect of the rearrangement would be to reduce the size of what might be termed the "generalist Bar." Those who wanted to refer matters to freelance advocates, and who were able to distinguish, relatively simply, between generalist advocates in category (iii) and specialist advocates in category (iv), would tend to choose the latter. So those lawyers in category (iii) would have an incentive to move into category (iv). That is a further major change to which the other changes would lead.

OTHER KEY ASPECTS OF THE LEGAL ENVIRONMENT

There are some aspects of legal work which have a bearing upon the organisation of the profession, but whose importance is not necessarily recognised by outsiders—or, indeed, by the government. There are three issues which we regard as central, each of them raised (unprompted) in the course of our interviews with practitioners in Bristol, but none of which figures prominently in *The Way Ahead*. These three topics are: legal education, court listing, and judicial specialisation.

Legal Education

A generation ago the Ormrod Committee on Legal Education[36] pronounced itself in favour of a common basic training for would-be barristers and solicitors. By and large the solicitors and barristers whom we interviewed in Bristol were in favour of joint training. One head of chambers commented as follows:

[36] Set up in 1967; reported in 1971 (Cmnd 4595).

> I think it [joint training] is absolutely essential. That is ultimately how I see the Bar being maintained . . .. The way to deal with it is to fuse the educational system, make people do both sides up to a point and then let those people who obviously have the capability emerge. They will have demonstrated their capabilities and be sure what they want to do.

Whilst the barristers whom we interviewed all favoured the retention of a separate Bar, many were in favour of joint training. Some took this further than others: All who raised the point favoured at least joint law school training on what might be termed the Northern Ireland model;[37] some went further and argued for joint training contracts/pupillage; and some barristers envisaged a future in which all lawyers underwent common training and practised on a non-referral basis for a period—say, five years—following which some would decide to practise as barristers. This is, of course, consistent with our proposal for a four-strand legal profession. Joint initial training would be the logical starting point for that, with all newly qualified lawyers beginning their careers in category (i) before they gained experience and, in most instances, obtained further qualifications and became identified as specialists—with some, of course, becoming specialist advocates. One Bristol barrister recalled for our benefit his embarrassment when he appeared for the first time before the Court of Appeal and his lay client commented adversely on his youthful appearance. Appearance is not everything, but he had thought at the time, and still thought twenty years later, that the client's implied criticism of a system which had projected an almost newly-qualified barrister into the Court of Appeal carried considerable force. It is difficult to defend a system which erects formal barriers to protect the lay client from representation by incompetents, but which then positions these hurdles arbitrarily.

Court Listing

It was suggested to us by Bristol solicitors that one reason why the 1990 Act had achieved so little was the lack of any attempt to deliver more fixed hearing dates, or even to regard this matter as a priority. The failure to timetable cases defeats the office-based advocate no matter what court is involved. Giving office-based lawyers rights of audience, but without changing the way in which cases are timetabled, meant that the 1990 Act was doomed from the outset.

It was common ground amongst our informants that barristers can be more flexible than solicitors in responding to revised court dates. Solicitors

[37] In Northern Ireland would-be barristers and solicitors undertake the same one-year professional postgraduate training course, following which they diverge.

find the present listing arrangements hugely inconvenient. Many conclude that cases without a fixed date must be assigned to counsel. Solicitors need to be able to predict when they will be required at court. It is not so much a question of court listing defeating solicitors' higher court advocacy rights, as of the present listing arrangements in *all* courts tending to favour the full-time advocate over practitioners who are primarily office-based. One assistant solicitor referred to her local County Court in these terms:

> The Court has even started stamping summonses with this outrageous little phrase "Notice of an Appointment does not guarantee you a Hearing." Imagine you have an assessment of damages hearing, for example, and you have got two counsel down from London. You have got the clients, you have done all the bundles so it is all up together, and then you go along and sit around for four hours only to be told you are out of the list! I mean, who is going to pay for that wasted cost?

This point was taken up by the chief clerk of one of the Bristol chambers:

> What tends to happen is that the civil servants who run the listings are obliged to keep the judges busy. They have statistics and they have to fill in their little boxes over a year, term, week, whatever it is. They are performance measured on how busy the judges are and how full the lists are . . .. Of course, the result of all that is that they all over-list and you will get three or four cases listed in a court for a day. Well, everyone knows the judge cannot hear the lot . . .. The result . . . will be that all the witnesses will be called forward. You may get medical experts from all over the country turning up and then they have to go away. So when people talk about the cost of litigation, it is not necessarily the lawyers' fees, it is also all the costs thrown away on all these aborted hearings.

A more rigid system would operate in favour both of the office-based advocate, and of the freelance advocate who is also a specialist lawyer. This is because the present arrangements often lead to last minute substitution, favouring the quick thinker who is not *too* specialised. Broadly speaking they encourage the retention of the generalist Bar.

Solicitors identified two other deficiencies in the present listing arrangements. First, they claimed that the *quality* of advocacy suffers through last minute changes; and secondly, they argued that one reason barristers fail to deal promptly with papers, or fail to attend Plea and Directions Hearings, is that they cannot be certain that they will still have the case at trial.

Given that it will never be possible to timetable all cases in advance with any degree of exactitude, *someone's* time has to be wasted; someone has to be inconvenienced. So who should this be? Why should it not be the judge? Or to put this another way: why is it preferable to inconvenience, say, six

lawyers plus four expert witnesses rather than one judge? Again, the answer seems to be based, at least in part, on an historical accident. From the mid-nineteenth century, when the levels of court fees were placed on a statutory footing, much of the actual cost of providing court services was excluded from the calculation of court fees. It was only in 1994 that the then Lord Chancellor suggested that judicial salaries no longer be excluded from the definition of recoverable costs.[38] A Discussion Paper, *Access to Justice—Civil Court Fees*, published by the Lord Chancellor's Department in February 1998, went as far as to suggest the possibility of charging litigants on a "pay-as-you-go" basis with daily hearing fees. This suggestion has not been implemented, but there are now going to be separate fees set for each of the main stages in civil litigation.[39] The movement is clearly towards charging litigants the true cost of the service provided. But a logical corollary of treating litigants as paying customers is that their interests be given greater weight. Indeed, they might be given the opportunity to pay *extra* to ensure that they have fixed dates and times. Some litigants might find that this provided them with a considerable overall saving.[40]

This is relevant to the future shape of the profession because the so-called "returned brief" discourages early preparation and squeezes out the subject specialist in favour of the generalist advocate. In our terms it favours category (iii) lawyers over categories (ii) and (iv). A system with fixed hearing dates, or more fixed hearing dates, would alter the balance of the profession. It would be part of a trend, encouraged by the other reforms which we propose, favouring the subject specialist at the expense of the generalist advocate.

A Specialist Judiciary

Judicial specialisation is relevant to practising advocates in at least two ways. First, senior members of the Bar, many of whom already sit as Recorders, contemplate the possibility of full-time judicial office. The extent of judicial specialisation may well affect their view of the attractiveness, or otherwise, of a career on the bench. Secondly, all advocates have a direct interest in the quality of the judge before whom they are to argue a case, and quality is related, at least in part, to experience. Most of the barristers whom we interviewed favoured a greater degree of judicial specialisation, arguing that when specialist judges were appointed the impact was wholly positive. This was one observation:

> The development [of the Bristol Bar] in the last ten years has been extraordinarily positive and fast. It is largely down to specialist judges sitting,

[38] Cmnd 2509.
[39] See *Civil Court Fees,* Consultation Paper, published by the Lord Chancellor's Department in November 1998.
[40] E.g., where the time of expert witnesses, as well as lawyers, could be saved.

> because in a sense the Bar is irrelevant. You can always bring the Bar to places. You can take me to Cardiff or to Newcastle, or more importantly, you can bring the whole of London down to Bristol, and they will come. But you must have a judge in whom lawyers have confidence . . .. Once you have got the perception that there is a specialist judge, or judges, sitting, all else follows. That's what's happening in [a named legal area]. It started off with a judge who was a qualified success, then another, then a particular judge who is a tremendous success. The jurisdiction has blossomed to such an extent that the quality of applicants to chambers for this sort of work has also shot up.

The strongest support for a specialist bench came from middle-ranking barristers and solicitors who had experienced the benefits of having a specialist in their field sitting in Bristol.[41] Practitioners know which judges are competent in particular fields. If they, the solicitors and barristers, are specialists they expect judges to be specialists too. The reputation of any legal centre depends more on the judges than it does on the local Bar.

It has generally been perceived that the Lord Chancellor's Department does not favour judicial specialisation. For example, Recorders have not generally been allowed to stipulate that they will only try certain types of case. But now, we are advised, the Department supports solicitor advocates provided they are specialists. The corollary, surely, is to encourage judicial specialisation also. A generalist Bar feeds a generalist judiciary, and a generalist judiciary gives comfort to a generalist Bar. This, then, is the third nettle that needs to be grasped if the Lord Chancellor's Department is serious in its intention to reform the legal profession.

FUTURE DEVELOPMENTS

As we draft this article (June 1999), the Access to Justice Bill, which began life in the Lords, has just been passed through the Commons. The Lords made an important amendment to the original draft Bill, deleting clause 31, the clause which gave rights of audience to employed advocates.[42] The Commons then reinstated this clause.[43] It appeared from the discussions in the House of Commons Select Committee that some members of the Bar, particularly those who had links with commerce and industry, were in favour of its reinstatement. The Bar as a whole seems not to be unit-

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[41] Judges have been known to express a different view. See, for example, Sir Neville Faulks (a retired judge) in *A Law Unto Myself,* who wrote that it was "fun [being a vacation judge] trying Chancery matters of which I had no experience at all." (London: Kimber, 1977) 126-127, 137.

[42] Employed advocates include, of course, members of the Crown Prosecution Service.

[43] It is now clause 36.

ed on this issue, and although it is possible that the Lords will once again delete the clause when the Bill goes back to them, this now seems unlikely. If the clause stands, it is bound to affect the workload of some members of the self-employed Bar.[44]

Whatever the fate of this clause,[45] it will not be the end of the matter. The profession as a whole will come under increasing pressure to demonstrate that it is delivering a cost-effective service. This pressure will come both from the government paymaster and from the private client. There is also bound to be increased competition from other professional groups. There is a clear need, therefore, to create a structure which is demonstrably in the public interest. Two key elements in this are *flexibility* and *transparency*, and these lie at the heart of our proposal.

Lawyers, both solicitors and barristers, made a series of errors a generation ago when they thought that they could preserve their restrictive practices and maintain their monopolies. They were wrong. The profession is probably less self-confident now, and the future is uncertain. Many praiseworthy features could be lost if there is a drift towards unification. A unified profession would probably be dominated by large firms employing in-house advocates. The referral arm of the profession would be squeezed and could eventually disappear. Costs would probably rise and the client base would shrink. The public, in other words, would be the poorer. This does not have to happen, and we have outlined a possible way forward.

[44] The Bar Council's proposal to launch BarDirect—a scheme whereby some organisations may be able to instruct the Bar without going through solicitors (see n 5 above)—appears to be, at least in part, a response by the Bar to what it considers to be encroachments on its territory. This *could* be the slow route to fusion.
[45] The Access to Justice Bill received Royal Assent on 27 July 1999, after this article went to press. Clause 36 of the Bill is now section 37 of the Access to Justice Act 1999.

CRIME IN AMERICA: A RESPONSE TO EUGENE METHVIN

Douglas A. Trant*

The Quarterly *recently published "How We Can Cut Crime in America,"[1] an address delivered by Eugene Methvin at the 2000 convention of the International Society of Barristers. In that address, Mr. Methvin identified the Warren Court's "due process revolution" and liberal theories about crime and its remedies as factors contributing to the increase in crime that began in the 1960s. One of his listeners, Douglas Trant, taking issue, wrote the following response.*

Eugene Methvin brings a particular perspective to the issue of crime in America from all his years as a police reporter, and I respect him for that. I, as a criminal defense lawyer, have a very different perspective on the "war on crime." In his presentation, Mr. Methvin attributed much of the increase in crime to soft federal judges and a liberal philosophy toward the criminal justice system. I appear on a regular basis before federal judges at the district and circuit levels. I also regularly petition our Supreme Court for review of criminal cases. I can tell you that none of those judges is soft on crime. In fact, because of legislation that Congress has passed in recent years, the hands of our federal judges are often tied as to what they can do—particularly in sentencing. But their vigorous enforcement of our constitutional rights certainly does not indicate that they are soft on crime.

Mr. Methvin, implying a connection to disregard for law, reminded us that the Supreme Court under Chief Justice Earl Warren ruled out posting the Ten Commandments in classrooms. One need only read the first amendment to the United States Constitution to see plainly what our Founding Fathers intended. They meant for church and state to be separate. One can come to no logical conclusion other than that no state-operated institution should promote religion in any way. The Founding Fathers knew firsthand of the religious persecution of minorities in England. We should remember the lesson they learned and not permit religious doctrine to be promoted in government operated facilities. How is a Muslim or Hindu to feel when he sees the Ten Commandments posted in his school? How is he or a Jewish child to feel when the principal prays over the public address system "in Jesus'

* Knoxville, Tennessee; Fellow, International Society of Barristers.

[1] Methvin, *How We Can Cut Crime in America*, 35 INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY 401 (2000).

name"? I was sent to a fundamentalist Baptist elementary school when I was a child and I know from that experience what religious discrimination can be. Our school constantly talked of Catholics as nothing less than sinners. They told us that Blacks were pagan, so that certainly their religions were as well. The potential for abuse and discrimination and persecution of religious minorities by governments in schools and other institutions is so great that the only way it can be prevented is, as the Founding Fathers intended, to keep church and state totally separate. I submit that the exclusion and persecution of religious minorities promotes crime and that religious tolerance makes crime much less likely.

I find myself amused by Mr. Methvin's allegation that *Miranda v. Arizona* has increased crime. How could a decision increase crime when it merely mandates that law enforcement officers advise one of his constitutional rights, to which we are all entitled, before he is interrogated after he is placed into custody? As we all know, the failure to advise one of his Miranda rights does not invalidate his arrest, but merely invalidates any statement made pursuant to law enforcement interrogation while in custody. I have had occasion to know many police officers over the years, as well as represent dozens of them. I know that most of them feel that they are doing a better job by making sure that one understands his constitutional rights before he makes a statement to them.

Mr. Methvin alleged that liberal theories about crime and its remedies have contributed to an increase in crime. To say that we should abandon rehabilitation is not only fatalistic but counterproductive to our society. William Penn and, later, Thomas Jefferson and others of our Founding Fathers knew that punishment should bear a direct relation to the crime committed and that we should try to rehabilitate criminals whenever possible in order to make them productive citizens who will enhance society when released from prison. There is no question that some people need to be restrained forever, and there is no question that the victims of crimes—indeed, society itself—need to see justice done. But it is also very much in the interests of society to try to make the prisoner want *not to* commit more crimes upon release from prison and want *to* be a productive, law-abiding citizen. Rehabilitation is challenging, but to dismiss it as impossible guarantees failure.

Mr. Methvin identifies population increase as a cause of increased crime, stating that "[t]he proportion of criminals in any year's birth cohort remains about constant; the predatory minority stays about the same size."[2] That is, the same percentage of criminals in a larger population means more crime.[3]

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[2] *Id.* at 402.

[3] The growth is compounded, he suggests, by growth in the frequency and violence of offenses and in the power of their weapons. *Id.*

Notably lacking from his analysis of the causes of crime are economic causes. The disproportionate presence of racial minorities in his "predatory minority" can lead all too easily to racist theories, when, in fact, the base cause of that disproportion is not racial but economic. Is it any wonder that many young black men look around their poor neighborhoods and see that the only people with money are the drug dealers, who drive nice cars, wear nice clothes, and are accompanied by beautiful women? What does such a young man have to lose, he thinks, by stepping in place of one drug dealer who goes to jail, to pick up his business. At least he is allowed to have a short period of living a good life before he is caught. If we are to dissuade such young men from dealing crack cocaine, we must have other, viable ways for them to become successful and be part of the American dream.

Mr. Methvin criticized violence in television and identified it as a cause of increased crime. We do live in a free market society and the market determines the success of the product. I fully agree that some television programming is not suitable for children. The job of monitoring what children watch, however, is the parents' responsibility. We should not step in, either as a society or as a government, to try to replace the parents' role. On the other hand, I do agree with Mr. Methvin that we need to try to teach parenting skills to those in dysfunctional homes as early as possible. By the time many of the children from these homes reach our school systems, much less when they might reach juvenile court, they are lost to any successful attempt at rehabilitation. To get to them very early on and help their families to be law-abiding citizens who believe they have a vested interest in the American dream is the only answer.

In his allegation that technological advances in chemistry and firearms are a fifth force that has stimulated juvenile crime, he says, "Chemistry brought crack cocaine, the most addictive drug ever invented, to our city streets."[4] Mr. Methvin apparently has never researched what simple chemistry it takes to make crack cocaine. All one needs is cocaine in its powder form, water, and baking soda. No "advanced technology" is required; any third grader can make it. Even more important is his allegation that crack cocaine is more addictive. The facts simply do not bear that out. Even though crack cocaine enters and leaves the system more quickly, it is no more powerful nor any more addictive than cocaine in its powder form.

Crack cocaine, however, does increase incarceration rates because of the faulty reasoning of Congress in enacting minimum/mandatory sentences. Minimum/mandatory sentences require severe prison sentences for first-time nonviolent drug offenders, in both the federal system and many state

[4] *Id.*

systems. As an example, one who possesses five grams or more of crack cocaine receives a minimum/mandatory sentence of five years in the federal system. There is no parole; the individual defendant must serve at least 85 percent of his sentence before being eligible for release. He then has a minimum/mandatory period of supervised release following his prison sentence. Five grams of crack cocaine is less than one-fifth of an ounce. To qualify for the five-year minimum/mandatory sentence of powder cocaine, the amount must be a hundred times greater, that is, 500 grams. Is it an accident that the form of cocaine of choice for African-Americans is usually crack cocaine while white Americans usually prefer powder cocaine?

We need to reform our sentencing schemes for nonviolent offenders. The Founding Fathers shaped our early criminal justice system to provide for forfeiture and restitution in the case of property crimes. Such a scheme along with intensive counseling, treatment, drug screens, curfews, and education would do more to reform those convicted of property crimes than incarcerating them in what Ramsey Clark called our penitentiaries—"factories of criminals." Similarly, minor street-drug offenders should be treated, screened, and counselled, not subjected to minimum/mandatory sentences; and there is a move across the country to establish drug courts to do just that. Long prison sentences should be reserved for those who physically and/or emotionally hurt others—murderers, rapists, and child abusers.

We should come to our senses to realize that the fiction that the death penalty deters crime is just that—a fiction. Studies have shown that neighboring states such as Michigan, which does not have the death penalty, and Ohio, which does, do not have significantly different murder rates. All the countries in Western Europe have realized that deterrence is a fiction and have eliminated the death penalty. The death penalty is also extremely expensive. It costs taxpayers more to house one in the ultra-maximum security facilities called death rows than it does to house one in general population in a prison for life.

In addition, the death penalty can even act as an attraction to commit horrible crimes. The best example of this phenomenon is Ted Bundy. As we all remember, Ted Bundy brutally strangled a number of young women students around the country. He asked a lawyer friend in Colorado where he would go if he *wanted* to get the death penalty. The easy answer to that question was Florida or Texas, which carry out by far the most executions. We know that Bundy traveled to Florida and killed several students before he was caught by authorities there. Those women might still be alive had Florida not attracted Bundy with what he saw as the glory that being charged with a capital crime would bring him. If the prosecution were seeking life, he would have gotten no more press than a short article in the newspaper which would

have then wrapped today's fish. In passing, let me suggest, with due deference to Mr. Methvin and others of the Fourth Estate, that if the media would provide less sensational coverage of heinous murders, serial killers would not be so able to bask in their twisted glory.

We should also realize that if we kept in prison the most heinous murderers, those who get the death penalty these days, and subjected them to intensive study by psychologists, neurologists, and criminologists, we might well unlock the secrets that make a brain so twisted and might learn how to interrupt the development of serial killers.

The causes of crime are many and the solutions far from simple. By avoiding jumping to conclusions about "predatory minorities" and "liberal judges," we should be able through reasoned and intensive study to learn how to deal better with crime and criminals through the judicial system and, more importantly, to prevent crime before it occurs.

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