REFORM OF THE LEGAL PROFESSION IN ENGLAND AND WALES

MJ Quinn

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REFORM OF THE LEGAL PROFESSION IN ENGLAND AND WALES

I. INTRODUCTION

The British legal profession has traditionally consisted of two types of lawyers: barristers, who argue cases in court; and solicitors, who primarily advise clients. Solicitors perform all the non-arguing functions of lawyers (and may appear before lower courts), while barristers are generally limited to oral presentation. Barristers may appear in all courts, yet solicitors have essentially been restricted from the High Court and limited in appearances before the Crown Court. Solicitors may practice

1. The legal system of Great Britain is the legal system of the Kingdom of England, but it also encompasses the principality of Wales; Northern Ireland and Scotland have separate laws, legal professions and courts (which join with Britain only at the level of the House of Lords). F. M Morrison, COURTS AND THE POLITICAL PROCESS IN ENGLAND 17 (Sage Series on Politics and the Legal Order, vol. III, J. Grossman ed. 1973).

By statutes ranging in time from 1284 (the Statutum Walliae) to 1747, the body of English law has become applicable to Wales. F. Maitland, THE CONSTITUTIONAL HISTORY OF ENGLAND 330 (1908, reprinted 1931); see also infra note 10. The laws of Ireland (Northern Ireland), although based on English common law, have remained separate from England's laws. F. Maitland, supra, at 336. Similarly, Scotland retains its own legal system, which is based on Roman law. Id. at 331-32.


Although the American legal profession is not divided according to these functions, the distinction between an advocate and an advisor has been noted. For example:

A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different. In asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as he finds them.

By contrast, a lawyer serving as adviser primarily assists his client in determining the course of future conduct and relationships.


3. Walker & Walker, supra note 2, at 248-49. Some barristers, however, may carry on little or no work in court, and some solicitors may spend much of their time in court. H. Hanbury & D. Yardley, supra note 2, at 143.

together in law firms; barristers are sole practitioners, who usually share chambers (mostly at the Inns of Court in London) with clerks in common.5

The existence of the two branches is founded upon the oral orientation of English courts.6 In contrast to legal practice in the United States, where the facts and law of a case are presented in detailed written briefs, and

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**ALLIANZ LEGAL PROTECTION, THE LAWBOOK 5 (1987) [hereinafter THE LAWBOOK]**. The inferior courts include County Courts (staffed by Circuit Judges, Recorders, or Registrars), Juvenile Courts, and Magistrates’ Courts (staffed by Magistrates or Justices of the Peace, and Stipendiaries). Id.

5. The barristers’ clerks serve the tenants of their chambers for administrative matters, including, for example, policy considerations, public relations, regulation of work flow and cash flow, negotiating fees, keeping accounting and tax records, and general office management. BARRISTERS’ CLERKS’ ASS’N, BCA QUESTIONS AND ANSWERS TO THE ROYAL COMMISSION ON LEGAL SERVICES, app 1-3 of answer to question 1 (1977) [hereinafter BCA ANSWERS]. Senior-level clerks give career advisement to the barristers and recommend to solicitors the barristers or chambers most suited (by ability and expertise) to handle particular cases. Id.

The origin of clerks is not certain, but mention was made in 1660 of a Mr. Anthony Card, a barrister’s clerk, who saved a drunken barrister from a fall into a pond when his horse bolted; Mr. Card later became a practitioner in Gray’s Inn. BCA ANSWERS, supra, answer to question 4 (Introduction to the Role of the Barrister’s Clerk, Address by Eric Cooper to Junior Clerks (Sept. 30, 1976)).

6. The foundation of the two branches according to arguing and non-arguing functions solidified during the sixteenth to eighteenth centuries. See infra text accompanying notes 56-61. “Thus, the separation of the legal profession has an historical foundation as has the nature of the respective functions which barristers and solicitors perform.” WALKER & WALKER, supra note 2, at 248.
where oral argument is relatively short and focused on issues raised by judges or their clerks. English courts rely on the barristers' oral presentation of the facts and on the barristers' specialist knowledge of the law.

As the 1980s drew to an end, the Lord Chancellor of Great Britain proposed reforms to the legal profession which would, among other things, extend to solicitors the rights of audience previously reserved for barristers in the higher courts. This proposal and its precursors are discussed below, after an examination of the history that produced a two-branch legal profession in England and Wales. Legislative changes will be considered in light of their potential effects on legal services and the two-branch structure of the profession.

II. THE DEVELOPMENT OF THE LEGAL PROFESSION IN GREAT BRITAIN

The distinction between the roles of barristers and solicitors (which has been particularly subjected to public and professional scrutiny since 1989) was rudimentarily present as long ago as the reign of Edward I. This section traces the development of the profession from its roots in the thirteenth century, when methods of regulation and education evolved, through the fairly elaborate structures of the fifteenth and sixteenth centuries, the collapse of legal education in the mid-seventeenth century, and an emergence of professionalism from the late eighteenth through nineteenth centuries. The section concludes with a discussion of the present state of legal education in Britain.

A. The Thirteenth Century

While the English common law courts took shape primarily during the reigns of King Henry III (1216-1272) and his son Edward I (1272-1307), the legal profession itself is thought to have evolved from the period of the latter's reign to that of his great-great-great-grandson


8. Id. The significance of this concept of "judicial unpreparedness," as opposed to the rule of curia novit legem is emphasized by the reporting of barristers' arguments in important cases. Id.

9. See, e.g., infra text accompanying notes 12-14.

10. During the interregnum, in 1272, Wales had not been brought entirely into England's dominion, and the Statutum Walliae legislative code had not yet issued. F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 220-21 (2d ed. 1968). While some Welsh countrymen sought English law, others preferred retention of Welsh tribal customs. Id.
Henry VI (1422-1461). In the time of Edward I, the two types of practicing lawyers were attorneys and pleaders. An attorney could represent a person, but that individual might also seek assistance in court by the "learning, ingenuity, and zeal" of a pleader. An attorney was, in these early days, neither an "officer of the court" nor even a member of a recognized professional class.

During this time, pleaders were probably used in all important cases. Legal representation soon became prevalent enough in London to require a royal concession, in 1259, that citizens might actually plead


12. Id. "Attorneys" appears to be the term generally applied to attorneys (non-pleading lawyers) at this time, but responsalis also serves as an alternate term for, or a subordinate office to, an attorney. See 2 W. Holdsworth, A History of English Law 316 & nn. 1-10 (4th ed. 1936); E. Jenks, A Short History of English Law (1913). Pleaders, however, bore such titles as countors and serjeant-countors, see infra text accompanying note 17, or the French countours and serjeant-countours, R. Pound, supra note 11, at 78; see 2 W. Holdsworth, supra, at 311; or the Latin narratores, R. Pound, supra note 11, at 78, as well as apprentices (junior pleaders in training under serjeants). Id.; see also infra text accompanying note 20.


14. 1 F. Pollock & F. Maitland, supra note 10, at 213. "Probably every 'free and lawful' person may appear as the attorney of another; even a woman may be an attorney, and a wife may be her husband's attorney." Id. (footnotes omitted). A recent definitive case, McKenzie v. McKenzie, reasserted the right of a party to assistance, in court, from a non-lawyer. 3 All E.R. 1034, 1036 (Ct. App. 1970). The McKenzie court quoted from Collier v. Hicks, in which Lord Tenterden stated:

Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice; but no one can demand to take part in the proceedings as an advocate, contrary to the regulations of the Court as settled by the discretion of the justices.


15. 2 W. Holdsworth, supra note 12, at 313. An advantage gained by using a pleader was that a party could always disavow his pleader's mistake, because the party was not speaking his own words on his own behalf. See, e.g., id. at 311-12; R. Pound, supra note 11, at 79; 1 F. Pollock & F. Maitland, supra note 10, at 211-12 ("[T]he pleader's] words will not bind his client until that client has expressly or tacitly adopted them.")

Holdsworth identified the nature of the differing representations of attorneys and pleaders as the cause of the subsequent development of two distinct classes of lawyers:

The idea that one man can represent another is foreign to early law. When first it is introduced it is regarded as an exceptional privilege, and the representative must be solemnly appointed. On the other hand, the idea that a litigant may get assistance from his friends or others to conduct his case in court is known to and recognized by early law. Thus the appointment by a litigant of an attorney, and the obtaining by the litigant of the assistance of a pleader, are two very different things; and so the class of attorneys and the class of pleaders naturally tended, from a very early period, to become quite distinct.

6 W. Holdsworth, supra note 12, at 432 (footnote omitted).
their own causes, in certain civil courts, without lawyers.16 Even Edward I's father had retained a body of pleaders or countors to plead his causes.17 Edward's own pleaders, known as servants or serjeants at law,18 had already adopted the coif, the distinct headdress of the serjeants at law.19 By the end of the thirteenth century, a group of young men called "apprentices," apparently pupils of the serjeants, had acquired some exclusive right of audience in the courts.20 Mention of narratores pro rege (pleaders for the king) was also frequent at that time.21 The status of some serjeants22 was so great that their opinions were reported with weight equal to judges' opinions.23

By 1292, both branches of the legal profession were under the jurisdiction of the king's justices.24 A decade earlier, the mayor and aldermen of London had ordained that no attorney or pleader could regularly practice there unless duly admitted by the mayor.25 They further fortified the functional distinction between the two types of legal practitioners by forbidding any countor from being an attorney.26

In the twelfth and thirteenth centuries, clerical schools of law were

17. Id.
18. Id. at 215-16. No distinction between serjeants and pleaders seems to have existed during the reign of Edward I. Id." The term 'serjeant' or 'serjeanty' is a common term to express service of very various kinds. We read of 'serjeant counters,' but the word 'serjeant' seems to be used as an adjective to mean a working or practising barrister." 2 W. HOLDSWORTH, supra note 12, at 314 (footnotes omitted).

For the subsequent evolution of law officers of the Crown, see 6 W. HOLDSWORTH, supra, at 457-81; R. POUND, supra note 11, at 111-18.
19. 2 W. HOLDSWORTH, supra note 12, at 314; R. POUND, supra note 11, at 81.
20. 1 F. POLLOCK & F. MAITLAND, supra note 10, at 216.
21. 2 W. HOLDSWORTH, supra note 12, at 313.
22. According to the first Year Book, in 1292, the important litigation of that time was conducted by a select group of serjeants or pleaders—Louther, Spigurnel, Howard, Hertpol, King, Huntingdon, and Heyham. 2 W. HOLDSWORTH, supra note 12, at 313-14; 1 F. POLLOCK & F. MAITLAND, supra note 10, at 216-17.
23. 2 W. HOLDSWORTH, supra note 12, at 314; 1 F. POLLOCK & F. MAITLAND, supra note 10, at 217.
24. 1 F. POLLOCK & F. MAITLAND, supra note 10, at 216.
25. Id.
26. Id. In the thirteenth century, both the Latin term narratores and the French contours (or counteurs) were used to identify pleaders—"all the advocates of the bench whom we commonly call countors. . . ." 1 F. POLLOCK & F. MAITLAND, supra note 10, at 215 & n.1 (quoting Matthew Paris in his account of the year 1235 ("banci quos narratores vulgariter appellamus," M. PARIS, CHRON. MAJ. iii 619)).
operated in the City of London. After Henry III prohibited law schools within the City and the Pope forbade the clergy from teaching common law, hostels for the education and housing of students arose in the suburb of Holborn, outside the City of London and facing Westminster Hall (where the Court of Common Pleas sat). Lawyers of the village of Holborn eventually took over the mansions of nobility and the Knights Templars along Chancery Lane. The lawyers' hostels became the four Inns of Court: the Inner Temple, the Middle Temple, Gray's Inn, and Lincoln's Inn. Ten or more Inns of Chancery also came into existence, which were attached to and served as preparation for entry into the Inns of Court. While the Inns of Chancery eventually dissolved, the Inns of Court continued to govern the training and admission of the lawyers who would eventually be termed “barristers.”

**B. The Fifteenth Century**

Sir John Fortescue, Chief Justice of the King's Bench (1442-1461), described three categories of the legal profession during the reign of King Henry VI, his contemporary: judges and serjeants, apprentices, and attorneys.

28. Id. at 5.
29. Id.
30. Id. The name Chancery Lane is a corruption of Chancellor's Lane, which "was flanked by a palace of the Bishops of Chichester, one of whom was Chancellor of England." Id.
31. Id. at 6.

The [Knights] Templars were forcibly expropriated; and their successors, the Knights of St. John of Jerusalem, leased their riverside estate to a body of men of the law who came from Holborn, and then or afterwards divided themselves into the Societies of the Inner and the Middle Temple. Another company of lawyers settled in the palace of the Bishops of Chichester and in the domain of the Earl of Lincoln, taking from the latter family the name of Lincoln's Inn. A third society, having become tenants of the manor-house of the [Barons] Grey[] de Wilton, adopted the name of their landlords, and so came to be known as Gray's Inn.

32. Id. at 9.
33. See infra notes 66 & 102 and accompanying text.
34. See infra text accompanying notes 59, 72-77, 92-95, & 101-07.
35. Soon after he advanced to the chief justiceship, on January 20, 1442, Fortescue was knighted. Chrimes, *Introduction* to J. FORTESCUE, DE LAUDIBUS LEGUM ANGLIE at lxxi (1545-46, S. Chrimes ed. & trans. 1942).
Judges were selected from the body of serjeants. The serjeants were called by writ from a list of seven or eight of the best lawyers who had been practicing at least sixteen years; the list was prepared by the Chief Justice of the Common Pleas and given to the Chancellor. In taking on the degree of serjeant, the chosen became public officers by "an oath to serve the King's people and not to delay justice for profit." When they became members of the Serjeant's Inn, they relinquished membership in the Inn where they had been called to the Bar. Their appointment was marked with ceremony and great personal expenditure. As serjeants, they were paid a fixed salary by the Crown and wore the distinctive white silk coif, "which is the primary and principal of the sartorial insignia with which serjeants-at-law are decorated at their creation." Unlike today's advocates (barristers), serjeants were permitted direct contact with their clients.

In turn, serjeants emerged from the body of apprentices. The

37. R. POUND, supra note 11, at 82; J. FORTESCUE, supra note 35, at 127; 6 W. HOLDsworth, supra note 12, at 483.

[N]one, though he be the most learned in the laws of the realm, will be installed in the office and dignity of a justice in the courts of pleas before the king himself and the common bench, . . . unless he shall have been first invested with the estate and degree of serjeant-at-law. J. FORTESCUE, supra note 35, at 125.

38. R. POUND, supra note 11, at 83.

39. Id.

40. Id. The Serjeants' Inns have subsequently been abolished. Id. Now judges remain Benchers of their respective Inns of Court. D. BARTON, supra note 27, at 10-11.

41. Each new inductee, for example, was expected to give rings of prescribed and ranked value to all princes, dukes, and archbishops present at the ceremony, to the Chancellor and Treasurer, to all earls and bishops present, to the Keeper of the Privy Seal, to the Chief Justices and the barons of the King's Exchequer, to the Parliamentary barons, to the abbots and noble prelates, to each "great knight" present, to the Keeper of the Rolls of the King's Chancery, to the justices, to the chamberlains, to the officers, to "notable men serving in the king's courts," and even to clerks. J. FORTESCUE, supra note 35, at 123, 125. Fortescue reckoned the expense incurred by each new serjeant at a minimal £266.13s.4d. Id. at 123.

42. R. POUND, supra note 11, at 83.

43. J. FORTESCUE, supra note 35, at 125. "Nor shall a justice or serjeant-at-law ever doff this coif, . . . even in the presence of the king, even though he is talking to His Highness." Id.

44. "Advocate" is used here to refer to a pleader, that is, one who is "called to" the Bar of one of the Inns of Court for eligibility to plead cases before the courts. Note that the term "advocate" is still used in present-day Scotland for the lawyer equivalent to the British barrister.

THE LAWBOOK, supra note 4, at 9.

45. R. POUND, supra note 11, at 83.

46. Id. at 84.
apprentices, organized in the Inns of Court and Inns of Chancery, consisted of: benchers or readers, and inner barristers or students. The benchers were older men who taught at the Inns; they regulated the affairs of the Inns through Parliaments. By the fourteenth century, the group of inner barristers had been differentiated into: utter (outer) barristers or juniors, the advanced students who assisted the benchers and who could plead without the Bar; and inner barristers or students. In Fortescue's time, the Inns of Court were restricted by cost to the nobility.

Professional attorneys had come into being in the reign of Edward I. Even into the fifteenth century, apprentices could be professional attorneys, and attorneys might hold membership in one of the Inns of Court. By the seventeenth century, however, attorneys were no longer members of the Inns and did not study there. Attorneys were simply people admitted to practice in the common law courts—without formal education or discipline.

C. The Sixteenth Century into the Eighteenth Century

During the late sixteenth century and continuing through the seventeenth century, the distinctions between those who would become barristers and solicitors grew from the different modes of education, appointment, and discipline. Attorneys, acting as officers of the courts where they were admitted to practice, necessarily became involved in the clerical side of the law. Their education was directed toward practical application,

47. Id. at 82. For a detailed discussion regarding the Inns of Court and legal education, see infra notes 87-95 and accompanying text.
48. R. Pound, supra note 11, at 85.
49. E. Jenks, supra note 12, at 200.
50. R. Pound, supra note 11, at 82, 85.
51. J. Fortescue, supra note 35, at 118-19. "[N]o student could be maintained on less expense than £13.6s.8d, and if he had servants to himself alone, as the majority have, then he will by so much the more bear expenses." Id. at 119. Because only the sons of nobles could meet such costs, "it comes about that there is scarcely a man learned in the laws to be found in the realm, who is not noble or sprung of noble lineage." Id.
52. R. Pound, supra note 11, at 86.
53. Id.
54. Id.
55. Id.
56. 6 W. Holdsworth, supra note 12, at 433.
57. Id. at 434-36. Attorney candidates for admission were required to have served five years as a common solicitor or as a clerk to a court, judge, barrister, etc. Id. at 436.
"the construction and the use of the common forms and processes of the legal machine." In contrast, those who would become barristers were called to the Bar by the Inns of Court, where they were educated primarily "in mooting and discussion, in reading and reporting." Because the attorney, and not the lay individual, was in a position to know when the speculative expertise of a barrister was needed, the attorney, "rather than the lay client, tended to be the client of the barrister." Increasingly, attorneys prepared written pleadings, which barristers argued. A further distinction was formally recognized in 1629-1630: barristers, unlike attorneys, could not sue for fees.

While the Inns of Court tended to exclude practicing attorneys from being called to the Bar, judges required that attorneys seeking admission be members of an Inn of Court or Chancery. The resultant assumption was that attorneys would belong to the Inns of Chancery, which were already in a state of decay. Consequently, in the early eighteenth century, a group of attorneys formed a voluntary professional association, the Society of Gentlemen Practisers in the Courts of Law and Equity.

58. Id.
59. Id. at 435, 437.
60. Id. at 439.
61. Id. at 439-40. This delegation of responsibility had begun in the reign of Elizabeth I (1558-1603) and was nearly engrained by the end of the seventeenth century. Id. at 440.
62. Id. at 440 n.5 (citing Moor v. Row, 1 Ch. Rep. 38). "[T]he fees of professors of the law are not duties certain growing due by contract for labour or service, but gifts; not merces, but honorarium..." Id. (citing J. Davis, Davis's Reports 23).
63. 6 W. Holdsworth, supra note 12, at 442; R. Pound, supra note 11, at 105. As used in this portion of the text, "attorney" continues to identify the function equivalent to today's solicitor.
64. 6 W. Holdsworth, supra note 12, at 443; R. Pound, supra note 11, at 105.
65. 6 W. Holdsworth, supra note 12, at 443 & n.3; R. Pound, supra note 11, at 105.
66. 6 W. Holdsworth, supra note 12, at 443; R. Pound, supra note 11, at 105. In the eighteenth century, the Inns of Chancery "gradually sank into the position of mere dining and perquisite clubs for the benefit of a few 'ancients' or benchers..." E. Jenks, supra note 12, at 203. In the nineteenth century, the property of the Inns of Chancery was taken for public purposes and the compensatory payment "pocketed by the members of their governing bodies." Id.

For discussion of the decline of the Inns of Court and Chancery in the eighteenth century, see 12 W. Holdsworth, supra note 12, at 15-46.
67. 6 W. Holdsworth, supra note 12, at 443; 12 id. at 52; R. Pound, supra note 11, at
The seventeenth century also saw the rise of new legal practitioners: pleaders, who drafted written pleadings according to detailed rules; conveyancers, who undertook the drafting of estate conveyances and related documents; and solicitors, who carried out legal business but were neither barristers nor attorneys. By association, pleaders and conveyancers “approximated” barristers, and solicitors were grouped with attorneys. Those years brought about little change in the provisions for administration of barristers. The benchers had complete control over the government of the Inns and over calls to the bench. Education within the Inns, however, was in flux. During the late sixteenth and early seventeenth centuries, the upsurge of the printing trade, as well as the disinterest of students and benchers, led to a decrease in attendance at readings and moots in favor of individual reading of printed material in libraries. During the Commonwealth years (1649-1660), the regimen of legal education collapsed: readers refused to read; students, barristers and even benchers ignored orders issued from the benches of the Inns. Despite efforts in the later portion of the seventeenth century to enforce orders from the Inns, the judges, and the Lord Chancellor, the old system of education could not be reinstated. In about 1677, readings ceased at all the Inns of Court. Until the middle of the nineteenth century, students were left to their own ingenuity to obtain a legal education.

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105-06 (Pound uses the term “Society of Gentlemen Practitioners.”). This Society existed from its 1739 inception until it merged, in 1831, into the Incorporated Law Society, which has continued from 1903 to the present as the Law Society. E. JENKS, supra note 12, at 204.

68. 6 W. HOLDSWORTH, supra note 12, at 446.

69. Id. at 447. The work of conveyancing continued to be shared, at this time, by legal professionals and scriveners. Id.

In 1760, a requirement that all attorneys and solicitors performing conveyances in the City of London join the Scriveners’ Company was successfully defeated in court. 12 id. at 70-71. Scriveners continued to be allowed to do conveyancing work until 1804, when such work was limited solely to the legal profession. Id. at 71; 15 id. at 27-28.

70. 6 id. at 448-49. The profession of solicitor appears to have arisen in the middle of the fifteenth century and gained prevalence and status until, by the early seventeenth century, “no distinction at all is drawn between attorneys and solicitors.” Id. at 450 (footnote omitted).

For a discussion of the distinction between solicitors and attorneys, and the need for introduction of the latter position, see id. at 450-57.

71. Id. at 432, 448.

72. 12 id. at 18.

73. 6 id. at 481-84.

74. Id. at 486-87.

75. Id. at 488-89.

76. Id. at 489.

77. Id. at 493. “Thus the solitary education, to which the law student was condemned,
D. The Eighteenth and Nineteenth Centuries: Education

During the eighteenth century, attorneys and solicitors were governed by the legislature and the Society of Gentlemen Practisers. In 1729, the legislature passed an act providing that attorney candidates for admission must submit to judges' examination for fitness and capability and must have been articled by contract in writing for five years prior to admission. The early records of the Society stated its supportive goals "to detect and discountenance" unfair practices. In 1742, the Society emphasized its role of enforcement:

It was ordered that all proper and necessary enquiries be made by the Committee to discover any Attorneys or Solicitors who had been or should be surreptitiously admitted: that every member of the Society should use their utmost endeavours to discover and discountenance any such practice, and that the Committee should use such ways and means as they should find most necessary to prevent such practices in the future.

Throughout the century, the Society proposed various reforms of the legal profession. In the nineteenth century, attorneys and solicitors took over property conveyancing and later the business of proctors (whose duties in ecclesiastical courts and admiralty court were analogous to those of attorneys and solicitors in the courts of common law and equity). They gained rights to appear in probate and divorce courts, ecclesiastical courts, and new county courts, and were allowed to become justices of the peace.

produced effects which . . . were not unlike the effects of the narrow and self-centered outlook of the medieval common lawyers." Id. at 498 (footnote omitted).

78. 12 id. at 54-55.
79. Id. at 63 n.1, 66 (quoting first minute in RECORDS OF THE SOCIETY OF GENTLEMEN PRACTISERS IN THE COURTS OF LAW AND EQUITY I (Feb. 13, 1739) [hereinafter RECORDS OF THE SOCIETY OF GENTLEMEN PRACTISERS]).
80. 12 W. HOLDSWORTH, supra note 12, at 66-67 (quoting RECORDS OF THE SOCIETY OF GENTLEMEN PRACTISERS, supra note 79, at II (1742)).
81. See, e.g., id., at 72-75. The Society was particularly emphatic in condoning conveyancing by anyone other than solicitors. Id. at 74.
82. See supra note 69.
83. 15 W. HOLDSWORTH, supra note 12, at 228.
84. 12 id. at 8.
85. Id.
86. Id.
Formal procedures for legal education developed steadily throughout the nineteenth century. In 1833, the Incorporated Law Society began conducting lectures for articled clerks on conveyancing, law, and equity; the topics were extended in subsequent years.\textsuperscript{87} The Society also gave an annual entry examination, which became statutory in 1843.\textsuperscript{88} University College, London, was one of the first notable schools to provide lectures.\textsuperscript{89} Oxford University gave an examination for the Bachelor of Civil Law (B.C.L.) degree in 1852, and Cambridge offered the Bachelor of Laws (LL.B.) degree in 1855.\textsuperscript{90} By 1906, eight universities were awarding degrees in law.\textsuperscript{91} At the Inns of Court, few lectures had been offered in the early decades of the 1800s.\textsuperscript{92} In 1847, the Inns organized lectureships and, in 1852, the Council of Legal Education was established.\textsuperscript{93} In 1871, a joint committee of the four Inns decided on compulsory examination for call to the Bar.\textsuperscript{94} In 1964, the Inns of Court opened their own School of Law at No. 4 Gray's Inn Place.\textsuperscript{95}

\textit{E. Legal Training at Present}

Today, the education of solicitors,\textsuperscript{96} the procedures for their admission to practice, and their disciplinary control reside in the authority of the Law Society.\textsuperscript{97} The standard requirements for admission of solicitors are as follows:

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\textsuperscript{87} 15 \textit{id.} at 231. However, the statutory employment requirements indicated an expectation that the major part of a solicitor's training would be in the office; classroom education would be supplementary during the evening, after office-hours. \textit{id.} at 240.

\textsuperscript{88} \textit{Id.} at 232.

\textsuperscript{89} \textit{Id.} at 232-33.

\textsuperscript{90} \textit{Id.} at 241.

\textsuperscript{91} \textit{Id.}

\textsuperscript{92} \textit{Id.} at 233.

\textsuperscript{93} \textit{Id.} at 237.

\textsuperscript{94} \textit{Id.} at 239. The same committee rejected joint education for the Bar's students and solicitors' articled clerks. \textit{Id.}

\textsuperscript{95} Malloy, \textit{The Inns of Court}, 60 N.Y. St. B.J. 48 (Dec. 1988). As of September 1989, the vocational course has been changed "so that it is fully directed to training in the skills of advocacy, drafting, negotiation and communication . . . in professional ethics and conduct and the uses of information technology." \textsc{Gen. Council of the Bar, Quality of Justice: The Bar's Response § 19.8 (1989) [hereinafter Quality of Justice]; see also Council of Legal Educ., Inns of Court School of Law: Vocational Training for the Bar [hereinafter Vocational Training Pamphlet]} (undated pamphlet; distributed 1989).

\textsuperscript{96} Hereafter, no distinction will be made between a British attorney and a solicitor. The usual term "solicitor" will be used.

\textsuperscript{97} H. Hanbury & D. Yardley, \textit{supra} note 2, at 144.
1. Enrollment as a student with the Law Society (demonstrated by acquiring a Certificate of Enrollment); 98

2. Completion of academic training, demonstrated by:
   a. securing a qualifying law degree (such as one conferred by a British university or the Council for National Academic Awards); or
   b. passing the Common Professional Examination; or
   c. gaining a Diploma in Law; or
   d. passing the Solicitors First Examination; 99 and

3. Completion of the second stage of training, demonstrated by:
   a. satisfactorily attending a preparatory course approved by the Law Society; and
   b. passing the Final Examination; and
   c. serving a two-year term of articles in employment under a solicitor in Britain (at least eighteen months of which period must be served after passing the Final Examination). 100

Barristers’ education, admission requirements, and discipline are governed by the Benchers of their respective Inns of Court, rather than by statute. 101 The Inns’ system of legal education, which had ceased in the seventeenth century, was revived with the establishment of the Council of Legal Education and the resumption of lectures in 1852, followed by the first examination in 1853. 102 Today, a candidate may practice law after being called to the Bar by an Inn 103 and after completing the following standard requirements as a student:

1. “Keeping terms” (dining on three separate days for each of eight terms in the Hall of the student’s Inn); 104 and
2. Completion of the academic stage of education by:

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99. Id. regs. 2(2), 5, 8(1).
100. Id. regs. 5, 29-30, 39-40, 51.
101. H. HANBURY & D. YARDLEY, supra note 2, at 146.
102. COUNCIL OF LEGAL EDUC., INNS OF COURT SCHOOL OF LAW 1988-89 CALENDAR 60 (student booklet).
103. H. HANBURY & D. YARDLEY, supra note 2, at 146.
a. securing a qualifying law degree (conferred by a British university or the Council for National Academic Awards); or
b. securing a degree satisfactory to the Council of Legal Education or being accepted by an Inn as a mature student, demonstrated by:
   i. passing the Common Professional Examination; or
   ii. fulfilling the conditions prescribed by the Council of Legal Education's Certificate of Eligibility prior to October 1, 1989;9 and
3. completion of the vocational stage of education by passing the Bar Examination;106 and
4. completion of twelve months' pupillage, under a practicing barrister of at least five years' service (a Pupil Master), as follows:
   a. six months in a non-practicing capacity, and
   b. six months in a practicing capacity.107

III. PRE-1989 PROPOSALS TO REFORM THE LEGAL PROFESSION108

"Law is a dynamic subject."109 As committees and commissions continued to review the evolution of the law itself,110 the structure of the legal profession continued to change accordingly.111 This section will

105. Id. regs. 15-16.
106. Id. regs. 18(a)(ii), (c). Students who have not completed the vocational stage or have not declared an intent to practice at the Bar prior to October 1, 1989 must fulfill an additional, transitional requirement of completing the vocational course offered at the Inns of Court School of Law. Id. regs. 18(a)-(b), 20.
107. Id. regs. 44-45. In October 1989, the Inns of Court School of Law introduced a new Vocational Course "to provide a practical training in the specialist skills required by barristers, and to ensure competence in those skills." VOCATIONAL TRAINING PAMPHLET, supra note 95, at 3.
108. A review of government legal services specifically not discussed in this text was begun in March 1988; the report was published in January 1989. See R. ANDREW, REVIEW OF GOVERNMENT LEGAL SERVICES (1989).
110. See, e.g., id. at 353-55.
111. Complaints from outside the profession that have instigated internal and independent examinations included: excessive fees, poor quality of service in some areas, and inadequate services for poorer clients. ROYAL COMM'N REPORT ON LEGAL SERVICES, FINAL REPORT, 1979, CMND. 7648, § 22.1 [hereinafter BENSON REPORT].
examine the primary proposals for reform of the profession during the nineteenth century and then from the 1970s to the present (prior to the Lord Chancellor’s scheme).

A. Nineteenth-Century Proposals

In 1846, the law reformer E.W. Field proposed the merger of barristers and solicitors so that all lawyers could plead in court, as is the case in the United States. Some of the contemporaneous arguments in favor of

The novels of Charles Dickens often portrayed critical images and conditions of the law, legal practitioners, and structures in the nineteenth century. The following is but one example:

The one great principle of the English law is, to make business for itself. Them is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think it. Let them but once clearly perceive that its grand principle is to make business for itself at their expense, and surely they will cease to grumble.


112. 15 W. Holdsworth, supra note 12, at 242.

In the United States, the legal profession took a different track by evolving into a single-branch profession.

As one author has aptly pointed out, “[n]ot a single lawyer came to Plymouth on the Mayflower.” Morris, The Legal Profession in America on the Eve of the American Revolution, in The Colonial Bar and the American Revolution 5 (H. Jones ed. 1976). During the first hundred years or so of the American colonies existence, general hostility toward lawyers was prevalent. R. Pound, supra note 11, at 136. William Penn, for example, expected that the laws of his new Quaker settlement would be so simple that one could plead one’s own case. Id. at 139 (citing Laws Agreed Upon in England, art. 6, Charter and Laws of the Province of Pennsylvania). In the seventeenth century, Massachusetts Bay, for example, maintained prohibitions against lawyers, as did Virginia, Connecticut, and the Carolinas. L. Friedman, A History of American Law 81 (1973). Nor were professional lawyers readily found in West New Jersey or Pennsylvania. Id. Although legal skills were necessary in the growing colonies, such work was often performed by “unauthorized lawyers, petitfoggers, shysters, and low-lifes . . . .” Id. at 84. Referring to this period, John Adams said: “I found the practice of law grasped into the hands of deputy sheriffs, petitfoggers and even constables who filled all the writs upon bonds, promissory notes, and accounts, received the fees established for lawyers, and stirred up many unnecessary suits.” R. Pound, supra note 11, at 143 n.38 (quoting John Adams, Diary (Jan. 3, 1759), 2 Works of John Adams 58).

At the close of the seventeenth century, the legal profession began to take root in the American colonies. Morris, supra, at 8. In the mid-eighteenth century, the colonies initiated procedures for attorney admissions. R. Pound, supra note 11, at 146-48. Some colonies, such as Massachusetts, New Hampshire, Pennsylvania, and Maryland, simply carried on the English system for admitting attorneys. Id. at 145. Meanwhile, the barristers trained at London’s Inns of Court (even though formal legal education was wanting at the Inns at that time) were
the proposal were that all lawyers might be allowed to appear in court in order for solicitors to have access to the bench;\footnote{113} the "distributor" of the law might be brought "more under the control of the consumer and so make him better; a lawyer might go to the Bar because of noticed talents rather than advantageous connections; solicitors "would have a career and a future before them" by virtue of which the public would benefit from their "highest energies";\footnote{114} and "a man who begins his career does not know until he has been practising for years for which [branch] he may have the greatest fitness."\footnote{115} Sir William Holdsworth's somewhat rationalized and hindsight objections (some fifty years later) to Field's proposal were that the separate functions of barrister and solicitor emerge "naturally" in "a more complex legal system"; that barristers have a salutary impartiality to clients; that, since barristers possess "more detachment" than solicitors, they can present the legal implications of a case "with greater clarity"; that the independence of barristers afforded by their governance by the Inns rather than the courts "has been of great service to the cause of liberty"; and that the independence of barristers and generally allowed to practice in the colonies. R. POUND, supra note 11, at 155-57, 163. In fact, from 1760 to the American Revolution, more than one hundred Americans studied law in London. \textit{id.} at 157 ("Theoretically, a man could become a counselor-at-law in England without reading 'a single page of any law book.' But the Inns were part of English legal culture; the American travelers no doubt absorbed some of the ideas of English law; and they read law and observed English practice." L. FRIEDMAN, supra, at 84 (footnote omitted)). Nine of the 30 lawyers who signed the Declaration of Independence had been trained at the Inns of Court. R. BODEN, THE COLONIAL BAR AND THE AMERICAN REVOLUTION 3 (1976) (Although colonial America had no analogous structure, the concept of Inns of Court drew later interest within the United States. As of June 1989, there were 81 \textit{American} Inns of Court, whose guidance and fellowship functions are based on London's Inns of Court. Cotter, \textit{American Inns of Court: A Renaissance in the Legal Profession}, 36 \textit{FED. B. NEWS & J.} 232 (June 1989).) At the eve of the war, American lawyers were well-educated and esteemed and often came from families of means. R. POUND, supra note 11, at 163; Morris, \textit{supra}, at 27.

The Revolution left the United States with a markedly conspicuous depletion of lawyers, many of whom had been loyalists. R. POUND, supra note 11, at 173-74, 178. The post-war American lawyer appeared from the lower ranks of the profession, with inferior training. \textit{id.} at 178. The English model of undifferentiated general practitioners (solicitors) and democratic resistance to the elevation of a particular profession (barristers) help explain the existence of a single rank of lawyers in the United States. \textit{id.} at 181-82. Similarly, the ever-expanding geography of the new country required the ready creation of regional courts of general jurisdiction, whose lawyers were simply "taken to be competent to practice in the highest court on application." \textit{id.} at 183.

\footnote{113} 15 W. HOLDSWORTH, supra note 12, at 242.

\footnote{114} \textit{id.} at 242-43 (quoting Bagehot, \textit{Good Lawyers or Bad}, in 3 \textit{LITERARY STUDIES} 276, 278-79 (Silver Library ed. 1870)).

\footnote{115} \textit{id.} at 243 (quoting Lord Hannen, at an 1868 meeting of the Solicitors' Benevolent Association, in CHRISTIAN, A HISTORY OF SOLICITORS 210-11).
the selection of judges from their ranks "helped to produce that courage and impartiality which . . . have distinguished the English bench, and have been a principle [sic] safeguard of the rule of law and the liberties of the subject." 116

In 1854, one of the recommendations expressed by a Royal Commission was that the Inns of Court jointly form a university empowered to confer the degree of master of law upon its barristers. 117 The more ambitious Legal Education Association, founded by Roundell Palmer in 1867, recommended a single General School of Law to train both legal branches. 118 Opponents to the proposal referred to the unique educational needs of each group. 119 In 1874, Palmer, as Lord Chancellor, put forward several bills in an attempt to establish his General School of Law, but the effort failed. 120

B. The Benson Report

In the 1970s, review of the legal system was induced by media reports of complaints concerning inefficiency, delays, and high costs for legal services. 121 Consequently, the establishment of a Royal Commission on Legal Services was announced by Prime Minister Wilson on February 12, 1976. 122 The terms of reference of the Royal Commission were:

To inquire into the law and practice relating to the provision of legal services in England, Wales and Northern Ireland and to consider whether any, and if so what, changes are desirable in the public interest in the structure, organisation, training, regulation of and entry to the legal profession, including the arrangements for determining its remuneration, . . . and in the rules which prevent persons who are neither barristers nor solicitors from undertaking conveyancing . . . . 123

116. Id. at 243-44.
117. Id. at 238, 244-45.
118. Id. at 245.
119. Id.
120. Id. at 245-46.
121. P. Reeves, Are Two Legal Professions Necessary? 10 (1986).
After three and one-half years, the Commission released the Report of the Royal Commission on Legal Services (the Benson Report), which "[t]he average newspaper reader might well have" perceived as a "'white-washing' [o]f the legal profession." Early expectations of the Royal Commission included enquiry into the accessibility of lawyers; the education of lawyers; the income and social class composition of barristers and solicitors; and the question of solicitors' conveyancing monopoly. The released Benson Report left conveyancing to solicitors, exclusive rights of audience to barristers, educational systems to their ongoing development, and the distinction between barristers and solicitors in status quo. The report stated its conservative recommendations in unmistakably clear language:

R17.1 The legal profession should continue to be organised in two branches, barristers and solicitors.

124. BENSON REPORT, supra note 111. In completing the Report, the Commission utilized for the report some 800 invited submissions "and evidence from some 2,000 members of the public about their experiences with lawyers." Wickenden, supra note 122, at 241.


126. Zander, State of Knowledge About the Legal Profession—IX: Unmet Need for Legal Services (Continued), 126 NEW L.J. 999, 999 (1976). Mr. Zander's 11-part report on the "State of Knowledge About the Legal Profession" contained not only expectations of and suggestions for the Royal Commission's review, but also contemporary statistics (including those compiled by the author's own surveys) and analyses of the legal profession. Id. The serial article was reported, from August to November 1976, under the following subtitles: I: The Size, Location, Composition and Work of the Profession, 126 NEW L.J. 823, 823 (1976); II: The Size, Location, Composition and Work of the Profession—2, 126 NEW L.J. 847, 847 (1976); III: Cost of Legal Services and Incomes of Lawyers, 126 NEW L.J. 871, 871 (1976); IV: Incomes of the Legal Profession (Continued), 126 NEW L.J. 891, 891 (1976); V: The Extent, Impact, Selection and Quality of Legal Representation, 126 NEW L.J. 903, 903 (1976); VI: The Impact of Representation (Continued), 126 NEW L.J. 939, 939 (1976); VII: Representation (Continued), 126 NEW L.J. 959, 959 (1976); VIII: Legal Aid and Unmet Need for Legal Services, 126 NEW L.J. 979, 979 (1976); IX: Unmet Need for Legal Services (Continued), 126 NEW L.J. 999, 999 (1976); X: Legal Education, 126 NEW L.J. 1023, 1023 (1976); XI: What Research Should Be Done Now?, 126 NEW L.J. 1047, 1047 (1976); Index, 126 NEW L.J. 1086, 1086 (1976).

Prof. Michael Zander, "the gadfly of the legal profession," is credited with providing an impetus from the academic world for the creation and research efforts of the Royal Commission. Twining, Benson and the Academics, 43 MOD. L. REV. 558, 559, 562 (1980).


There should be no general extension of the rights of audience of solicitors.

Partnerships between solicitors and members of other professions should not be permitted.

Barristers should not be permitted to practise in partnership.

Two examples of recommendations that would later draw totally opposite results, namely, rejection and acceptance, respectively, are that notaries public should no longer be permitted to undertake conveyancing for reward and that a barrister should not be required to have a clerk.

Immediate reaction to the Benson Report was likewise diverse. For example, the Report has been described as having "lasting importance to the legal profession and its clients, the general public . . . ." Another representative critic, however, blasted the Royal Commission’s specific recommendation not to extend solicitors’ rights of audience as "based on an unconvincing premise and illogical reasoning." Sir Michael Havers, at that time Attorney-General, emphatically accepted the Benson Report "so far as it concerns the future," and declared the report sufficiently comprehensive in content to support further discussion of the topics it addressed.

Ultimately, the Benson Report did not, as its conservative language indicates it did not intend to do, precipitate an overhaul of the British legal profession. The Report did serve, however, as a policy doctrine and as a foundation for further study of professional reform.

131. For responses to relative proposals in 1989, see infra text accompanying notes 246 and 256.
132. Principal Recommendations, supra note 130, at 966.
133. Id. at 983.
134. Implementing Benson, supra note 125, at 113.
137. Twining, supra note 126, at 558, 559.
138. See infra text accompanying notes 139-42 (discussing the Civil Justice Review); infra text accompanying notes 143-59 (discussing the Marre Committee Report); infra text accompanying notes 177-219 (discussing the Lord Chancellor’s proposals in the “Green Papers”
C. Civil Justice Review

The tasks of a Civil Justice Review Committee—appointed in February 1985 by the then Lord Chancellor Lord Hailsham, chaired by Sir Maurice Hodgson, chairman of British Home Stores, and composed primarily of non-lawyers—were directed toward legal procedural reforms.\(^{139}\) In its report,\(^ {140}\) the Review Committee recommended additional judicial training in the civil area\(^ {141}\) and mentioned the need for barristers’ self-regulatory procedures to address charges of misconduct.\(^ {142}\)

D. The Marre Committee Report

In July 1988, the Committee on the Future of the Legal Profession presented its report, *A Time for Change* (the Marre Committee Report or Marre Report).\(^ {143}\) The Committee had been appointed jointly by the Bar Council and the Law Society, in April 1986, “to review generally the extent to which the services offered by the legal profession meet the needs and demands of the public,” to identify areas of potentially beneficial change in legal education and “in the structure and practices of the profession,” and to recommend areas for further examination directed toward change.\(^ {144}\) The Marre Committee distinguished itself from the Benson Royal Commission by addressing problems, rather than by conducting a review of the legal profession.\(^ {145}\)

Instead of contemplating fusion of barristers and solicitors,\(^ {146}\) the Committee purported to deal with the procedures and practices of the legal profession within the existing two-branch structure.\(^ {147}\) Ultimately what

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140. CIVIL JUSTICE REVIEW, REPORT OF THE REVIEW BODY ON CIVIL JUSTICE, 1988, CMND. 394.

141. ORDINARY JUSTICE, supra note 139, at 266.

142. Id.

143. MARRE REPORT, supra note 4.

144. Id. § 2.2 (quoting the Committee’s terms of reference).

145. Id. § 3.4.

146. Id. § 3.5. The committee, however, did acknowledge that it did not see that fusing the professions “would, in itself, contribute to a more effective, more accessible or cheaper service to the public.” Id. § 3.6.

147. Id.
furor the Marre Report engendered centered primarily on the proposed extension of solicitors' rights of audience to the Crown Court. The majority of the Marre Committee argued basically that clients should have a "maximum informed choice of advocate" and that rights of audience should be granted to take advantage of the abilities, training, and experience of lawyers, including solicitors—in short, "that it would be in the public interest to extend rights of audience for solicitors to all cases in the Crown Court . . . ." The dissenting one-third of the Committee, which included five of the six barrister members, relied on the need for the specialist advocacy skills of barristers and echoed the Benson Report conviction that rights of audience should not be extended for solicitors.

The Marre Report's conclusion that rights of audience should remain unchanged in all other courts supported the continued exclusion of solicitors from the higher court for civil cases.

The Marre Committee also expressed its concerns about the legal aid system and its confidence in the new Legal Aid Board. Conveyancing was thought to be better left to solicitors than to financial institutions. While a sizable portion of the Marre Report discussed legal education and training, the Committee's suggestions generally bolstered the Law Society's and the Bar's existing procedures and contemplated changes, and further promoted grants and financial awards for law students' training.

148. See, e.g., Malins, Big Bang at the Bar, COUNSEL, Apr./May 1988, at 7.
149. The Committee's majority recommendations concerning rights of audience are discussed in the Marre Report in chapter 18. MARRE REPORT, supra note 4, §§ 18.1-39, 41 (summary). The arguments of the Committee's dissenting members are found in part VI of the Report. Id. at 197-211.
150. Id. §§ 18.27-28.
151. Id. § 18.33 (emphasis omitted).
153. MARRE REPORT, supra note 4, §§ 2.1-3 (Note of Dissent).
154. Id. § 3.1 (Note of Dissent).
155. Id. § 20.17(1).
156. See supra note 4 and accompanying text.
157. MARRE REPORT, supra note 4, §§ 8.1-140.
158. Id. § 11.47.
On October 26, 1987, after only four months in office, Lord Havers (who, as Attorney-General, had expressed satisfaction with the "white-washing" Benson Report), resigned from the post of Lord Chancellor. It has been suggested that in conjunction with Lord Havers' declining health "the burden of law reform inherited from his predecessor [Lord Hailsham] may have finally proved too daunting." He was succeeded by Lord Mackay of Clashfern, the first active member of the Scottish Bar (although not the first Scot) to hold the post of Lord High Chancellor of Great Britain. Margaret Thatcher's selection of James Mackay as the new Lord Chancellor was considered a surprise move by the Prime Minister, as was her earlier appointment of Mackay as Lord Advocate of Scotland in 1979.

As Lord Mackay readily acknowledged, his post encompasses executive, judicial, and legislative functions.

The office of Lord Chancellor is . . . something of a constitutional curiosity. To many it seems odd that one person can

160. See supra text accompanying notes 124-25.
162. Purpoole, supra note 161, at 1041. "Three weeks in the job has been long enough for Lord Havers to realise the enormous workload facing him"—which included legal aid reform, ongoing civil justice review, and the question of conveyancing by financial institutions. Id. Like Lord Hailsham, Lord Havers opposed increasing rights of audience for solicitors. Lord Havers Introduces Himself, 131 SOLIC. J. 980, 980 (1987).
164. Fraser, supra note 163, at 26.
165. The Lord Chancellor is a member of the cabinet (the advisory group of the executive branch, the Ministers), the Speaker of the House of Lords (legislative branch), and the presiding judge over judicial proceedings on appeal (judicial branch); he is recommended by the Prime Minister and appointed by the Queen. THE LAWBOOK, supra note 4, at 2.

While the interaction of the executive and legislature conflict with Montesquieu's ideal of separation of powers, the British judiciary has historically remained a recognizably separate branch. J. HARVEY & L. BATHER, THE BRITISH CONSTITUTION 366-67 (1963).

Strange as it may seem, the Lord Chancellor finds it possible to keep his different functions distinct. He has been trained as and remains a lawyer, and the tradition of legal neutrality is so deeply ingrained in him that, when he sits as a judge, nobody would suggest that he is influenced by his activities as a politician. Id. at 367.

166. "We Englishman are Very Proud of our Constitution, Sir. It Was Bestowed Upon Us
be at the same time Speaker of the House of Lords,\(^{167}\) Head of the Judiciary and a member of the Cabinet. What it really comes to . . . is a fear that a Government minister will use his 2 other positions to bring improper influence to bear upon either the House of Lords or the judges.\(^{168}\)

Lord Mackay explained that the executive powers of such a Cabinet Minister are checked by removability “at the will of the Prime Minister or the electorate, who is also the head of the judiciary,” and by withdrawal in the House of Lords “from the party political fray.”\(^{169}\) He identified the delivery of “an effective and efficient legal system to Parliament and the public” as a primary duty of his tenure—a task in which his fellow judges could not share, “because it would inevitably make them accountable to Parliament and so potentially endanger their independence.”\(^{170}\) However, the very multiplicity of the Lord Chancellor’s roles elicited objection to some structures proposed in Lord Mackay’s suggested reforms of the legal profession.\(^{171}\)

A government determined to force through radical change in the British legal profession could hardly have chosen a better Lord Chancellor than Lord Mackay. Unlike his immediate predecessor, Mackay has waxed

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\(^{167}\) By Providence.” J. HARVEY & L. BATHER, supra note 165, at 6 (quoting Charles Dickens in C. DICKENS, OUR MUTUAL FRIEND (1865, Signet ed. 1964). The English Constitution is not embodied in any single written document; rather, its rules “are found in written laws known as statutes or Acts of Parliament, in judicial decisions interpreting those statutes and the common law, and in conventions which, though unwritten, are equally binding . . . .” Id. at 4. In lieu of a written constitution, the coherence of society depends on a perpetual balancing act between the Executive (the government which gives order and pursues policies), the Legislature (the House of Lords and the House of Commons which jointly exercise the monopoly of making new laws and repealing old ones) and the Judiciary (the judges who prevent the other two from overstepping their authorised powers and who keep the private citizens from abusing their freedom of action in relation to the State or to one another). Cownper, The Lord Chancellor’s ‘Indigestible Lump of Legislation,’ N.Y.L.J., Jan. 24, 1990, at 2, col. 3.

\(^{168}\) By tradition, the Lord Chancellor sits in the House of Lords on the woolsack, a cushion stuffed with wool. “Woolsack” is used as a metaphor for the office of Lord Chancellor. N. MOSS, BRITISH/AMERICAN LANGUAGE DICTIONARY 164 (1984).

\(^{169}\) Lord Mackay, Address to the Society of Solicitors in the Supreme Court of Scotland Biennial Lecture (Nov. 18, 1988).

\(^{170}\) Id.

\(^{171}\) Id.; see JTA, The Role of Lord Chancellor, 34 J.L. SOC’Y SCOT. 63 (1989).

\(^{172}\) Concerning opposition to the proposed Lord Chancellor’s Advisory Committee, see infra text accompanying notes 246, 261, 266-67, 275-76, & 279-80.
enthusiastic for reform. During, in a press conference in the first weeks of his post, the Lord Chancellor spoke of the need for evolution and improvements, citing, as an example, the value of circuit judges to be appointed from ranks of solicitors. Just short of the first anniversary of his post, Lord Mackay announced that the new year would see publication of his proposals for legal reform, which would focus on the two-branch structure of the profession, legal education, training and standards, multi-disciplinary partnerships, conveyancing by non-lawyer professionals, and the possibility of contingency fee arrangements. The proposals would be in the form of consultation papers, released to elicit response by the public and the profession within a narrow time frame. Some individuals hoped that the latest evaluation might produce changes to make the practice of lawyers more efficient and deserving of public trust.

A. The Green Papers


1. Legal Education

Training consists of three stages: academic (normally, the taking of a law degree), vocational, and practical (the latter two in separate systems for barristers and solicitors). A course in evidence might be added to the

174. Id.
175. See, e.g., Comment, End the Squabbles, 133 SOLIC. J. 3, 3 (1989).
176. Proposed legislation is sometimes previewed in governmental green or white papers—green for tentative proposals to be discussed, white for firm policy to be implemented. M. Zander, The Law-Making Process 6-7 (3d ed. 1989).
178. LORD CHANCELLOR’S DEP’T, CONTINGENCY FEES, 1989, CMND. 571 [hereinafter GREEN PAPER ON CONTINGENCY FEES].
179. LORD CHANCELLOR’S DEP’T, CONVEYANCING BY AUTHORISED PRACTITIONERS, 1989, CMND. 572 [hereinafter GREEN PAPER ON CONVEYANCING].
180. GREEN PAPER ON THE LEGAL PROFESSION, supra note 177, § 3.3.
academic core subjects, namely, constitutional and administrative, contract, tort, land, trusts, and criminal law. High priority should be given to the consideration of a required core of courses for vocational training, with deference to the arguments of the Benson and Marre Reports that promote a common system of vocational training for both branches of the profession. These educational considerations, as well as practical and continuing training for advocacy and other "specialisms,"—with limited consultation with the General Counsel of the Bar, the Council of the Law Society, and others—should be decided by a new Lord Chancellor's Advisory Committee on Legal Education and Conduct (the Advisory Committee). The Advisory Committee, appointed by and answerable to the Lord Chancellor—with limited consultation with the General Council of the Bar, the Council of the Law Society, and others—would consist of a judge as chairman, two barristers, two solicitors, two academic representatives, and eight lay representatives.

2. Professional Standards and Conduct

The Lord Chancellor, upon advice from his Advisory Committee, would set two codes of professional standards: one for the provision of legal advice and assistance, and another directed primarily toward barristers or other advocates for advocacy and the process of cases in chambers and in court. To handle complaints against the legal profession, the Solicitors Complaints Bureau should be abolished and replaced by a Legal Services Ombudsman, who would be appointed by the Lord Chancellor and would have authority over both solicitors and barristers and "any other new legal professionals who may establish themselves in the future." 

3. Advocacy

Rights of audience would depend not on status as a barrister or a solicitor, but on adequate qualifications as demonstrated by certificates of competence. The Lord Chancellor, with advice from his Advisory

181. Id. annex C §§ 2-3.
182. Id. annex C §§ 4-5.
183. Id. annex C § 6; see also id. §§ 5.18-.23.
184. Id. §§ 3.12-.16, annex C § 6.
185. Id. § 3.14.
186. Id. §§ 4.11-.15.
187. Id. § 4.31.
188. Id. §§ 5.8, .14.
Committee and the judiciary, would make final decisions on the qualifications for advocacy in each court. 189

A full advocate's certificate, entitling its holder to rights of audience in all courts, would be granted to the qualified applicant who had completed the appropriate academic, vocational, and practical training courses (including advocacy training), and who had obtained and practiced for a prescribed period with a limited certificate of advocacy. 190 A limited certificate would be one of three types—criminal, civil, or general (criminal and civil)—which would allow a lawyer to practice in Coroners' Court, Magistrates' Court (all proceedings), Crown Court (all proceedings except jury trials), County Court (all proceedings), and High Court (formal and unopposed proceedings, as well as proceedings in chambers). 191 During a transitional period, all practicing solicitors would be granted limited certificates, and barristers who had completed their pupillage when the new rules became effective would be granted full general certificates. 192

Immunity from actions for negligence would be extended to all advocates in their conduct of cases in court. 193 Whether a proceeding required attendance by both an advocate and a non-advocate (that is, under the current system, by a barrister and a solicitor) should be decided by the client, rather than by rule. 194

4. Direct Access

At present, a barrister may accept instructions from solicitors, and sometimes from patent and trademark agents, London notaries, licensed conveyancers, and certain others. 195 In foreign practice, a barrister may take instruction from a foreign lawyer for non-United Kingdom work, from a United Kingdom lay client for non-United Kingdom litigation or arbitration, and from a non-United Kingdom lay client for non-United Kingdom work. 196 The Green Papers welcomed suggestions on proposals for direct access especially in light of European

189. Id. § 5.16.
190. Id. § 5.15.
191. Id. §§ 5.24, .26.
192. Id. §§ 5.36-.37.
193. Id. § 6.2.
194. Id. § 7.4.
195. Id. § 8.4 (referring to the Bar's Code of Conduct).
196. Id. (referring to the Overseas Practice Rules of the Bar).
Community competition, which was anticipated from 1992 through the Single European Act.\textsuperscript{197}

5. Queen’s Counsel\textsuperscript{198}

The two-tiered system of advocates would be retained to act as an incentive for junior advocates.\textsuperscript{199} In addition to barristers, solicitors as advocates would be eligible for appointment to Queen’s Counsel.\textsuperscript{200} Similarly, the appointment as an honorary status to people who are not practicing advocates could continue.\textsuperscript{201}

6. The Judiciary\textsuperscript{202}

The judicial eligibility requirements would be as follows:

Masters and Registrars: Any person holding a limited civil advocacy certificate for at least seven years should be eligible for appointment as a High Court Master or Registrar, or as a County Court Registrar.\textsuperscript{203}

Circuit Judges and the Supreme Court: A Master or Registrar (or equivalent court officer) who has held office at least two years should be eligible to become a Circuit Judge.\textsuperscript{204} Alternatively, one who has

\textsuperscript{197} id. §§ 1.11, 8.8-9.

\textsuperscript{198} "QCs" or "Silks"; "King’s Counsel" when a king is the ruling monarch of the United Kingdom. The Lawbook, supra note 4, at 3. The Queen’s Counsel, senior barristers who are recommended for appointment by the Lord Chancellor, may appear in any case. Id. QCs are involved in the more important court cases, where they “lead” junior barristers. J. Owens, The Law Courts 84 (1976).

\textsuperscript{199} Green Paper on the Legal Profession, supra note 177, § 9.5(b).

\textsuperscript{200} Id. § 9.6.

\textsuperscript{201} Id.


\textsuperscript{203} Green Paper on the Legal Profession, supra note 177, § 10.10. A County Register serves as the administrative head of each County Court. "The Registrar also sits in a judicial capacity dealing with smaller claims, taxation of costs, interlocutory summonses and applications in very much the same way as the High Court Masters adjudicate." Address by C.B. Harrison, The Barristers’ Clerk and the Courts System (Oct. 6, 1976), in BCA Answers, supra note 5, answer to question 4.

\textsuperscript{204} Green Paper on the Legal Profession, supra note 177, § 10.8(ii).
held a full general advocacy certificate—or a full criminal and limited civil certificate, or vice versa—for at least ten years should be eligible for appointment to the Circuit Bench. Eligibility for Supreme Court appointment might arise by two routes: serving office as Circuit judge for at least two years, or holding a full general advocacy certificate for at least ten years.

House of Lords: A candidate for appointment as a Lord of Appeal in Ordinary must have held either a full general advocacy certificate for at least fifteen years or have held the office of Lord Chancellor or Judge in a superior court in Great Britain or Northern Ireland.

7. Barristers’ Practices

In the language of the Green Papers, the Bar was expected to ensure fair allocation of pupillages and access to tenancies in chambers. A “more positive” approach was suggested for accommodating barristers’ chambers outside the Inns of Court. Comments on the possibility of partnerships and incorporation of barristers were encouraged. Barristers should be able to employ assistants, including other barristers.

Barristers should be able to decide whether to use a clerk—who traditionally acts as administrator and business negotiator for a chamber of barristers—or negotiate fees on their own and manage their practices by some other system.

8. Multi-Disciplinary and Multi-National Practices

The Solicitors Act 1974, the Law Society’s Practice Rules, and the Bar’s Code of Conduct should be amended to remove restrictions against multi-disciplinary and multi-national practices.
9. Advertising

The British Code of Advertising Practice of the Advertising Standards Authority has established principles sufficient to govern the legal profession: “that advertising should be legal, decent, honest and truthful.” In other words, allowance of and standards for advertising should be governed by the code.

10. Probate

Two of the approaches to probate work which were considered in the Green Papers, were that special classes, such as trust corporations, licensed conveyancers, authorized practitioners, and chartered and certified accountants (in addition to barristers, solicitors, and notaries), should be allowed to make applications for grants of probate or letters of administration; or that anyone, without restriction, should be so entitled. In either event, the swearing of an oath for an application should no longer be required.

11. Contingency Fees

Further consideration should be given to the introduction of contingency fee arrangements, whereby a lawyer would receive an agreed share of a successful award but no fees if the case were lost.

12. Conveyancing

In addition to lawyers, individual practitioners might be allowed to provide conveyancing services if they could satisfy certain prescribed requirements, including recognized authorization, maintenance of separate client accounts, compliance with a statutory code of conduct, ability to meet claims of financial loss, demonstrated ability to meet complaints, and membership in a suitable ombudsman scheme. Authorized practitioners would be regulated by the Bank of England under the Banking Act 1987 (for banks), by the Building Societies Commission under the Building

214. Id. § 13.3.
215. Id. §§ 14.11-.17.
216. Id. § 14.18.
217. GREEN PAPER ON CONTINGENCY FEES, supra note 178, §§ 1.1, .8, 5.3-.4.
218. GREEN PAPER ON CONVEYANCING, supra note 179, §§ 3.5-.13.
Societies Act 1986 (for building societies), or (for others) by “an authority which can satisfy the Lord Chancellor that it is able to impose and enforce the necessary requirements,” which could include authorities already in existence to regulate such practitioners as surveyors, valuers, and insurance brokers.219

V. REACTION TO THE GREEN PAPERS

As will be seen below, reaction to Lord Mackay’s proposals has been diverse—ranging from enthusiastic welcome to indignant hostility.

A. The General Council of the Bar

The General Council, responding on behalf of members of the Bar of England and Wales, rejected expansion of the core of required courses for legal education, although it proposed courses in European Community law and foreign language, and additional training for “specialisms” other than advocacy.220

The Bar labelled the existing Lord Chancellor’s Advisory Committee a failure.221 As an alternative, the Bar recommended creation of a Legal Education Committee separate from any professional review committee and empowered by the law schools and the professions, not by the Lord Chancellor.222 The committee would be chaired by a High Court Judge and would have twenty members chosen from barristers, solicitors, the Council of the Inns of Court, the College of Law, university and polytechnic law schools, certain fields of legal practice, and knowledgeable nonlawyers.223

While judges may be advised by the Lord Chancellor’s proposed Advisory Committee, the Bar should be left to maintain its own Code of Conduct with continued supervision by judges.224 The responsibilities of a legal ombudsman should include examination of allegations of mismanagement by courts and tribunals, because sometimes “barristers and

219. Id. §§ 3.15-.16, .18.
220. QUALITY OF JUSTICE, supra note 95, §§ 19.3-.5, .23-.24
221. Id. § 19.28.
222. Id. § 19.30. “Such a committee will command respect and successfully guide the Law Schools and the professions, not by the power of the Lord Chancellor to impose the Committee’s or his views by statutory instruction, but by the excellence of its proposals.” Id. (emphasis in original).
223. Id. § 19.31.
224. Id. § 18.9-.10.
solicitors find themselves being blamed e.g. for delays which are in reality caused by bad administration of the Courts."

The Bar emphasized the importance of the distinct professions of barrister and solicitor. The discrete role of barristers carries definite advantages: the functioning of sole practitioners independent of the government, solicitors, or any others; specialization in advocacy; maximum choice for individuals by free choice of barristers as ensured by the "cab-rank rule;" and the continuance of high standards by "peer group discipline" and judicial supervision. The Bar has been generally unopposed to judges granting rights of audience in higher courts to qualified solicitors but opposed to turning over to the government the power to recognize or remove professional bodies from such entitlement because such power could readily be used for political ends.

Further-

225. Id. § 18.12.

226. The General Council's response drew an analogy of the relationship between solicitors and barristers to that between anaesthetist and surgeon: "The anaesthetist prepares the patient so that the surgeon can operate. Both remain in continuous care of the patient during the operation, exercising their different but vital skills." Id. § 5.3.

To further support the need for continued separation of the professions, the General Council devoted the epilogue of its response to a letter written by retired Welsh solicitor Cyril Moseley in March 1989. Mr. Moseley expressed his opinion of the court inquiry into the Aberfan coal-mining explosion:

The men and women of these mining valleys know pain and anguish only too well . . . . Those families needed first-class advocates. They got them: advocates of great skill and experience from Cardiff, Swansea and London.

... I saw silks and junior counsel fighting on behalf of ordinary men and women and for powerful corporations. Most of all, I heard them in court on behalf of injured colliers and their stricken widows and children. My hope is that the Government will decide not to alter any part of the training and experience which moulded these advocates.

The delicate arrangements which produce the standards of excellence and spirit of independence should not be tampered with, lest we undermine or even destroy the very qualities which are crucial to us all in both judge and barrister.

The Inns of Court may seem mysterious places to most of us. But they produce the goods: a fearless judiciary and formidable advocates . . . .

Epilogue to id. at 274-75 (quoting letter from Cyril Moseley to The Times (Mar. 21, 1989)).

227. QUALITY OF JUSTICE, supra note 95, § 12.3. Literally, the "cab rank" rule provides that any barrister, like a taxi driver with his/her fares, is "bound to accept any brief to appear before a court in the field in which he professes to practise . . . ." Arheim, The Greening of the Law, 133 SOLIC. J. 527, 527 (1989) (quoting the BAR'S CODE OF CONDUCT, § 13.4.1).

228. QUALITY OF JUSTICE, supra note 95, § 12.3.


The Bar has demonstrated, however, with the assistance of Coopers & Lybrand, statistically the additional costs involved in solicitors' audience before the Crown Courts. GEN.
more, the advocacy certificates proposed in the Green Papers would be "an unwise system to adopt," because they would be inadequate for barrister specializations and for assurance of advocate quality.\footnote{230}

The Bar came out against direct access by lay clients to barristers;\footnote{231} recommended that barristers rather than clients (that is, paying clients and the government paying for legal aid clients) continue to decide when attendance by solicitors in court is not necessary;\footnote{232} and it opined that partnerships, incorporation, and multi-disciplinary practices would be adverse to the public interest.\footnote{233} Due to the resultant financial interest of a lawyer in the outcome of a case, the Bar argued that contingency fee arrangements should not be allowed.\footnote{234} Barristers may be safely left to their own "good sense" in advertising their services for the benefit of solicitors and other professionals.\footnote{235}

Concerning the appointment of judges, the Bar Council argued both for status quo and for exclusion of the Lord Chancellor from the selection process.\footnote{236}

The Bar recommended the Green Papers' first option for probate work, namely, that the field remain with solicitors, barristers, notaries and an extended group of specified professionals;\footnote{237} the requirement of a sworn oath should be retained.\footnote{238} The Bar also opined that it would be against public interest to allow financial institutions to provide conveyancing services.\footnote{239}

In general, members of the Bar conceded the need for reform within

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\footnote{COUNCIL OF THE BAR, A FINANCIAL EVALUATION OF EXTENDING RIGHTS OF AUDIENCE IN THE CROWN COURTS TO SOLICITORS 1-3 (1989).}

\footnote{230. QUALITY OF JUSTICE, supra note 95, §§ 12.15, .16. "The system of certification proposed would be strong on form but weak on substance. . . . The test would take no account of ability, of skills in cross-examination of witnesses or of skills in presenting facts or law: simple 'flying hours' would suffice, however poor the pilot." Id. § 12.16 (emphasis in original).}

\footnote{231. Id. §§ 12.38-.40.}

\footnote{232. Id. §§ 12.51-.52.}

\footnote{233. Id. §§ 15.1-.22 Specifically, partnerships between barristers and solicitors would amount to de facto fusion of the branches. Id. § 15.22.}

\footnote{234. Id. § 24.4. However, the Bar did promote a contingency proposal not mentioned in the Green Papers, namely, the creation of a pilot program for a Contingency Legal Aid Fund. Id. §§ 24.14-.16.}

\footnote{235. Id. § 20.47.}

\footnote{236. Id. §§ 16.16-.19.}

\footnote{237. Id. § 22.4.}

\footnote{238. Id. § 22.12.}

\footnote{239. Id. § 23.32.}
their own ranks, particularly concerning the structure of chambers and financial commitment to pupillage programs.\textsuperscript{240}

\textbf{B. The Barristers' Clerks' Association}

The Barristers' Clerks' Association (the BCA) gave its "[c]omplete and unqualified support" to the comments of the General Council of the Bar.\textsuperscript{241} The Bar Council did not object to chambers outside London or outside the Inns of Court within London.\textsuperscript{242} It also stated an intention to create a library system by 1990, which would include conference rooms, barristers' clerks, computerized accounting systems, communications systems, and word processing and printing capabilities.\textsuperscript{243}

The BCA's response sought to correct some misstatements in the Lord Chancellor's Green Papers. For example, barristers are not required to have a clerk,\textsuperscript{244} nor are they prohibited from negotiating fees themselves.\textsuperscript{245}

\textbf{C. The Law Society}

In its response to the Green Papers, on behalf of the solicitors' branch of the profession, the Council of the Law Society rejected the proposed Advisory Committee on Education and Conduct as placing excessive power in the Lord Chancellor, and welcomed instead an independent advisory body, a Legal Affairs Commission, to consist of a lay chairman, judges, barristers and solicitors, academic lawyers, and a majority of lay members.\textsuperscript{246} The Council encouraged progress toward a common system of

\textsuperscript{240} A Programme of Genuine Reform, COUNSEL, May/June 1989, at 3.

\textsuperscript{241} BARRISTERS' CLERKS' ASS'N, RESPONSE TO LORD CHANCELLOR'S GREEN PAPER ON THE WORK AND ORGANISATION OF THE LEGAL PROFESSION I (Apr. 28, 1989) [hereinafter BCA'S RESPONSE TO GREEN PAPERS].


\textsuperscript{243} QUALITY OF JUSTICE, supra note 95, §§ 20.28-.29; see GEN. COUNCIL OF THE BAR, A COMMENTARY FOR THE BAR COUNCIL ON THE WHITE PAPER, annex A § A.3 (1989); Cowper, supra note 242, at 2, col. 3.

\textsuperscript{244} BCA'S RESPONSE TO GREEN PAPERS, supra note 241, at 4; see also Gibb, supra note 242, at 5, col. 2.

\textsuperscript{245} BCA'S RESPONSE TO GREEN PAPERS, supra note 241, at 4.

\textsuperscript{246} LAW SOC'Y, STRIKING THE BALANCE: THE FINAL RESPONSE OF THE COUNCIL OF THE
education for both branches.247

The Law Society criticized the proposed range of limited advocacy certificates as "unduly complex" and suggested procedures whereby a solicitor would be granted full rights in the criminal or civil field after two-years qualification, regular practice, and training in the field.248 Clients should be allowed to decide when a solicitor need not accompany the barrister in court, subject to the solicitor's right to terminate retention if the solicitor determines that such decision would radically hamper handling of the case.249 Although it left the questions of direct access to barristers and of barrister partnerships for the Bar's consideration, the Council appeared to disfavor the propositions.250 The Law Society took a restrained yet negative stance on multi-disciplinary practice, in light of European restrictions and possible misleading impressions about solicitors, but strongly favored removing bans on multi-national practices.251

The Council of the Law Society openly accepted the proposals for judicial appointment, with the provision that academic lawyers and nonadvocate solicitors and barristers be eligible for appointment without holding advocacy certificates.252 The rank of Queen's Counsel should depend solely on merit and should be available to practitioners, nonpractitioners, and academics.253 All advocates should wear the same court attire.254

247. Id. § 4.13, annex C. In anticipation of the 1992 European Community, the law department of the University of Essex has worked on a course leading to a juris doctorate in European law. *Euro Law Degree*, LAW SOC'Y GAZETTE., May 17, 1989, at 8.

248. STRIKING THE BALANCE, supra note 246, §§ 4.9-.12. The Council of the Law Society was vague, however, in delineating the specifics necessary to satisfy, for example, "regular" practice; it suggested that "substantial" civil experience might be "demonstrated with the production of a 'log book' of civil matters dealt with." Id. § 4.12.

249. Id. § 5.9.

250. Id. §§ 5.3, 5.6.

251. Id. §§ 6.6-.19, .21-.22.

252. Id. at § 5.13.

253. Id. § 5.11.

254. Id. § 5.14. The wearing of wigs especially marks judges and barristers from solicitors and others. Lublin, *Who Has Means and Motive to Steal in Halls of Justice?*, Wall St. J., Oct. 4, 1989, at A1, col. 4. The custom of wearing wigs, today made of hair from horses' tails and manes, was introduced from France by Charles II in the 1670s. Id. Today, wigs are a heavily criticized and cherished anachronism. Id. "Barristers treasure their old wigs, as smelly and filthy as they are, because they connote wisdom and experience." Id. Thefts of wigs are also prevalent. Id.

The widespread fashion of wearing wigs began with the court of France's King Louis XIII
While the Law Society did not suggest that probate practice be restricted to lawyers only, it did emphasize the need for a thorough regulatory scheme for the practice. The Council did not advise extending conveyancing business to institutions. “Speculative funding” (whereby counsel would recover normal fees only in a winning situation) should be permitted but not contingency fees as such.

D. Other Legal Organizations

Although cautious about the implementation of contingency fees, the Young Solicitors’ Group was enthusiastic about extended rights of audience and judicial appointments. In contrast, the response of the Judges’ Council was emphatic condemnation.

The Legal Action Group criticized the Green Papers for failure to examine lawyers in public service and for an especial weakness on legal aid issues. The organization also challenged the politically dangerous consequences of increased direct government control of the legal profession: “It cannot . . . be constitutionally right for the executive to have such control over the legal profession.” According to the Legal Action Group, the Green Papers’ scheme for rights of audience was “a hopelessly muddled attempt to pay some belated deference to the Bar and the judiciary”; solicitors should be given those rights by legislation.

In Just Choice, its response to the Green Papers, the London Criminal Courts Solicitors’ Association supported full rights of audience for solicitors and direct access to barristers, and called for abandonment of

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and became established in England after the Restoration. Matthews, Big Wigs and Periwigs, COUNSEL, Mar. 1990, at 28. One hundred years later, however, the style was not in fashion. Id. “Since then, heads of state, politicians, doctors, the armed forces, and every branch of every other profession have managed without them. In retaining the wig as part of their formal dress the Bar and judiciary have long stood almost alone.” Id.

Wigs and gowns have been criticized as “unnecessarily heighten[ing] the drama of a trial,” as intimidating where not appropriate (for example, in family cases), and out-of-place in the modern practice of law. Reeves, Wigs, Gowns and All That, 139 New L.J. 1094, 1094 (1989).

255. STRIKING THE BALANCE, supra note 246, §§ 3.8-.10 & annex B.
256. Id. §§ 2.5-.16 & annex A.
257. Id. §§ 9.4-.14.
259. Responses Round-up, COUNSEL, May/June 1989, at 32.
261. Id.
262. Id.
wigs and gowns. The Investigation Committee of the Solicitors Complaints Bureau suggested an independent, consumer-oriented entity to handle complaints, such as a Legal Services Ombudsman to replace the Office of Lay Observer.

The United Kingdom Delegation to the Council of the Bars and Law Societies of the European Community questioned whether the Green Papers proposals were compatible with practice and codes in the European Community. In later comments, the delegation stated that the legal profession must remain independent of the government and cautioned that the creation of multi-disciplinary or multi-national practices must take into account the effects on legal practice in the European Community and in the United States.

E. Universities, Students, and Tutors

The Heads of University Law Schools promoted a common system of vocational training and supported Lord Mackay’s proposed strong Advisory Committee, but questioned whether it should govern both conduct and training of lawyers. Bar students of the Council for Legal Education were in favor of extended rights of audience for solicitors; they also wanted improvements in pupillage procedures, including mandatory grants. One senior tutor at Downing College, Cambridge University, predicted that if the Green Papers’ proposals were adopted, the Bar would suffer a loss of barrister recruits and that, ultimately, many chambers might become “the litigation annexes of the great firms of solicitors. Cui bono?”

F. Commercial Organizations

The Consumer Association welcomed extended rights of audience, corporate conveyancing, and multi-disciplinary practices. The same

263. Responses Round-up, 139 NEW L.J. 603, 603 (1989).
264. Id.
265. Responses Round-up, supra note 259, at 32.
267. Responses Round-up, supra note 263, at 603.
270. Consumer Association Gives the Thumbs-Up, LAW SOC’Y GAZETTE, May 10, 1989, at
reception came from the Association of British Insurers, which also supported speculative fee arrangements. While the Council for Licensed Conveyancers looked forward to new opportunities for its membership, while the National Association of Solicitors Property Centres urged cautious monitoring of authorized conveyancing practitioners.

G. The House of Lords

In a lengthy House of Lords debate, Lord Lane, the Lord Chief Justice, was especially critical of the proposed Advisory Committee, which he claimed would put control of advocacy in the hands of civil servants. Former Lord Chancellor Lord Hailsham had previously suggested that Lord Mackay's proposals would eradicate judicial independence. Lord Coleraine likewise objected to government interference in the legal professions and opposed unlimited conveyancing rights, but supported widening advocacy practice. Although Lord Gifford favored increased rights of audience, he did not approve the implementation of advocacy certificates. The National Consumer Council, chaired by Baroness Oppenheimer-Barnes, had already expressed the view "that the balance of advantage is in favour of allowing solicitors to represent clients in the civil courts."

H. American Responses

One American law professor drew attention to a contradiction between the Green Papers' stated laissez-faire ideology and actual proposals for

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272. Official Reaction, supra note 258, at 149.
277. Id.
278. ORDINARY JUSTICE, supra note 139, at 237. The National Consumer Council is an independent, government-supported entity, which lobbies on behalf of consumers. THE LAWBOOK, supra note 4, at 124.
heavy government control. The president of the American Bar Association was likewise skeptical of the proposed functions of the Advisory Committee under the Lord Chancellor, likening the situation to the American lawyers' Code of Professional Conduct being subject to approval of Congress. American delegates to a "Lessons from America on the Reform of the Legal Services" conference in London advised unanimously that barristers and solicitors not be fused into a single profession.

"What you do in the end is your business," said a United States lawyer invited by the Bar Council to advise on the possible effects of the Green Paper's proposals, although he spoke strongly for preservation of the two-branch system. A practitioner from Chicago found the contingency fee proposal "conservative" in that it followed the Scottish rather than the American model.

VI. THE WHITE PAPER

On July 19, 1989, Lord Mackay released his White Paper on the proposed legal reforms: _Legal Services: A Framework for the Future_ (the White Paper). This comprehensive report, responding to the comments and reactions during the preceding few months, incorporated into one document the Lord Chancellor's revised reform proposals.

A. Legal Education and Conduct

The Lord Chancellor repeated his proposal of an Advisory Committee on Legal Education and Conduct, staffed as previously laid out but
“operationally fully independent of Government.” Instead of suggesting specific core courses, the White Paper simply left the stages of training, continuing education, and specialization to the Advisory Committee for examination and advice. Lord Mackay adhered to his suggestion for a new statutory Legal Services Ombudsman, “to be independent of Government and of the profession,” but suggested further discussions with the Bar Council and the Law Society to create joint disciplinary provisions.

B. The Judiciary

With the abandonment of the idea of advocacy certificates, the minimum requirements for appointment to the Bench would be simplified:

- Masters, Registrars and Magistrates: Rights of audience in the Supreme Court or general right of audience in County Court for seven years.

- Circuit Judges, Recorders and Assistant Recorders: General rights of audience in Crown or County Court for ten years. A Registrar of three years should be eligible to become a Circuit Judge.

- Lord Justice of Appeal, Judges or Deputy Judges of the High Court: General rights of audience in the High Court and the Court of Appeal for ten years. A Circuit Judge of two years should be eligible to become a judge of the Supreme Court.

- Lords of Appeal in Ordinary (House of Lords): General rights of audience in the Supreme Court for fifteen years and at least two-years’ service as Lord Chancellor or judge of the Superior Court in Great Britain and Ireland.

C. Rights of Audience

Lord Mackay backed away from his advocacy certificate proposal in favor of comprehensive statutory rights of audience, with qualification standards set by the Bar and the Law Society (and other eligible organiza-

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286. Id. §§ 7.9-.11, .13. The Advisory Committee would be able to appoint its own staff. Id. § 7.14.
287. Id. §§ 9.1-.11.
288. Id. §§ 10.9, .13.
289. Id. §§ 3.2-.3.
290. Id. § 15.5 (iv).
291. Id. § 15.5 (iii).
292. Id. § 15.5 (ii).
293. Id. § 15.5 (i).
tions) but "subject to concurrence of the Lord Chancellor," the Lord Chief Justice, Master of the Rolls, the Vice Chancellor and the President of the Family Division. All existing rights of audience would be preserved.

D. Queen’s Counsel

All individuals holding rights of audience in the High Court or the Crown Court would be eligible for appointment as Queen’s Counsel, “on an occasional and honorary basis,” as would other lawyers.

E. Direct Access

Barristers would decide on their own whether to take instruction directly from lay clients.

F. Multi-Disciplinary and Multi-National Practices

Statutes restricting partnerships between solicitors and other professionals should be abolished. Similarly, statutory and any other barriers to partnerships among barristers and solicitors and foreign lawyers should be removed in anticipation of the 1991 recognition of diplomas in the European Community.

G. Probate

The Lord Chancellor would extend the classes of people allowed to engage in probate practices but, at present, would keep the requirement of sworn oaths.

H. Contingency Fees

While the concept of contingency fees as generally understood was rejected, the White Paper proposed the allowance of speculative conditional

294. Id. §§ 3.9-.11.
295. Id. § 3.16.
296. Id. § 3.19.
297. Id. § 11.7.
298. Id. § 12.2.
299. Id. § 13.2-.3.
300. Id. §§ 6.3-.4, .6.
fees as utilized in Scotland, with the Lord Chancellor empowered to determine the maximum increase allowed for attorneys' fees.\footnote{301}

I. Conveyancing

Conveyancing, rights should be extended to other, non-legal professionals, essentially as set forth in the Green Papers.\footnote{302}

Notably absent from the White Paper were any suggestions concerning the structure of barristers' practice in chambers or the barristers' clerks.\footnote{303} Nor was advertising specifically mentioned;\footnote{304} bans on advertising were labelled anti-competitive in a separate white paper also released in July 1989.\footnote{305} Presumably, Lord Mackay either chose not to attempt formal regulation of those areas at that time, or he may have decided that existing regulations, practices, and ongoing developments were sufficient to conform to his general goals of efficiency and reform.

VII. REACTION TO THE WHITE PAPER

Reaction to the White Paper was generally in line with the Green Papers responses. With Lord Mackay's rescission of his advocacy certificate scheme, however, much of the reactive commentary shifted from rights of audience to multi-disciplinary practices, which both the Law Society and the Bar disfavored.\footnote{306} The Bar felt that multi-disciplinary

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\begin{itemize}
\item \footnote{301} Id. §§ 14.2–4.
\item \footnote{302} Id. §§ 5.5, 7–8.
\item \footnote{303} For a recent example of chambers' ongoing evolution in self-management, see de Wilde, Managing Chambers for Change, COUNSEL, Dec. 1989, at 14 (Chambers' constitutions proposed for internal operations).
\item \footnote{304} General reaction to the possibility of lawyers advertising was not insignificant. See, e.g., Buckhaven, Battered Images, 139 NEW L.J. 418, 418 (1989):

[W]hy could we not arouse public sympathy with a clip of a barrister in his dressing-gown, haggard and bedraggled after an all-night sitting on a contingency brief? (“All this can be yours, absolutely free . . .”) . . . We need heroic images; the barrister as a champion of the people, using his wig-bag to beat off the sewage inspector. Perhaps we need a miracle.

Id.

\item \footnote{305} No Exclusion for Professions, LAW SOC'Y GAZETTE, July 19, 1989, at 6 (referring to DEP'T OF TRADE & INDUSTRY, OPENING MARKETS: NEW POLICY ON RESTRICTIVE TRADE PRACTICES, 1989, MND. 727). For additional developments, see, e.g., Bar Council Lifts Advertising Ban, LAW SOC'Y GAZETTE, July 19, 1989, at 8. In its March 31, 1990 code, the Bar has removed an absolute ban against advertising by barristers. Gibb, supra note 242, at 5, col. 2.
\item \footnote{306} E.g., Law Society Reaction, 139 NEW L.J. 998, 998 (1989); Bar's Response, 139 NEW
practices would subject barristers and solicitors to control by large accountancy firms.\textsuperscript{307} Desmond Fennell, then chairman of the Bar, advised that the Bar would indeed survive into the future, as long as its members did not enter into partnerships.\textsuperscript{308}

The Bar did comment, however, that decisions on rights of audience should be in the realm of judges alone, without executive interference.\textsuperscript{309} In November 1989, Desmond Fennell specifically recommended that appointments to the Advisory Committee be made by the Lord Chief Justice along with the Lord Chancellor.\textsuperscript{310} He also pointed out that, if the rules for advocacy rights were drafted by the professions, with input from the Advisory Committee, then the subsequent submission to judges for approval would present a "real danger the judges will be seen as a rubber-stamp."\textsuperscript{311}

"The judges ought not to be subjected to political pressure and if they became a rubber stamp, clearly they could be..."\textsuperscript{312} Fennell also said that judges should be involved early in the proposals, in a consulting function.\textsuperscript{313}

The Law Society voiced concern that rules it may draft for solicitor advocacy could be thwarted through the power of judges.\textsuperscript{314} In a July 1989 press release, Sir Richard Gaskell, then President of the Law Society, stated that Lord Mackay had been persuaded, among other things, "to cut back... the sweeping powers proposed for the Lord Chancellor and for the Advisory Committee"; "to enshrine the principle of extended rights of audience for solicitors in statute"; and "to incorporate protections [the Law Society] sought to preserve a separate Bar."\textsuperscript{315} In his elaboration on the summarized recommendations, Mr. Gaskell went on to say: "Our call for a more open choice of advocate went hand-in-hand with support for a separate barristers' profession. To help the Bar we proposed that they


\textsuperscript{308} \textit{Bar's Response, supra} note 306, at 998.

\textsuperscript{309} Ford, \textit{supra} note 307, at 5.

\textsuperscript{310} Gibb, \textit{Bar Fights for Judges to Decide Advocacy Rights,} \textit{The Times} (London), Nov. 22, 1989, at 9, col. 1.

\textsuperscript{311} \textit{Id.}

\textsuperscript{312} \textit{Id.}

\textsuperscript{313} \textit{Id.}

\textsuperscript{314} \textit{Judges Veto Threat Revived, LAW SOC'Y GAZETTE,} Oct. 4, 1989, at 3.

\textsuperscript{315} Law Society, Government Has Moved Substantially in Our Direction, Say Solicitors, July 19, 1989, at 1 (press release).
should have full rights of audience on qualification and that they should not be forced to abandon their rules against partnership.\textsuperscript{316} The Society also reiterated its worries about conveyancing by financial institutions.\textsuperscript{317}

As expected, commercial institutions were essentially delighted with the potential extension of conveyancing rights to their ranks.\textsuperscript{318} One legal writer identified “the most radical departure” from the Green Papers as the reforming of the proposed Lord Chancellor’s Advisory Committee as a solely advisory, not regulatory, body, despite the Committee’s weighty statutory presence.\textsuperscript{319} Perhaps a contemporaneous call for a new English Bill of Rights\textsuperscript{320} could be applied to protect the judiciary from the executive influences of the Advisory Committee.\textsuperscript{321}

Among the peers first commenting on the White Paper, Lord Boyd-Carpenter was appreciative of Lord Mackay’s courage.\textsuperscript{322} Lord Elwyn-Jones, a former Lord Chancellor, felt most of the objections concerning infringement on the judiciary’s and the Bar’s independence had been removed, yet he and Lord Meston were disappointed with the absence of legal aid evaluations.\textsuperscript{323} According to Lord Hutchinson of Cullington, the matter of rights of audience for solicitors remained nebulous.\textsuperscript{324}

\textsuperscript{316} Id. at 3.
\textsuperscript{318} See, e.g., Initial Responses, 139 NEW L.J. 998, 998 (1989) (Royal Institute of Chartered Surveyors).
\textsuperscript{320} Jus, Silent Rights, 139 NEW L.J. 1069, 1069 (1989). Lord Scarman has suggested that a British Bill of Rights (also unwritten at present) could be modelled after the European Convention on Human Rights and Fundamental Freedoms, which was ratified by the United Kingdom in 1953 but remains unincorporated into British law. Scarman, Bill of Rights That’s Ours for the Taking, The Times (London), Jan. 4, 1990, at 12, col. 2.


\textsuperscript{321} For a discussion of the judiciary’s standing, see Stevens, The Independence of the Judiciary: The View from the Lord Chancellor’s Office, 8 OXFORD J. LEGAL STUD. 222 (1988).
\textsuperscript{322} 510 PARL. DEB., H.L. (5th ser.) 785 (1989).
\textsuperscript{323} Id. at 781-82.
\textsuperscript{324} “[T]he question of rights of audience would still seem to be left largely in the air and to be deferred.” Id. at 784.
VIII. THE COURTS AND LEGAL SERVICES BILL

Reform of the legal profession became an unavoidable political issue. The momentum for change is now so great that even a temporary retreat by the Government . . . will only stave off the day of retribution.

In her speech at the Opening of Parliament on November 21, 1989, Queen Elizabeth set forth the government’s goals of greatest priority for 1990: Her remarks indicated the certainty that reform of the British legal profession would soon enter into legislation: “A Bill will be introduced to improve the administration of civil justice and to increase choice in the provision of legal services."

A. Presentation of the Bill

In late November 1989, Lord Mackay announced the imminent publication of a bill, which would be based on the Civil Justice Review and the Green and White Papers, on the reform of the legal profession and legal services. The Civil Justice Review also provided the source for the bill’s new system of case allocation and transfer between the High Court and the County Courts, as previewed in late July by the Lord Chancellor. The Lord Chancellor’s Courts and Legal Services Bill (the Bill) was printed on December 6, 1989. For the most part, the Bill reiterated the

326. Id.
327. The Queen’s Speech on the Opening of Parliament on Tuesday, 21 November 1989 [hereinfter Queen’s Speech]. For discussions of television broadcast of House of Commons Proceedings, see Kinsley, Democracy Theatre, NEW REPUBLIC, Jan. 1, 1990, at 4; Fairlie, Maggie’s Flying Circus, NEW REPUBLIC, Jan. 1, 1990, at 22.
328. Queen’s Speech, supra note 327.
330. Id. When the White Paper was released, the Lord Chancellor simultaneously announced additional legislation to redistribute much of the caseload from the High Court to County Courts, thus reserving the High Court for extraordinary cases and for judicial review. Ford, Mackay Pledges Flexible and Speedier Legal System, The Times (London), July 20, 1989, at 4, col. 1; see infra text accompanying notes 338-345.
331. LORD CHANCELLOR, COURTS AND LEGAL SERVICES BILL [H.L.], H.L. Bill 13 (Dec. 6, 1989) [hereinafter the COURTS AND LEGAL SERVICES BILL 13].

In late January 1990, Lord Fraser of Carmyllie, the Lord Advocate, moved in the House of Lords a second recording of the Law Reform (Miscellaneous Provisions) (Scotland) Bill (the Scottish Bill). The Scottish Bill, similar to Lord Mackay’s Courts and Legal Services Bill in Britain, included provisions that would allow solicitors rights of audience in the Supreme Court and would extend conveyancing rights to others than solicitors. Reform for Scots Courts, The
provisions of (and drew the same general criticisms as) the White Paper by reworking "the more ordinary prose of" the latter into "the precise language of a Bill." The order to print the Bill constituted the first reading in the five-step legislative process in the Houses: first reading; second reading (debate); committee stage (detailed examination with amendment proposals); report stage (review of the amended bill); and third reading (final debate).

The initial Law Society reaction to the Courts and Legal Services Bill, on the day after the Bill's publication, was applause for "an end to unnecessary double-manning" of barristers and solicitors at trial. The Society's President, David Ward, foresaw no threat to barristers: "I believe [the Bill] will strengthen their ability to adapt and modernise their services to meet the needs of our clients."

Outgoing Bar chairman Desmond Fennell observed that the Bill did not actually address the issue of client access to the courts. "We feel these reforms have been approached from the wrong end. Tinkering with the structure of the legal profession is not going to remedy the shortcomings in the system. We are still convinced that this is little more than a Treasury motivated cosmetic exercise."

In the following discussion, the more controversial and noted elements of the Bill are considered in conjunction with the professions' reactions to each proposal.

B. High Court/County Courts

The Bill proposed that "[t]he Lord Chancellor may by order make provision" for the High Court and County Courts each to have jurisdiction over the other's proceedings and each to specify the proceedings it will...
handle. Proceedings could be transferred down to the County Clerk by order of the High Court, or to the High Court by order of the High Court or a County Court. The Bill specified that County Clerks may not be conferred authority to hear applications for judicial review and further stated that County Courts are not empowered “to order mandamus, certiorari or prohibition; or . . . to make any order of a prescribed kind.”

Both the Law Society and the Bar have opined that the County Courts were not currently capable of handling the increased workload engendered by the Lord Chancellor’s revision of the High Court. Lord Mackay has responded that the envisioned shift of cases would take place gradually, beginning in 1991, and promised that court staff would increase by some 400 during the next financial year.

In spite of objections of such peers as Lord Rippon, who saw the Bill’s court transfer clause as a further “whittling away” of the judiciary’s and legal profession’s independence in favor of executive governmental control, the House of Lords agreed to the clause during the first day of the committee stage.

C. Rights of Audience

The major provision for the granting of audience rights is embodied in the following language:

338. COURTS AND LEGAL SERVICES BILL 13, supra note 331, § 1(1).
339. Id. § 2(1).
340. Id. § 2(3).
341. Id. § 1(6).
342. Id. § 3(1).
344. Id.
346. The Lord Chancellor would have authority to set regulations by which practitioners of Scotland or Northern Ireland, who are not otherwise so permitted, may exercise rights of audience or rights to conduct litigation or to undertake conveyancing or probate work in Britain. COURTS AND LEGAL SERVICES BILL 13, supra note 331, § 45.
347. The Bill defines the “right of audience” as “the right to exercise any of the functions of appearing before and addressing a court including the calling and examining of witnesses . . . .” Id. § 81(1).
A person shall only have a right of audience before a court in relation to any proceedings in the following cases—

. . . where—

(i) he is granted a right of audience before that court in relation to those proceedings by the appropriate authorised body; and

(ii) that body’s qualification regulations and rules of conduct have been approved for the purposes of this section, in relation to the granting of that right.  

The section concerning rights to conduct litigation is virtually identical to the section on audience rights, with the substitution of the appropriate terminology directed toward litigation.

In reference to either rights of audience or rights to litigate, the “appropriate authorised body” is the body granting the right and of which the concerned person is a member—be that body the Law Society, the General Council of the Bar (regarding rights of audience only) or “any professional or other body which has been designated by Order in Council . . . .” To achieve entitlement to the prescribed rights, the authorized bodies are required to create “qualification regulations” (meaning educational and training regulations) and “rules of conduct” (meaning requisite conduct standards for members).

An entity that seeks qualification as an “appropriate authorised body” would apply to the Lord Chancellor (specifying the purposes for which

348. Id. § 24(2).
349. The Bill defines the “right to conduct litigation” as the right—(a) to exercise on behalf of a client all or any of the functions of issuing a writ or otherwise commencing proceedings before any court; and (b) to perform any ancillary functions in relation to proceedings (such as entering appearances to actions) . . . . Id. § 81(1).
350. Id. § 25(2).
351. “[M]ember, in relation to any profession or other body,” is defined in the Bill to include “any person who is not a member of that body but over whom that body has disciplinary powers . . . .” Id. § 81(1).
352. Id. at §§ 24(7), 25(4). Upon the Bill’s becoming effective, the General Council of the Bar would be deemed to have granted to barristers the rights of audience that they had before December 7, 1989. Id. § 28(1)(a). The Law Society would be deemed to have granted to solicitors the rights of audience and the rights to litigate that they had before December 7, 1989. Id. §§ 29(1)(a), 30(1)(a).
353. Id. at §§ 24(7), 25(4). Upon the Bill’s becoming effective, both the General Council of the Bar and the Law Society would be deemed to have in force properly approved qualification regulations and rules of conduct. Id. §§ 28(1)(b)-(c), 29(1)(b)-(c), 30(1)(b)-(c).
authorization is sought) and comply with certain prescriptions.\textsuperscript{354} The Lord Chancellor would transmit the applicant's submissions (including proposed qualification regulations and rules of conduct) to the Advisory Committee\textsuperscript{355} and the Director General of Fair Trading for advice.\textsuperscript{356} After he has received the Advisory Committee's and Director's advice and has determined that the application should be approved, the Lord Chancellor would send the advice, his own decision regarding approval, and the body's application and submissions to each designated judge.\textsuperscript{357} Approval by the Lord Chancellor and the designated judges must be unanimous; the application could fail from a single refusal.\textsuperscript{358} The Lord Chancellor may then recommend to the Queen that the approved entity be designated an authorized body by Order in Council.\textsuperscript{359}

On the fourth day of committee debate in the House of Lords, Lord Rawlinson of Ewell moved an unsuccessful amendment to delete from the Courts and Legal Services Bill the right of solicitors to be heard in the High Court, which proposal he said would make the legal system more costly and less effective.\textsuperscript{360} In the debate, Lord Simon of Glaisdale predicted that within a few years the rights of solicitors would bring on the end of the barristers' profession, except for a few specialists.\textsuperscript{361} In contrast, the Earl of Onslow expressed concern that small, high street solicitors would suffer in competition.\textsuperscript{362} Because it works, said former

\begin{itemize}
\item \textsuperscript{354} Id. \S 26(1).
\item \textsuperscript{355} See infra text accompanying note 371.
\item \textsuperscript{356} COURTS AND LEGAL SERVICES BILL 13, supra note 331, sched. 4, \S\S 1(1), 3(1).
\item \textsuperscript{357} Id. sched. 4, \S 5(1)-(2). The "designated judges" are the Lord Chief Justice, the Master of the Rolls, the President of the Family Division, and the Vice-Chancellor. Id. \S 81(1).
\item \textsuperscript{358} Id. sched. 4, \S 5(9). Upon request from the applicant, the Lord Chancellor must specify who refused approval and the reason given for refusal. Id. sched. 4, \S 5(10). Approval of authorized bodies' alterations to their qualification regulations or rules of conduct would involve scrutiny by the same reviewing entities, as would revocation of designations. Id. sched. 4, \S\S 6-11.
\item \textsuperscript{359} Id. sched. 4, \S 26(2). The Lord Chancellor may also recommend an Order in Council revoking such designation. Id. sched. 4, \S 27(1).
\item \textsuperscript{360} 515 PARL. DEB., H.L. (5th ser.) 46-48, 61 (1990).
\item \textsuperscript{361} "Lord Gardiner used to ask (and I never heard an answer): if one provides to solicitors the same satisfactions and rewards as are at the moment available to barristers, why should anybody come to the Bar? . . . Those early years at the Bar can be very difficult." Id. at 49. Lord Gifford drew attention to the thriving Bar in Australia, where solicitors have enjoyed advocacy rights since 1891. Id. at 57-58.
\item \textsuperscript{362} "The problem that we are creating is that if solicitors grab too large a hold over the advocacy skills, the amount of choice available to the public will be reduced and not increased." Id. at 57.
\end{itemize}
Lord Chancellor Lord Hailsham, the existing system is good.  

The Council of Her Majesty's Circuit Judges believed that solicitors should not have increased rights of audience and elaborated that solicitors' advocacy abilities vary; there are "very few who have sufficient skill and experience to oppose counsel. The able are remarkable for their absence."

Circuit Judge Balston argued that the solicitors promoting increased rights of audience are a vocal few—coming, at least in part, from a few large, wealthy London firms (which "never do legal aid work"). He pointed out that firms of different sizes have been competitive because of their equal access to the best barristers. In a firm where solicitors were also advocates, a client would no longer receive independent advice on the best barrister for a case. Nor did Lord Mackay claim that legal services would become less expensive, which indeed cannot happen, according to Judge Balston.

The Law Society seemed primarily concerned that the language and interpretation of the Bill should not narrow the promised rights of audience for solicitors. In particular, the Society voiced concerns about judicial approval of wider audience rights.

D. The Advisory Committee

The Advisory Committee would bear responsibility for "assisting in the maintenance and development of standards in the education, training
and conduct of those offering services. The duties of the Advisory Committee were written to include review of, evaluation of and recommendations for "all stages of legal education and training" — including training in advocacy, training in the conduct of litigation, and practical training in other areas concerned with legal services — as well as similar responsibilities concerning specialization schemes, advice on probate services, and general advice.

The Advisory Committee would be appointed by the Lord Chancellor and would consist of a chairman (a Lord of Appeal in Ordinary or a judge of the British Supreme Court) and fourteen other members, composed of:

- two practicing barristers (appointed after consultation with the General Council of the Bar);
- two practicing solicitors (appointed after consultation with the Law Society);
- two individuals experienced in legal teaching (after consultation with representative organizations (as the Lord Chancellor considers appropriate); and
- eight additional individuals who are not salaried judges, practicing barristers or solicitors, or teachers of law.

E. Ombudsman

The Lord Chancellor would appoint, for a three-year renewable term, the investigative Legal Services Ombudsman (the Ombudsman), who may not be an authorized advocate, litigator, practitioner or notary, or a licensed conveyancer. The Ombudsman may investigate any allegation regarding the manner in which a professional body has dealt with complaints

371. COURTS AND LEGAL SERVICES BILL 13, supra note 331, § 17(1).
372. Id. sched. 2.
373. Id. § 16. In an effort to counter the domination of the highest levels of the legal profession by white males, Lord Mackay has promised that his Advisory Committee would include persons experienced in promoting equal opportunities. Gunn, Mackay in Move on White Male Bias of Top Lawyers, The Times (London), Feb. 19, 1990, at 3, col. 4. Sir Nicholas Lyell also spoke assurance of the Lord Chancellor's commitment to a judiciary more representative of the genders and races. Judicial Mix, 140 NEW L.J. 22, 55 (1990).
374. COURTS AND LEGAL SERVICES BILL 13, supra note 331, § 18.
375. A "professional body" means any body or officer having disciplinary power over authorized advocates or litigators, recognized bodies or notaries thereof, or licensed conveyancers, as well as any body or officer specified by order of the Lord Chancellor. Id. § 19(1)(a), (11).
against itself, its members, or its employees. Upon completion of investigation, the Ombudsman would send a report of his conclusions to the person making the allegation, the person about whom the complaint had been made, and any concerned professional body. Any person to whom a recommendation is directed must, within three months, notify the Ombudsman of responsive action taken or proposed to be taken. One who fails to comply with a recommendation must publicize the reasons for failure.

On January 24, 1990, Lord Mackay announced his intention to amend the Bill to give the Ombudsman investigatory jurisdiction over alleged maladministration by court officials. Although the Law Society and the National Consumer Council had been pressing for the change, Lord Mackay and the Lord Chancellors preceding him had resisted such increased jurisdiction because the courts (on whose behalf court officials act) are constitutionally separate and independent from the executive. Mackay conceded that giving the Ombudsman powers to investigate mistakes by court staff would likely “raise difficulties, some of them constitutional.” Lord Mackay’s constitutional concern for judicial independence in evaluating the authority of the Ombudsman is curious in light of the peers’ and legal profession’s strong objections to the extent of the Advisory Committee’s jurisdiction and power on the same ground of unconstitutionality.

F. Conveyancing

The Lord Chancellor empowered himself with the appointment of the Authorised Conveyancing Practitioners Board (the Conveyancing Board),

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376. Id. § 19(1). The Ombudsman may not investigate allegations concerning immune persons or issues determined by courts, the Disciplinary Tribunal of the Council of the Inns of Court, the Solicitors Disciplinary Tribunal, or other tribunals specified by the Lord Chancellor. Id. § 19(7).

377. Id. § 20(1).

378. Id. § 20(7). “It shall be the duty of any professional body to whom a recommendation is made under this section to have regard to it.” Id. § 21(2).

379. Id. § 20(8).


381. Id.; see also Society Wants Remedy Against Court Staff, LAW SOC’Y GAZETTE, Dec. 13, 1989, at 4.


383. See supra text accompanying notes 309-10, 319.
composed of a chairman and four to eight other members. The general duties of the Conveyancing Board were stated as the development of competition and the supervision of authorized practitioners in the field of conveyancing services. The Bill would pointedly strike down the section of the Solicitors Act 1974, which limits those eligible to provide conveyancing services. The Conveyancing Board “shall authorise” any applicant for conveyancing services, where the Board “is satisfied that the applicant’s business is, and is likely to continue to be, carried on by fit and proper persons or, in the case of an application by an individual, that he is a fit and proper person” and where the Board believes that the applicant will comply with stated requirements. Among potential eligible organizations mentioned were banks, building societies and insurance companies.

The Law Society cautioned against inadequate consumer safeguards as a result of one-stop conveyancing by financial institutions. The Society particularly pushed for the removal of the “no restrictions” clause, which it considered contrary to its general regulatory control of solicitors.

G. Conditional Fees

The Bill provided for a conditional fee arrangement between attorney and client whereby the fees and expenses for attorney services may be payable only in specified circumstances. Under conditional fee arrangements, attorneys may charge more than their usual fees at agreed percentages up to limits set by the Lord Chancellor.

The provision allowing conditional fees (no-win, no-fee) was sharply
attacked during the committee stage in the House of Lords. Lord Rawlinson of Ewell said that such practice would develop into speculative litigation, which he labelled the worst feature of the American legal system. Lord Renton, who clarified that conditional fees would not entail the contingency fee arrangement where attorneys share in the damages award, stood in agreement with Lords Rawlinson and Mishcon that conditional fees are "a poor substitute for improved legal aid." Lord Hailsham of St. Marylebone called the conditional fee proposal evil and inherently immoral: "It undermines the whole ethic of advocacy, the whole ethic of the legal profession."

H. Multi-Disciplinary and Multi-National Practices

Those sections of the Solicitors Act of 1974 and Public Notaries Act 1801 that prohibit solicitors and notaries, respectively, from entering into partnership with persons not of their professions would "cease to have effect," although the Law Society and the Master of the Faculties may still make rules prohibiting solicitors and notaries from entering into any such "unincorporated association." Nor could any common law rule prevent barristers from entering into "unincorporated associations" with non-barristers, although the General Council of the Bar could maintain such restrictions.

Both the Bar and the Law Society have stated their opposition to multi-disciplinary practices, which they consider a threat to the independence of their professions. They did not, however, oppose multi-national partnerships.

An attempted amendment to the Bill to prohibit solicitors from

396. Id. at 537.
397. Id. at 540. Lord Hailsham, in a pointed reference to the Lord Chancellor's native country, where a form of conditional fees exists, remarked: "The Scots have voted with their feet. They will not have anything to do with this evil thing. Less than 1 per cent of the cases are fought on this basis. They cannot touch it with a barge pole and we are asked to imitate them." Id. at 543.
398. COURTS AND LEGAL SERVICES BILL 13, supra note 331, § 48(1)-(4).
399. Id. § 48(5)-(6).
401. Id.
entering into multi-disciplinary practices was rejected. The Law Society feared a situation where it may be able to impose a multi-disciplinary practice ban on non-advocate solicitors but not on other solicitors.

I. Barrister/Client Contracts

Although the Bill would allow barristers to enter into contract directly with clients (rather than through solicitors), it would not hinder the General Council of the Bar from making rules to prohibit such contracts.

IX. THE BILL'S PROGRESS IN PARLIAMENT

During debate on the Bill (as on the earlier Green and White Papers), one constant question was whether the opening of the barristers' exclusive court turf to solicitors would presage the end of the barristers' profession. Critics particularly anticipated unfair competitive advantage in the extension of rights of audience to solicitors, who had not been subject to the cab-rank rule, as were barristers. Under the existing system barrister-advocates are accessible for any client's case, while under the earlier language of the Bill's proposals solicitor-advocates would be free to choose the most lucrative cases. During the Bill's report stage in the House of Lords, however, a cab-rank amendment proposed by Lord Alexander of Weedon, a barrister, overcame the Law Society's strong opposition to be carried by a vote of ninety-nine to forty-two.

404. COURTS AND LEGAL SERVICES BILL 13, supra note 331, § 46.
405. See, e.g., Harper, supra note 364, at 59.
406. See supra note 227 and accompanying text.
407. GENERAL COUNCIL OF THE BAR, supra note 243, § 6.5. In the United States, there is no general requirement analogous to the cab-rank principle. The ABA's Model Code of Professional Responsibility states: "A lawyer is under no obligation to act as advisor or advocate for every person who may wish to become his client; but in furtherance of the objective of the bar to make legal services fully available, a lawyer should not lightly decline proffered employment." MODEL CODE, supra note 2, EC 2-26.
409. Hall, We Say No and We Mean No!, 140 NEW L.J. 284, 284 (1990); Raymond, The Profession's Duty to Provide; A Solicitor's Right to Choose, 140 NEW L.J. 285, 285 (1990); Inns and Outs, The Times (London), Feb. 20, 1990, at 31, col. 6. The National Consumer Council has also spoken out against cab-rank requirements. NCC OPPOSES CAB RANK, LAW
ninety-two. As the Bill went into the House of Commons, the Government firmly supported the application of the cab-rank rule to rights of audience for practicing bodies in all courts. By June 1990, the Bill included, in its general principle, specific language requiring that any body whose members provide advocacy services must include in its rules of conduct a provision that such services may not be withheld by its members on the grounds of objection to the nature of a case or a client’s conduct or opinions, or the source of funding (specifically, legal aid).

The Bar has been rather demonstrative in its insistence that, in accordance with the cab-rank principle, it is “the duty of every barrister to represent any client, whether legally aided or not,” within the barrister’s field of practice. The Bar’s Code of Conduct has been revised to clarify that a legal aid fee “shall for this purpose be deemed to be a proper professional fee . . . .” In a private interview, 1990’s Bar chairman Peter Cresswell spoke emphatically on this point:

Legal aid rates are below what they should be, but that hasn’t caused the Bar to pull out of legal aid work . . . A legal aid fee is deemed to be a proper fee unless the Bar determines otherwise, through the Bar Council or a general meeting. We believe this is the only responsible approach for a profession. This isn’t a sectarian point, it’s a point that goes to access to justice.
As the Courts and Legal Services Bill approached the finish of its course through Parliament—its progress was nearly complete when Commons recessed on July 20, 1990—"the legal branches were turning their attention to making the proposed statute work for the betterment of the legal system, particularly in the area of legal aid. Tony Holland, president of the Law Society from July 1990 to mid-1991, redirected his focus from the "'greatly watered down'" Bill to the need for lawyers to "'use their ingenuity to get better conditions'" for legal aid. He suggested, for example, studying foreign models for legal services, such as those in Sweden and Australia. Peter Cresswell expressed the Bar's concerns:

We need to focus on access to justice. And one of the sad features of this exercise has been that in many respects we've been divided from the Law Society. . . . [T]he time has come for us to stop fighting in public, to make common cause. Although areas of difference remain, these will be sorted out by the new machinery. And, as long as we fight—and I make it clear that I don't approve of that—as long as we fight in public, we make it easier for the government to dictate the agenda. We should be dictating the agenda to the government in terms of pressing the government to provide better access to justice—i.e., improved legal aid.

[hereinafter Cresswell Interview].


418. Gilvary, A Pragmatist for President, LAW SOC'Y GAZETTE, July 25, 1990, at 2. Mr. Holland's successor, Philip Ely, does not promote a rush of solicitors, who lack proper advocacy training, into the higher courts, but he has pointedly remarked that the standards set for solicitors seeking rights of audience will not be unrealistically high. Gilvary, Steady Hand at the Helm, LAW SOC'Y GAZETTE, July 10, 1991, at 2.


The legal system is for the people and not for the lawyers or the judiciary. We are all servants of the community and if our system does not care for those who need legal aid, then it does not deserve to be called a system of justice. The same quality of advice and representation should be available to those on modest or no income as to the rich, the prosecution and large companies.
Both branches have also addressed the need for a judiciary more representative of the populace. Mr. Holland revealed plans for a "fast track" for judicial appointment of women and ethnic minority candidates. Mr. Cresswell pointed to the Bar's "very good track record in terms of race relations" and its success in having provisions added to the Bill to prevent racial or sexual discrimination by or in relation to barristers.

Among his accomplishments in affecting the Bill during its course of passage, Mr. Cresswell rated high the addition of "a circuit judge to the lay-nominated Advisory Committee, and [the strengthening of] the position of the four senior judges in the new machinery," each holding an individual veto. The profession has also managed to avoid a restriction of only one lawyer on legal aid cases. The profession has retained immunity for advocates from actions in negligence and for breach of contract and the Bar's self-determination on multi-disciplinary practices. "And we have secured the fast track for the Bar. That means that, as soon as you have completed pupillage, an entrant will obtain full rights of audience."


422. Cresswell Interview, supra note 415. The proposed Advisory Committee increased from 14 to 16 members, with the addition of one circuit judge and one more non-lawyer. Compare COURTS AND LEGAL SERVICES BILL 13, supra note 331, § 16(4), with COURTS AND LEGAL SERVICES BILL 164, supra note 412, § 17(4).

The four designated judges are the Lord Chief Justice, the Master of the Rolls, the President of the Family Division, and the Vice-Chancellor. COURTS AND LEGAL SERVICES BILL 164, supra note 412, § 99(1). The designated judges would play a key role in the approval of authorized bodies. Compare COURTS AND LEGAL SERVICES BILL 13, supra note 331, sched. 4, § 5, with COURTS AND LEGAL SERVICES BILL 164, supra note 412, sched. 4, § 5.

423. Cresswell Interview, supra note 415; see Clause 31 Here to Stay, 140 NEW L.J. 878, 878 (1990).

424. Cresswell Interview, supra note 415; COURTS AND LEGAL SERVICES BILL 164, supra note 412, § 52.

425. Cresswell Interview, supra note 415; COURTS AND LEGAL SERVICES BILL 164, supra note 412, § 54(5)-(6).

426. Cresswell Interview, supra note 415; COURTS AND LEGAL SERVICES BILL 164, supra
Mr. Holland expressed doubts about the role that the Advisory Committee and designated judges will actually take in accomplishing extension of rights of audience to solicitors\(^4\) and about over-regulation of the legal profession in general.\(^2\) He was instrumental in the Law Society’s quest for full advocacy rights\(^2\) and, as the Society’s President, continued to decry the Bar’s resistance to full sharing of rights of audience.\(^4\)

Throughout his term as Chairman of the Bar, Mr. Cresswell emphasized that the two branches of the legal profession must “stop airing any differences . . . and . . . make common cause wherever possible.”\(^4\) In referring to the process of evaluating and discussing the reform papers and amendments, he commented:

> [O]ne of the lessons that emerges is that any differences within the legal profession need to be sorted out and that there’s a danger . . . , if you don’t sort out those differences, that the government can put pressure where the whole profession should be resisting the government in some areas. We need to retain our independence, we need to press for better access to justice. And there’s a danger that the government can divert attention from, for instance, the need to improve access to justice through legal aid by putting pressure on the profession.\(^4\)

In its route through Parliament, the Bill endured the scrutinizing of a plethora of proposed amendments.\(^4\) After resumption of Parliament in October 1990, the Bill re-emerged in the House of Lords for review of the

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\(^4\) Mr. Holland's doubts about the role of the Advisory Committee and designated judges, his instrumental role in the Law Society's quest for full advocacy rights, and his continued criticism of the Bar's resistance to full sharing of rights of audience.

\(^2\) Mr. Holland's instrumental role in the Law Society's quest for full advocacy rights and his continued criticism of the Bar's resistance to full sharing of rights of audience.

\(^4\) Mr. Cresswell's emphasis on the need for the two branches of the legal profession to stop airing any differences and make common cause wherever possible.

\(^4\) Mr. Cresswell's comments on the need for the legal profession to address differences and resist government pressure.

\(^4\) Mr. Cresswell's emphasis on the lessons learned from the process of evaluating and discussing reform papers and amendments.

\(^4\) Mr. Cresswell's emphasis on the need to retain independence and press for better access to justice.

\(^4\) Mr. Cresswell's emphasis on the danger of government pressure diverting attention from improving access to justice.

\(^4\) Mr. Cresswell's comments on the need for the two branches of the legal profession to address differences.

\(^4\) Mr. Cresswell's emphasis on the need to retain independence and press for better access to justice.

\(^4\) Mr. Cresswell's emphasis on the danger of government pressure diverting attention from improving access to justice.

\(^4\) Mr. Cresswell's comments on the need for the two branches of the legal profession to address differences.

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\(^4\) Mr. Cresswell's comments on the need for the two branches of the legal profession to address differences.
Commons amendments, then returned to the House of Commons for consideration of the Lords additions. The latter amendments included protection for home buyers against unwanted extra services from mortgage lenders.

The Courts and Legal Services Bill was among the proposals to receive Royal Assent (the final stage in a bill's transition into legislation) on November 1, 1990—less than a week before the official opening of Parliament's new year on November 7, 1990.

The Courts and Legal Services Act (the Act) contained few changes from the June 19, 1990 draft of the Bill. The language extending the cab-rank rule to all advocates remained essentially the same:

As a general principle the question whether a person should be granted a right of audience, or be granted a right to conduct litigation in relation to any court or proceedings, should be determined only by reference to—

(c) whether, in the case of a body whose members are or will be providing advocacy services, the rules of conduct make satisfactory provision in relation to the court or proceedings in question requiring any such member not to withhold those services—

(i) on the ground that the nature of the case is objectionable to him or to any section of the public;
(ii) on the ground that the conduct, opinions or beliefs of the prospective clients are unacceptable to him or to any section of the public;
(iii) on any ground relating to the source of any financial support which may properly be

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437. The Broadcasting Act, the Environmental Protection Act and the Human Fertilisation and Embryology Act were among other bills which received the Royal Assent on the same day. Moncrieff, Electioneering Session Ahead at Westminster, Press A. Newsfile, Nov. 1, 1990.
438. The Queen's Speech previewed no further legislation directed toward the British legal profession. See The Queen's Speech on the Opening of Parliament on Wednesday, 7 November 1990.
given to the prospective client for the proceedings in question (for example, on the ground that such support will be available under the Legal Aid Act 1988). . . .

As originally proposed, the seventeen-member composition of the Advisory Committee will be subject to appointment by the Lord Chancellor. In the Act, however, the description of the Committee's specific functions has a new section, an acknowledging nod to "special" legal services: "In discharging its functions . . . , the Advisory Committee shall have regard to the need for the efficient provision of legal services for persons who face special difficulties in making use of those services, including in particular special difficulties in expressing themselves or in understanding." Similarly, the Lord Chancellor will appoint the Legal Services Ombudsman.

The Act also retains the prohibition against restricting legal aid representation to "a single barrister, solicitor or other legal representative" and preserves the right for the legal aid recipient to select legal representatives. Nowhere else in the Act is legal aid specifically addressed, although the statutory objective of the "Legal Services" part is "the development of legal services in England and Wales . . . by making provision for new or better ways of providing such services and a wider choice of persons providing them, while maintaining the proper and efficient administration of justice."

X. CONCLUSION

This author's objections to the proposed reform of the British legal profession center on two factors: the expansive opening of rights of

440. Id. § 17(3)(c); cf. COURTS AND LEGAL SERVICES BILL 164, supra note 412, § 15(3)(c).
441. Courts and Legal Services Act 1990, § 19(2); accord COURTS AND LEGAL SERVICES BILL 13, supra, note 331, § 16(2); COURTS AND LEGAL SERVICES BILL 164, supra note 412, § 17(2).
442. Courts and Legal Services Act 1990, sched. 2, § 7; cf. COURTS AND LEGAL SERVICES BILL 164, supra note 412, sched. 2 (which contains no such section).
443. Courts and Legal Services Act 1990, § 21(1); accord COURTS AND LEGAL SERVICES BILL 13, supra note 331, § 18(1); COURTS AND LEGAL SERVICES BILL 164, supra note 412, § 19(1).
444. Courts and Legal Services Act 1990, § 59(1)-(2); accord COURTS AND LEGAL SERVICES BILL 164, supra note 412, § 49(1)-(2).
audience in the High Court to solicitors and others, and the extensive powers granted to the Lord Chancellor (and his Advisory Committee) over the judiciary and the legal profession.

The eager efforts to extend rights of audience to solicitors have not taken into account the history of the legal profession, which produced wide divergence between the nature of solicitors and barristers. Nor have the Lord Chancellor’s drafts addressed the fact that most of the legal education of lawyers, as well as their professional training, is directed toward the specific functions of the separate branches of the profession; barristers’ education and training are focused on advocacy, solicitors’ on advice and administration. Nor have the proposals resolved the apparent conflict between barristers’ requirement of presenting legal truths to the court and solicitors’ priority of representing the client’s interests (within the allowances of the law). The Act’s very vagueness about the actual criteria necessary for granting rights of audience could hinder drastic changes in the professions. The proposed reforms can only be implemented over time, and are subject to the legal profession’s, the judiciary’s, the government’s and the public’s perceptions of what changes are acceptable. Lord Mackay has provided extensive and ultimate power to his own position, as the Lord High Chancellor of Great Britain. In addition to judicial appointments, the Lord Chancellor will be responsible for appointments to the Advisory Committee, the Conveyancing Board, and the Ombudsman. In a worst case scenario, an influential Prime Minister could exert considerable, albeit previously unconstitutional, control over the appointment of judges, the granting of advocacy and litigation rights, the composition of authorized conveyancers, and even court personnel.

The language of the legislation is potentially dangerous—sometimes unconstitutional, poorly thought out, often vague, and unduly expedited. The time required for actual implementation—which has extended

446. The Law Society proposed that rights of audience be extended to solicitors' clerks, who would be governed by the Society as an “authorized body,” as anticipated in the Courts and Legal Services Bill. Rights of Audience for Solicitors' Clerks, 140 NEW L.J. 591, 591 (1990); see COURTS AND LEGAL SERVICES BILL 13, supra note 331, § 24(2)-(3); COURTS AND LEGAL SERVICES BILL 164, supra note 412, § 25(2)-(3). Lord Mackay also told the Council of Licensed Conveyancers that their membership will be allowed to undertake probate, litigation and legal advocacy. Gibb, Law Reform Gives Wider Powers to Conveyancers, The Times (London), Oct. 17, 1990, at 5, col. 1.

447. The Act has, however, now joined the body of statutes which, in part, embodies what is perceived as Britain's constitution.

448. Criticism has, in fact, been made of the lack of sufficient time to develop considered responses to proposals and gather comments from all sides. See, e.g., supra text accompanying notes 174 and 285.
into a post-Thatcher, albeit still Tory, government\textsuperscript{449}—may well bring about a cautious, even constrictive, application of the changes.

While the reforming Act has, arguably, introduced needed changes—and has provided for establishing regular mechanisms by which the many skilled and responsible solicitors may, if they so desire, seek higher rights of audience—its focus has been somewhat misdirected. Legal access to justice has not been directly addressed.\textsuperscript{450} To the extent that the legal aid scheme will have garnered any benefits, those advances have arisen from the arguments of legal practitioners, not by the government’s efforts. Qualified solicitors may now have access to full rights of audience, but provisions already existed to allow their transfer to the Bar upon completion of requisite training.\textsuperscript{451} In reality, fewer than thirteen percent of the

\textsuperscript{449} For a discussion of Thatcher’s downfall, see infra notes 469-75 and accompanying text.

\textsuperscript{450} Lord Elwyn-Jones:

‘an integral part of the Government’s wider programme of improving access to justice’

but we hear no further words about improved access to justice in the sense of increased provision to enable those who cannot afford it to go to justice—not a word.


\textsuperscript{451} For example: “A solicitor of more than 3 years practice since admission and with
solicitors governed by the Law Society are expected to seek qualification as High Court advocates, according to the Society's own survey.452

The major impact of Lord Mackay's proposals, as first presented, would have undermined the independence of barristers. But the amendments have not traumatized the Bar,453 and discussions have revealed (or prompted) major progress within the Bar; for example, the establishment of a library system to support barristers under three years' call who have not secured tenancy in chambers;454 funding of pupillage;455 and an increase in use of legal technology.456 Although a working party of the

general experience is normally exempted from all requirements of the academic and vocational stages, and may be required to do only a shortened pupillage of 3 months before accepting briefs to appear in Court.” QUALITY OF JUSTICE, supra note 95, § 5.19 (referring to the Consolidated Regulations of the Inns of Court).


453. “I now believe that the independent Bar will not only survive but will emerge stronger. A shake-up is a very good thing.” Cresswell Interview, supra note 415. Prevalent opinion abounds that the reforms have been less severe than anticipated: “Big Bang for lawyers has turned out to be little more than a damp squib.” Rice, Stirred But Not Shaken, Fin. Times, Oct. 19, 1990, at 33, col. 1.

454. Cresswell Interview, supra note 415; see supra text accompanying note 243. Although the library system has been successful in Scotland, the corresponding entity in England has proved disappointing, due in part to “the view that in England and Wales ... a practice can only be established by contact with other barristers” and to “a fear that those who participated would be regarded as second class barristers ...” Bar Practising Library System Fails, 141 NEW L.J. 1322, 1322 (1991). The Bar's practicing library system is expected to close at the end of 1991. Id.

However unsuccessful the library experiment has been, the attempt has demonstrated the Bar's intention to accommodate those individuals who qualify to join the ranks of barristers. The precedent may facilitate a later resurrection of a restructured library system or even the creation of one- or two-year adjunct barristerships—which could provide further legal exposure and experience for candidates, and in-chambers assistance without permanent commitment for established chambers—prior to the new barristers' securing tenancy elsewhere in London, to their setting up practice in the provincial Bar, or to their taking up corporate positions.

455. Id.

456. Id. In late July 1990, the chambers of Ronald Walker, QC and Julian Gibson-Watt announced their merger, which they expected would give them a greater technological advantage. Gibb, Bar Merger May Mark New Trend, The Times (London), July 31, 1990, at
Bar has recommended that employed barristers remain restricted solely to audience rights on behalf of an employer, the working group found a "strong case" for granting litigation rights to employed barristers. The General Council of the Bar has recently begun to focus on strengthening the provincial Bar (i.e., outside London) and on optimizing chambers' efficiency through recommended structures and staffing, as well as informational technology. The General Council also reports on current undertakings for funding pupilages, and notes the need for pupilage income competitive with salaries of solicitors at equivalent stages. Even Lord Mackay has complimented the progress of the legal profession, calling the Bar's recent discussion report "revolutionary," and commenting on the Law Society's "most radical proposal," which led to development of a procedural skills course for solicitor-students. Mackay has cited his own legislation as responsible for continuing changes in the branches: "I hope and believe . . . that the framework the Courts and Legal Services Act has established will be both sufficiently stable and sufficiently balanced both to foster the right sort of evolutionary develop-

4, col. 4.

457. "Whereas barristers in independent practice provide legal services to the public generally, employed barristers provide their legal services to the persons who employ them. This crucial distinction is reflected in the different rules laid down in the Code of Conduct . . . ." GEN. COUNCIL OF THE BAR, REPORT OF THE EMPLOYED BAR WORKING PARTY § 7 (undated; released about Oct. 25, 1990).

458. Id. §§ 45-49.

459. "We can see no good reason why an employed barrister should not have the same right to conduct litigation on behalf of his employer as is at present enjoyed by an employed solicitor." Id. § 57. Note that the Courts and Legal Services Act does not specifically list the General Council of the Bar as an authorized body to grant rights to conduct litigation. Courts and Legal Services Act 1990, § 28(5).


461. Id. §§ 3.24-76. Specifically, the Bar's discussion report anticipates a necessary change in the role of barristers' clerks: "The influences of information technology, the new professional direct access rules, the relaxation in attitudes to marketing of services, the growing need for accurate time recording and the prospect that employed professional researchers and other paralegals will be more numerous, all combine to make the clerks' existing role outmoded." Id. § 3.45.

462. Id. §§ 3.85-87.

463. Id. §§ 3.77-84.


465. Id. (referring to the Law Society's consultation paper Training Tomorrow's Solicitors).
ment and to preserve what is best in the past."466

After the extensive argument and publicity surrounding the evolution of Lord Mackay's legal reform scheme, the Courts and Legal Services Act remains essentially a political instrument.467 Prime Minister Thatcher selected a Lord Chancellor who was not part of the British legal system and much of whose subsequent time in office has been devoted to promulgating legislation to alter the legal profession.468 Despite the decline of the Prime Minister's popularity, particularly during implementation of a riotously unpopular poll469 as during negotiations concerning the

466. Id.


468. One author has postulated that Mrs. Thatcher's "war against the professions"—"[c]hurchmen, civil servants, broadcasters, journalists, barristers, doctors, academics, school-teachers and social workers"—rested on economic grounds: that the professional ethics and institutions "are anti- or at least non-market," and that the central government is the only entity capable of purging the "anti-market values." Marquand, Smashing Times, New Statesman & Soc'y, July 27, 1990, at 18-19. The author suggests that the professional ethic, although "elitist," should not be abandoned. Id. at 20.

[The question that matters] is whether the professional ethic and the institutions that embody it provide a better safeguard against abuse than the ethic and institutions of the market.

... Suppose that human beings can—and sometimes do—behave in the way that the professional ethic presupposes. Is it not then at least conceivable that the professional ethic should be seen ... as a safeguard against a peculiarly destructive kind of market failure? And if that is so, may it not be that policies designed to marketise the professions will result in less scrupulous producers, shoddier products and a nastier, poorer society?

Id.

469. See, e.g., Ford, Thatcher Set to Ride Out 'Media Storm,' The Times (London), Mar. 12, 1990, at 1, col. 1; see also Clancy, Students Stage Poll Tax Protest, The Times (London), May 18, 1990, at 3, col. 3; Clancy, Council Staff on Strike as 50% of Poll Tax Remains Unpaid, The Times (London), May 18, 1990, at 7, col. 1.

Some of Mrs. Thatcher's opponents have been arguing that her Government disregarded those informal restraints [of convention, precedence and common sense] in the past year with the imposition of the "poll tax." This is the community charge for local government services that the Conservative majority in Parliament decided should be the same for everybody, rich and poor alike, in each community, and then rammed down the throats of local governments, which weren't asked to approve the idea of the new charge but had to set the rate and collect it. ...

On [May 3, 1990], voters at the local level got a chance to tell government what they thought, through elections to community councils. The results were not the triumph the opposition Labor Party hoped for, though the Conservatives suffered a net loss of nearly 200 seats in England, Wales and Scotland and Labor made a net gain of about 300.

emerging European single market, legislation to reform the British legal profession has been enacted during the tenure of Mrs. Thatcher and her chosen Lord Chancellor. By the time that Thatcher lost the support of her own party, the distilled reform of the legal profession had become a "non-issue." It was, rather, her unabated opposition to the European currency unit (ecu) that presaged her downfall.

In a first ballot responding to the leadership challenge within her party, Thatcher failed to win a conclusive majority. Rather than facing a second ballot, which would have required only a simple majority lead, Margaret Thatcher

470. Sir Geoffrey Howes' departure from the Prime Minister's Cabinet, stemming from disagreement over European policies, led to speculation of further loss of support for Mrs. Thatcher. Langdon & Wastell, Heseltine Ready to Fight Thatcher, Sunday Telegraph (London), Nov. 4, 1990, at 1, col. 1 (29% of Tory MPs against Thatcher's approach in EC dealings, according to Gallup poll).

Most MPs are now convinced that the Prime Minister will want to go to the country [with an election] within the next 12 months—at the moment when she believes the economy has picked up sufficiently to re-elect the Tories for a fourth term of power. They believe it is against her instincts to leave it until the summer of 1992, the latest possible time, when the economy may be faltering again. Moncrieff, supra note 437. Contra Jones & Osborn, Ministers Deny Leadership Challenge, Daily Telegraph (London), Nov. 3, 1990, at P1, col. 1.

A political editor from The Times posed three obstacles which Mrs. Thatcher would have to overcome to retain support of her government: a potential "stalking horse" challenger in an election; a lagging economy; and disagreements over European policies. Oakley, Three Hurdles Prime Minister Must Survive, The Times (London), Nov. 3, 1990, at 3, col. 7; see Storey, Europe, Inflation and Gulf Overshadow Thatcher's Election Plans, Reuter Lib. Rep., Oct. 14, 1990.

471. Howe's resignation speech in the House of Commons, on November 13, 1990, dramatically illustrated the problem:

"It was remarkable—indeed it was tragic—to hear the prime minister dismissing, with such personalised incredulity, the very idea that the hard-ecu proposal (as put forward by her own chancellor) might find growing favour among the peoples of Europe... How on earth are the chancellor and the governor of the Bank of England, commending the hard ecu as they strive to do, to be taken as serious participants in the debate against that kind of background noise... It is rather like sending your opening batsmen to the crease only for them to find, the moment the first balls are bowled, that their bats have been broken before the game, by the team captain..."


472. The resignation of former Chancellor, Foreign Secretary and Deputy Prime Minister Howe was shortly followed by a challenge from Michael Heseltine for leadership of the Tories (the Conservative Party). In for the Kill, ECONOMIST, Nov. 17-23, 1990, at 73.

473. The Prime Minister lacked four votes which would have given her a requisite 15% lead over Heseltine, her contender. Watson, Pederson & Foote, The Iron Lady Falls, NEWSWEEK, Dec. 3, 1990, at 28, 30 ("Complex Rules, Unpredictable Outcome").

474. Id. at 31.
resigned as Prime Minister and head of the Conservative Party on November 22, 1990. A mere three weeks had passed since the Courts

475. Oakley & Webster, Bravura End for Thatcher Era, The Times (London), Nov. 23, 1990, at 1, col. 1; Timetable of the Westminster Drama, The Times (London), Nov. 23, 1990, at 2, col. 1; Reiss, Thatcher Resigns, Evening Standard (London), Nov. 22, 1990, at 1, col. 1. In what may be one of the best-remembered quotations of the former Prime Minister, Mrs. Thatcher announced her decision to the Cabinet: “It is rather a funny old world that it has to come to this, when I had won three elections for the Conservative Party and still have the majority of the party’s support . . . .” Painton, ‘It Is Time to Go,’ TIME, Dec. 3, 1990, at 60 (quoting Thatcher); see also Bevins, ‘It’s a Funny Old World,’ The Independent (London), Nov. 23, 1990, at 1, col. 1. Her husband’s own advice had been: “Margaret, it is time to go.” Painton, supra, at 60 (quoting Denis Thatcher).

During the second ballot, on November 27, 1990, the party majority and therefore the Prime Minister position were won by John Major, Chancellor of the Exchequer. Oakley, New Prime Minister Will Be Youngest Since 1894, The Times (London), Nov. 28, 1990, at 1, col. 1. Major is expected to deviate little from Thatcherism. Webster, ‘Thatcher’s Man’ Is Denounced by Labour, The Times (London), Nov. 28, 1990, at 3, col. 7. “Dr Moonie joined other Labour MPs in describing the result as ‘perfect for us. We have a nice, anonymous, boring, grey little man.’” Timmins, Labour Delighted at ‘No Change’ Choice, The Independent (London), Nov. 28, 1990, at 1, col. 3 (quoting Lewis Moonie, Labor MP for Kirkcaldy).

The battle is over—won or lost according to your point of view—and the peace belongs not to the ideological warriors, but to those practical administrators who always go in to clear up after the fighting is over. Bush followed Reagan. Major followed Thatcher.

John Major is the quintessential politician of our age. He does not inspire many people, but he does not put many off, either.

He belongs to no obviously identifiable class, or region, or even philosophy. He will leave few hostages to fortune, for he will rarely say anything memorable in the first place. He is no one; he is Everyman. He is a worthy exponent of the new politics: not red, blue or even green; just grey.


Among Major’s new Cabinet appointments, Michael Heseltine, as Environment Secretary, was given responsibility for reviewing the controversial poll tax, and Norman Lamont, former Treasury deputy and now Chancellor of the Exchequer, has become involved in European Community discussions of financial matters, including the Ecu. Major’s Cabinet Shuffle Brings in Three New Faces, Press A. Newsfile, Nov. 29, 1990; Davies, Major Names Cabinet, United Press Int’l, Nov. 29, 1990.

and Legal Services Act received Royal Assent.

In the long run, the reform of the legal profession may achieve significant results—not the near-fusion of the branches originally described—a greater awareness of the operation of the legal profession by the public and practitioners, and a unified professional commitment to an ideal of responsible access to justice. If fusion of the two branches is inevitable, it seems that the concerned lawyers will plan such progression carefully, with due concern to both client and the law. The governmental fanfare and sometimes inflammatory rhetoric surrounding the introduction of the Courts and Legal Services Act have effectively strengthened the legal profession by challenging measured and reasoned opposition. Solicitors and barristers, indeed even the Lords of Parliament, inspired to respond soundly to the reform proposals, have demonstrated their ability to keep a Lord Chancellor in check. As long as the legal practitioners

to VAT at 17.5%, The Times (London), Mar. 20, 1991, at 1, col. 1. Shortly afterwards, Mr. Heseltine announced the total demise of the poll tax, which will be replaced by a "property-plus-people" tax, similar to the pre-poll tax system. Oakley, Death of Poll Tax Announced by Heseltine, The Times (London), at 1, col. 1. It is ironic that the poll tax, described as the "flagship of Thatcherism," was ultimately abolished by Michael Heseltine, whose challenge precipitated Thatcher's defeat. Ries, Britain Scraps Unpopular Poll Tax, United Press Int'l, Mar. 21, 1991. Bryan Gould, a Labor Party member of parliament, called the abandonment of the poll tax "the most complete capitulation, the most startling U-turn, and the most shameless abandonment of consistency and principle in modern political history . . . ." Id; see also Oakley & Wood, Tories Cool on Heseltine Plan for Councils, The Times (London), at 1, col. 1 (Tory "grassroots" reaction against Heseltine tax plan). Fellow Labor MP Dave Neilist commented: "It was not fine speeches in parliament, it was the 15.7 million people who refused to pay the Tory tax who forced the Tories into surrender." Jones, 10,000 Britons Rally in London to Celebrate "Poll Tax" Demise, Reuter Library Report, Mar. 23, 1991.

476. Contra Brian, The Myth of Two Branches,' 134 SOLIC. J. 974 (1990) (argues that solicitors and barristers constitute not two branches, but two professions that should be unified as a single legal profession).

477. Nor have the potential complicities of a Lord Chancellor passed unnoticed by history's witnesses. The poet Shelly, for example, incensed by a decree denying him custody of his children, penned a scathing curse against the Lord Chancellor of his time:

TO THE LORD CHANCELLOR

Thy country's curse on thee, darkest crest
Of that foul, knotted, many-headed worm
Which rends our Mother's bosom!—Priestly Pest!
Masked Resurrection of a buried Form!

By thy most impious Hell, and all its terror;
By all the grief, the madness, and the guilt;
Of thine impostures, which must be their error—
That sand on which thy crumbling Power is built—
and judiciary remain vocal, their voices, accompanied by public outcry, will counter the constitutional shortcomings and oversteppings of a British government that has an immoderately empowered Lord Chancellor, and will advance the goal of practical and accessible legal justice.

MJ Quinn

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By thy most killing sneer, and by thy smile—
By all the arts and snares of thy black den,
And,—for thou canst outweep the crocodile—
By thy false tears—those millstones braining men—

...I curse thee, though I hate thee not.—O slave!
If thou couldst quench the earth-consuming Hell
Of which thou art a demon, on thy grave
This curse should be a blessing. Fare thee well!

Shelley, To the Lord Chancellor, in THE COMPLETE POETICAL WORKS OF SHELLEY 353-54 (Cambridge ed. 1901). The poem was written by Percy Bysshe Shelley in 1817 and was first published in 1839. Id. at 353 (editorial notes).