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## Alice's Adventures in Wonderland: Preliminary Reflections on the History of the Split English Legal Profession and the Fusion Debate (1000-1900 A.D.)

Judith L. Maute

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# **ALICE'S ADVENTURES IN WONDERLAND: PRELIMINARY REFLECTIONS ON THE HISTORY OF THE SPLIT ENGLISH LEGAL PROFESSION AND THE FUSION DEBATE (1000- 1900 A.D.)**

*Judith L. Maute\**

Alice was beginning to get very tired of sitting by her sister on the bank, and of having nothing to do . . . So she was considering in her own mind . . . whether the pleasure of making a daisy-chain would be worth the trouble of getting up and picking the daisies, when suddenly a White Rabbit with pink eyes ran close by her. . . . [W]hen the Rabbit actually *took a watch out of its waistcoat-pocket*, and looked at it, and then hurried on, Alice started to her feet, for it flashed across her mind that she had never before seen a rabbit with either a waistcoat-pocket, or a watch to take out of it, and, burning with curiosity, she ran across the field after it, and was just in time to see it pop down a large rabbit-hole under the hedge.

In another moment down went Alice after it, never once considering how in the world she was to get out again.<sup>1</sup>

## INTRODUCTION

As I prepared to leave the States to teach summer school in Oxford, England, Russ Pearce asked me to contribute to this symposium. This, I reasoned, would give focus to my curiosity about the differences between English and American lawyers, would foster connections with Bar Council and The Law Society (the professional organizations that represent the interests of barristers and solicitors), and would give me an academic purpose to use the extraordinary resources of the Bodelian Library.<sup>2</sup> I agreed, with the understanding

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\* Professor of Law, University of Oklahoma College of Law. I gratefully acknowledge the research assistance of Kencade Babb and Cleta Puckett (J.D. expected, University of Oklahoma College of Law 2004), and Brian Childs (J.D. expected, Suffolk University College of Law, 2004)

1. Lewis Carroll, *Alice's Adventures in Wonderland* 19-20 (Signet Classic 2000) (1865).

2. The Bodelian Library of Oxford University is "one of the world's greatest libraries," with approximately five and one-half million books in its non-lending collection, including every book published in the United Kingdom since 1610. *Welcome to Oxford* 11 (Earls Print & Publications 2002); *see also* Mary Jessup, A

that there would be little time for anything more than preliminary reflections. In canvassing for a topic, Geoff Hazard suggested I consider the “drift” between barristers and solicitors.<sup>3</sup> “Fusion,” I soon learned, was the buzzword for the proposed merger of the two branches. And so I went down the rabbit hole, scarcely appreciating the journey that lay ahead.

Viewing the British legal system from afar, we Americans tend to paint with a broad brush: wiggled and robed barristers litigate in court, while suited solicitors do pretty much everything else. The divided bar appears to provide some benefits over America’s mythical unified bar.<sup>4</sup> Because barristers have no direct access to clients, their independence of judgment assures professional advocacy free of personal or financial connections with those whose interests are at stake. The cab rank rule, which theoretically requires that the barrister take all comers, even reviled criminal defendants and political despots. This benefits both litigants and the legal system by promising availability of counsel suitable for the case. Barristers’ formal regalia symbolically dignify the majesty of the law, and reinforce the advocates’ solemn obligations to the court. Solicitors—who are directly engaged by clients—are responsible for selecting and retaining the barrister, avoiding the difficulty American legal consumers have in identifying counsel competent to handle their particular types of problems.

On closer examination, it becomes clear that the divided bar was largely the result of historical accident, driven by class distinctions and economic turf protection. Complete separation between the branches was short-lived, occurring in the late eighteenth century; calls for fusion emerged soon thereafter. The larger and economically powerful “lower” branch of solicitors had been responsible for much of the pressure, demanding rights of audience in higher courts. Over the last thirty years, the English government has entered the fray, with Parliament’s 1973 Fair Trading Act, the Lord Chancellor’s 1989 Green Paper and other advisory reports, and the Office of Fair Trading focusing on competition in the professions. No longer is there a clear division between the branches: qualified solicitors can obtain rights of audience in virtually every court and can be named to the Queen’s Council and most judicial offices; barristers may be employed by government offices and solicitor firms. Although some

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History of Oxfordshire 118 (Phillimore & Co. 1975).

3. E-mail from Geoffrey Hazard (May 21, 2002) (on file with author). John Leubsdorf suggested rich avenues of inquiry, and reference materials. E-mail from John Leubsdorf (June 10, 2002) (on file with author).

4. See generally John P. Heinz & Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* (1982) (detailing stratification of the American Legal Profession).

distinctions remain, formalized barriers are eroding, with continuing demands that the organized bar justify its restrictions. Neither separation nor fusion happened quickly, but resulted from a combination of diverse legal, economic, and political elements. "Fusion" in the scientific sense connotes a state of completion, in which a substance is transformed from solid to a liquid, achieving a composite whole.<sup>5</sup> Complete fusion of the British legal profession is unlikely, for there will always remain a need for a small cadre of highly experienced advocates. And yet substantial convergence may be inevitable. Whether that is a good thing remains the subject of spirited debate in England. American lawyers, who have never known a divided bar, may offer some guidance in identifying the ethical issues that lie ahead.

This essay briefly addresses the history of how the English legal profession developed two distinct branches: the upper branch of barristers and the lower branch of solicitors. Discussion of the twentieth-century pressures toward fusion will have to wait for another day.

## I. HISTORY OF THE DIVIDED ENGLISH BAR

Americans have little appreciation of antiquity. Our nation's legal history began with colonization and has fewer than four centuries of development. English law, by contrast, is steeped in antiquity, dating back twelve hundred years. The advocate's role—to speak on another's behalf in a formal adversarial context—dates back to ancient Rome, and was transported to England by the Roman conquest, along with subtle distinctions in the form and function served by different types of representatives.<sup>6</sup> Serjeants-at-law, predecessors of the barrister branch, date back to the eleventh century.<sup>7</sup> Sir Frederick Pollock called the Norman Conquest "a

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5. Webster's Third New International Dictionary of the English Language, Unabridged 925 (3d ed. 1986).

Fu-sion\ 1a : the act or process of liquefying or rendering plastic by heat : transition of a substance from a solid to a liquid : MELTING (welds accompanied by ~ are by far the most common—*Welding Handbook*) b : the quality or state of flowing induced by this process (that degree of heat must be employed which will give perfect ~ to the glaze—G.R. Porter) 2 : a union by or as if by melting : as a : a merging of diverse elements into a unified whole : SYNTHESIS (opera is the ~ of five arts into a composite whole . . . e : a coalescence into a solid unit . . . .

6. Herman Cohen, *A History of the English Bar and Attornatus to 1450*, at 1-5, 24-25, 531-45 (1929) (identifying Latin distinctions between *advocatus*, *consilium*, *advocatio* and *consilium*, *defensor*, professional lawyers, and *prolocutor*).

7. See Robert R. Pearce, *A Guide to the Inns of Court and Chancery* 6 (1855) (quoting thirteenth-century *Miroir Aux Justices*, alluding to an eleventh-century proceeding: "And in full parliament let the accuser, by himself or by a *serjeant*, prefer his accusation, according as it was done in the time of King Edmond [who reigned

catastrophe which determines the whole future history of English Law”<sup>8</sup> and made French the dominant language of law until the latter part of the fifteenth century.<sup>9</sup> Medieval records show general recognition of both nominal and functional distinctions between different types of legal representatives.<sup>10</sup> As early as 1216 courts limited rights of audience to regular advocates.<sup>11</sup>

Two distinct branches began to emerge in the late thirteenth century, under the reign of King Edward I.<sup>12</sup> A pleading system was established, crafted by a small group of second- and third-generation professional pleaders—the serjeants-at-law.<sup>13</sup> Specially trained in the policy and procedure of courts, countors or serjeants conducted legal arguments.<sup>14</sup> Around the same time, an Ordinance of the King placed legal representatives under judicial control, hastening the clergy’s demise as lawyers in the King’s courts, and perhaps prompting the first Inns of Court.<sup>15</sup>

#### A. *The Lower Branch: Attorneys and Solicitors*

Courts generally required litigants to appear in person, plead their own cause, and receive the court’s judgment. Gradually courts relaxed the rule of personal attendance, allowing litigants to appoint agents to appear and speak in their place and to transact routine matters on their behalf. In their earliest form, these “attorneys” were not specially qualified officers of the court nor a distinct professional class.<sup>16</sup> Parliament formally declared the right to appoint an attorney to appear in one’s stead in the early fifteenth century.<sup>17</sup> Attorneys

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from 1016-17]”); *see also* The Royal English Monarchy, chronological list of the Kings (and Queens) of England, *available at* [www.scotlandroyalty.org/kings.html](http://www.scotlandroyalty.org/kings.html) (last visited Sept. 12, 2002).

8. 1 Frederick Pollock & Frederick William Maitland, *The History of English Law Before the Time of Edward I* 79 (Lawyers’ Literary Club 1959) (1898).

9. *Id.* at 80-87.

10. Pearce, *supra* note 7, at 6-8 (citing 1099 Assizes du Royaume de Jerusalem, which referenced different names and qualifications of counsel (conseil) and pleader (pleidoir)).

11. *Id.* at 18.

12. Edmund B.V. Christian, *A Short History of Solicitors* 3, 9 (1896) (citing 1 Pollock & Maitland, *supra* note 8).

13. 2 Frederick Pollock & Frederick William Maitland, *The History of English Law Before the Time of Edward I* 620 (Lawyers’ Literary Club 1959) (1898).

14. Christian, *supra* note 12, at 3.

15. Robert Megarry, *Inns Ancient and Modern* 10 (Selden Soc’y 1972).

16. Christian, *supra* note 12, at 3. “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.* at 3-4.

17. *Id.* at 8-9. *But see* C.W. Brooks, *Pettyfoggers and Vipers of the Commonwealth: The “Lower Branch” of the Legal Profession in Early Modern England* 18 (Cambridge Univ. Press 1986) (stating that by end of the thirteenth century all litigants had the right to an appointed attorney); *see also* Peter Reeves,

were by then a large and recognized group.<sup>18</sup> By comparison, the practicing bar of the higher branch of serjeants and pleaders was miniscule.<sup>19</sup> Other law-related occupational categories, such as stewards and town clerks, arose around the same time; clear distinctions between their training and functions did not exist.<sup>20</sup> Litigation increased significantly between 1560 and 1640, perhaps as a result of increased industrialization, economic development, and the relatively low cost of litigation, especially as compared to the costs of duels and other forms of armed conflict resolution.<sup>21</sup> Various social conditions encouraged vexatious litigation, multiplication of suits, chicanery, pettifoggery, unreasonable delays, and official corruption to flourish as easy and worthwhile games to play.<sup>22</sup> The number of attorneys—the lower branch of the profession, which served primarily to link litigants with the courts—rose dramatically as compared with growth in the general population.<sup>23</sup> Unsavory, abusive, or incompetent solicitors in diverse provincial practices highlighted the need for some regulation.<sup>24</sup>

In 1605, Parliament acted, by reforming the “*Multitudes and Misdemeanors of Attornies and Solicitors at Law and to avoid unnecessary Suits and Charges in Law.*”<sup>25</sup> The preamble’s pejorative language about attorneys, as contrasted with “the just and honest Serjeant and Councillor at Law,” suggests that the upper branch was the impetus for regulation of the lower branch.<sup>26</sup> Nevertheless, the legislative reforms were salutary, requiring accounting for disbursements made on a client’s behalf and written statements for attorneys’ fees.<sup>27</sup> Moreover, “to avoid the infinite number of

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Are Two Legal Professions Necessary? 2 (Waterlow Publishers Ltd. 1986) (citing 1285 statute conferring general power of appointment of an attorney).

18. Brooks, *supra* note 17, at 17-24.

19. *Id.* at 28 (estimating that in London in 1560, there were only ten or twelve serjeants, who, combined with pleaders, totaled no more than eighty or ninety men).

20. *Id.* at 46.

21. *Id.* at 94-96, 101.

22. *Id.* at 111. For example, this was the context in which Shylock exploited the penal bond. *Id.*; see also William Shakespeare, *The Merchant of Venice*, act 1, sc. 3, lines 141-152. Overbury caustically described the “Character of a Pettifogger”:

He promotes quarrels and in a long vacation his sport is to go a fishing with the penal statutes. He is a vestryman in his parish, and easily sets his neighbours at variance with the vicar, when his wicked counsel on both sides is like weapons put into men’s hands by a fencer, by which they get blows, he money . . . .

Christian, *supra* note 12, at 79-80.

23. Brooks, *supra* note 17, at 112-13 (stating that by 1640 there were over two thousand attorneys).

24. Christian, *supra* note 12, at 34-44.

25. *Id.* at 44.

26. *Id.* at 44-45.

27. *Id.* at 47-48.

Solicitors and Attornies,” the act restricted the right to practice to those “brought up in the courts or otherwise well practised in the soliciting of causes and proved by their dealings to be skilful and honest,” and also allowed for penalties against “unqualified person[s].”<sup>28</sup> Mention of solicitors in the act signaled development of a distinct, and inferior, rank of practitioners who functioned in equity courts in much the same way that attorneys acted in the common-law courts.<sup>29</sup> Apparently the reforms were effective in assuaging Parliament, for it enacted no new legislation regarding attorneys for 120 years, until the reign of King George I.<sup>30</sup> In the meantime, courts stepped in to regulate and control entry to the profession.<sup>31</sup>

In 1729 an Act of Parliament further regulated attorneys and solicitors by limiting practice to those who took an oath of office and met specified admissions standards, including five years of apprenticeship as an Articled Clerk.<sup>32</sup> Henceforth, those who became attorneys entered the field as young men in pursuit of a profession after an extended educational process.<sup>33</sup> These young apprentices—as young as thirteen—performed menial tasks like copying papers in the attorney’s office and fetching the mistresses’ groceries from market.<sup>34</sup> Some were “housed, fed and taught like the apprentices of petty tradesmen.”<sup>35</sup>

Following the Act of 1729, attorneys and solicitors achieved greater esteem and coalesced as a distinct trade group, organized in furtherance of their collective professional interests.<sup>36</sup> Early self-regulation began around 1739 with “The Society of Gentlemen Practisers in the Courts of Law and Equity,” which denounced trickery and unfair practice, considered alleged irregularities of professional conduct and sought to protect their practice turf from outside competition.<sup>37</sup> The Society of Gentlemen Practisers, predecessor of the contemporary Law Society, successfully defeated

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28. *Id.* at 49.

29. *Id.* at 70-71.

30. *Id.* at 47.

31. *Id.* at 80-81.

32. *Id.* at 111-12 (discussing 2 Geo. 2, c. 23 (Eng.)). The Act was a major step in transferring regulation of the junior branch from individual judges to a codified system of regulation. Brian Abel-Smith & Robert Stevens, *Lawyers and the Courts: A Sociological Study of the English Legal System 1750-1965*, at 19 (Harvard Univ. Press 1967).

33. Christian, *supra* note 12, at 111-13.

34. *Id.*

35. *Id.* at 113.

36. *Id.* at 111, 120.

37. *Id.* at 120-21; *see also* 44 (I) Halsbury’s *Laws of England* 7 (4th ed. 1995) (discussing organizational history, formed “for the promotion of fair and honourable practice and the detection and discountenance of all unfair practices”).

scriveners' efforts to establish a monopoly over conveyancing.<sup>38</sup> It merged into the Law Society shortly after its 1831 incorporation.<sup>39</sup> From the outset, the Law Society took an active role in legal education, entrance examinations, the codification of professional etiquette, discipline, and, of course, lobbying to protect the membership's collective economic interests.<sup>40</sup>

As the legal profession's two branches evolved over time in a parallel fashion, they developed common understandings and practices that reinforced their different roles in the legal system and created opportunities for each branch to flourish economically. A kind of symbiotic relationship formed, in which attorneys regularly referred matters to barristers under their patronage. To discourage shady referral arrangements, a rule of professional etiquette prohibited social interaction between the two branches.<sup>41</sup> Over time the two branches established a firm understanding that prohibited barristers from accepting briefs directly from lay clients without the intervention of an attorney or solicitor.<sup>42</sup> Originally, it appears, this arrangement developed because the bar tended to neglect the more tedious tasks of litigation, while attorneys picked up the slack on details handled outside of court.<sup>43</sup> One seldom encounters lucid explanations of why two professionals are needed in every case. Edmund B.V. Christian suggests that initially the rule was seen as enhancing the "dignity of counsel":

[I]n more recent times it has been defended on the ground that the advocate to whom the parties are no more than algebraic symbols, coming fresh to the consideration of a completed case, is more likely to form a comprehensive and well-balanced judgment than the solicitor, who has followed it through various developments and is anxious for the welfare of a client who may be a friend and is certainly a paymaster.<sup>44</sup>

And thus the barrister, as a professional advocate with technical

38. 44 (I) Halsbury's Laws of England, *supra* note 37, at 7.

39. See Hugh H.L. Bellot, *The Exclusion of Attorneys From the Inns of Court*, 26 L.Q. Rev. 137, 145 (Sir Frederick Pollock ed., 1910). Upon incorporation of the Law Society in 1831, it was no longer necessary for attorneys or solicitors to be in an Inn of Court, hastening the total demise of Inns of Chancery. *Id.* at 145.

40. See Abel-Smith & Stevens, *supra* note 32, at 53-54; see also The Law Society, *A History of the Law Society* (copy on file with author).

41. Christian, *supra* note 12, at 136. "By the time of the Stuarts [1603-1714] their patronage was enough to give a young barrister opportunity to rise." *Id.*; see also Abel-Smith & Stevens, *supra* note 32, at 21-22 (discussing considerable influence that practitioners in lower branch could have on barristers who had not yet established thriving practice, and corresponding incentive for barristers to curry favor with attorneys).

42. Christian, *supra* note 12, at 137.

43. *Id.* at 136.

44. *Id.*



legal knowledge and dispassionate judgment, presents the case in court, professionally and personally distanced from the client. The attorney or solicitor, as next friend of the client, was the one who got his hands dirty with the gritty details of the case, emotional concerns, and financial concerns. The historical split of functions fostered a quasi-contractual agreement between the branches to divide territories, giving each a monopoly over their respective field of trade.<sup>45</sup> Courts long held solicitors to be officers of the court,<sup>46</sup> and attempted to subject them to the direct, albeit “somewhat ineffective,” control of judges,<sup>47</sup> seeking to limit the excesses of overzealous agents.

As discussed in section B, the upper branch eventually succeeded in excluding the lower branch from having rights of audience to appear as advocates in court, with complete separation of the two branches coming in the nineteenth century.<sup>48</sup> Even while the split was still evolving, pressures for fusion emerged.

The Law Society now has almost exclusive control over entry to the profession.<sup>49</sup> Discipline is administered by a separate entity, the Office for the Supervision of Solicitors.<sup>50</sup> Much like the organized bar in America, today’s Law Society is multifaceted, serving educational and research needs for the profession and speaking for its collective interests before legislative, judicial, and parliamentary bodies.<sup>51</sup> Within the last fifteen years, the Law Society has been the dominant proponent of fusing the two branches.<sup>52</sup> In his 1999 presidential

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45. Henry Kirk, *A History of the Fusion Debate* 1 (Feb. 14, 1979) (unpublished manuscript, on file with author) (citing 1851 edition of the *Law Times* (London): “Because the attorney is prohibited from acting as an attorney [sic; counsel?] we the counsel engage not to act without the intervention of an attorney. Because counsel are prohibited from invading our province and acting as attorneys we the attorneys engage to call in the aid of counsel when we want advice on questions of law or require to be represented in Courts of Justice.”).

46. Reeves, *supra* note 17, at 6. *But see id.* at 3 (“[A barrister was] never regarded as an officer of the court, . . . [nor was he] concerned with the administrative work involved in an action and had no contact with court officials. His concern was with the understanding and application of the law and the pleading of cases in the courts.”).

47. Brian Abel-Smith & Robert Stevens, *In Search of Justice: Society and the Legal System* 40 (Allen Lane Penguin Press, London 1968).

48. Reeves, *supra* note 17, at 5 (identifying 1845 as the date of complete split, without explanation); *see also* Bellot, *supra* note 39, at 144-45 (stating that until 1793 attorneys, solicitors and clerks could be members of the same Inns as barristers and could practice in both capacities, and implying that at the time of the article there were still some attorneys and solicitors who were members of Inns of Court); Kirk, *supra* note 44, at 4 (discussing politics of split, referring to statements of prominent barristers claiming that the split was bar etiquette of “fairly recent origin”).

49. 44 (1) *Halsbury’s Laws of England*, *supra* note 37, at 8-9.

50. *The Law Society*, *supra* note 40.

51. *Id.*

52. *See, e.g., Marre’d Arguments*, 131 *Solic. J.* 923 (July 10, 1987) (objecting to the Law Society’s arguments to the Marre Commission in favor of fusion of the two

address, Robert Sayer threw down the gauntlet, paving the way for a new millennium:

Let us think the unthinkable. [He then proposed a universal code of conduct applicable to everyone who supplies a legal service.] And if we have a universal code of conduct, we may as well have one body to police that code. The Law Society is the obvious choice. . . .

How about one legal profession, embracing lawyers of all types, not just solicitors but legal executives, licensed conveyancers and barristers.

One unified legal profession. No more solicitors or barristers—just lawyers. With one code of conduct, one set of rules, one regulator. One legal profession offering the public whatever legal help they need.

Advocacy at every level, mediation, financial services, business consultancy, investment advice. From legal aid to corporate take overs. Every legal service. All provided by one unified profession regulated and represented by The Law Society. Wouldn't that be interesting?<sup>53</sup>

The Law Society's strategic campaign for fusion and to eliminate anticompetitive trade barriers and ethical restrictions has made significant headway, prompted at times by the Lord Chancellor, and most recently with the powerful support of the Office of Fair Trading.<sup>54</sup> Detailed consideration of the complex move toward fusion in the twentieth century is beyond the scope of this essay, and will be addressed in a sequel.

### B. *The Upper Branch: Counsel or Barristers*

Until the late sixteenth century, serjeants—the Order of the Coif—were unrivaled in their stature among legal practitioners. Serjeants were special servants of the Crown, appointed by writ under the Great Seal with ceremonial flourish.<sup>55</sup> They had exclusive rights of audience to appear before the Common Pleas Court sitting en banc, and generally had rights of audience to appear in other courts. The judiciary was drawn from their ranks.<sup>56</sup> Only serjeants could become

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branches).

53. Robert Sayer (President of the Law Society of England and Wales), Speech at Solicitors' Law Festival 15-16 (Oct. 30, 1999) (transcript on file with author).

54. The Office of Fair Trading was established by the Fair Trading Act of 1973. See Fair Trading Act 1973, reprinted in 47 Halsbury's Statutes of England and Wales 229 (4th ed. 2002).

55. Megarry, *supra* note 15, at 16.

56. *Id.* at 14-16.

common-law judges.<sup>57</sup> Ranking beneath serjeants were the predecessors of barristers, known at various times as “apprentices-at-law,” and “utter barristers.”<sup>58</sup> The barrister’s role as advocate solidified in the sixteenth century. In 1532 Parliament officially recognized them as men “learned in the law”; a judicial decision in 1590 established a call to the bar of an Inn of Court as the minimum qualification for rights of audience as an advocate before the higher common-law courts.<sup>59</sup> In 1596, Francis Bacon persuaded Queen Elizabeth I to appoint him to a new, superior office; thereafter a select group of barristers who “took silk” by their appointment to King’s Counsel (K.C.) or Queen’s Counsel (Q.C.), took precedence over serjeants.<sup>60</sup> The superior rank of this new category conferred both status and practical, economic benefits.<sup>61</sup> By the mid-nineteenth century and the 1873 Judicature Act, the demise of serjeants was complete. They no longer had a monopoly of appearance in and appointment to common law courts; no new serjeants were appointed.<sup>62</sup>

Although the English legal profession was stratified from the outset, the clear split between barristers and solicitors can be traced to the peculiar history of the inns—facilities created for housing, education, and professional activities. Inns began around 1292, possibly as an outgrowth of the order of Edward I that placed barristers and solicitors under judicial control.<sup>63</sup> They were voluntary, unincorporated societies of legal professionals, with common facilities providing a convenient place to live, learn, work, and socialize. Serjeants maintained their own Inn, at various locations, from around 1500 until 1877, when it was sold.<sup>64</sup> From early on, the Inns of Chancery served as preparatory schools for the Inn of Court with which it was affiliated. Benchers elected by the Inn of Court provided in-house education, focusing on common law writs, at the Inn of Chancery.<sup>65</sup> The greater inns tended to give preferential treatment to

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57. *Id.* at 16.

58. *Id.* at 15.

59. Wilfrid R. Prest, *The Rise of the Barristers: A Social History of the English Bar 1590-1640*, at 5 (1986).

60. Megarry, *supra* note 15, at 18-20. For more than three hundred years, only a few barristers took silk in any given year; in the late nineteenth century, there were only 245 silks total. *Id.* at 19.

61. *See id.* at 20 (explaining that in cases involving two members of the upper branch, silks served as lead counsel over the junior barrister or serjeant and on motion dockets, silks advanced to the head of the queue, ahead of juniors, and presented their motions without waiting in the longer line).

62. *Id.* at 14-15, 20, 22, 25 (describing demise of serjeants, culminating in the 1873 Judicature Act).

63. *Id.* at 10.

64. *Id.* at 23-26.

65. *Id.* at 29-31, 33-34. Until the sixteenth century, the title of “barrister” was

applicants from their affiliate chancery inn.<sup>66</sup> The lesser Inns of Chancery typically consisted of a dining hall and living chambers, whereas the Inns of Court also had a library and chapel for the use of members.<sup>67</sup>

Until the late eighteenth century, barristers, attorneys, and solicitors were members of the same inns, often progressively moving from an Inn of Chancery to the Inn of Court with which it was linked.<sup>68</sup> Starting in the mid-sixteenth century, the Privy Council, the judiciary, and the Inns of Court announced (and intermittently enforced) policies that excluded attorneys and solicitors from membership in the greater houses.<sup>69</sup> Their gradual exclusion from the Inns of Court reflected developing perceptions on their different educational programs,<sup>70</sup> social standing,<sup>71</sup> and incompatibility of professional roles.<sup>72</sup> By the late seventeenth century, the Inns of Chancery were exclusively occupied by attorneys and solicitors; soon thereafter they deteriorated into little more than dining clubs, and their demise became certain.<sup>73</sup> In 1762, a committee of the four major Inns of Court adopted a rule that prohibited a solicitor or attorney from being called to the bar unless he had quit his practice for at least two years.<sup>74</sup> Hugh Bellot, in his detailed study of the matter, concluded that “up to 1793 attorneys, solicitors, and clerks might be members of the greater Houses and continue to follow their professions and at the same time qualify for the Bar.”<sup>75</sup> Because rights of audience to appear as advocates in court were limited to those who had been called to the bar of an Inn of Court, the exclusion of attorneys and solicitors from bar membership solidified barristers’ dominant role as advocates in court.<sup>76</sup>

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used internally by inns regarding one’s participation at moots, not to the bar of a court. See J.H. Baker, *The Legal Profession and the Common Law: Historical Essays* 109 (1986).

66. Megarry, *supra* note 15, at 30-34.

67. *Id.* at 10-11, 27-28.

68. *Id.* at 33-34 (stating second stage of preparatory school lasted 150 years, on the wane by 1600); Bellot, *supra* note 39, at 137.

69. Bellot, *supra* note 39, at 137-38, 144 (detailing orders for exclusion starting in 1555, which culminated in a 1793 resolution by the bar of Lincoln’s Inn not to admit as a member any attorney or solicitor until his name had been removed from the roll of the lower branch).

70. *Id.* at 138-39; see also Megarry, *supra* note 15, at 30-31.

71. Bellot, *supra* note 39, at 141; Baker, *supra* note 65, at 117-18.

72. Bellot, *supra* note 39, at 138, 140, 143-45.

73. *Id.* at 137.

74. There are four Inns: Middle Temple, Lincoln’s Inn, Inner Temple, Gray’s Inn. *Id.* at 144.

75. Compare *id.* at 144-45, with Kirk, *supra* note 45, at 5 (stating that after 1762, attorney desiring to become barrister could do so only by ceasing practice as attorney for two years; by 1844, the Inns fixed this into a rule of membership).

76. Megarry, *supra* note 15, at 12; cf. Bellot, *supra* note 39, at 141.

In the course of bifurcating functions between the two branches, the bar embarked on a "conscious and deliberate policy in shaping the new profession," which asserted "their intellectual and social superiority over the 'mechanics' of the law."<sup>77</sup> During the reign of Queen Elizabeth I (1558-1603), the Inns of Court flourished as finishing schools for the sons of the upper classes.<sup>78</sup> Thus, in shaping its professional image as a liberal profession, the bar claimed an intellectual and social superiority as a distinguished, genteel vocation.<sup>79</sup> Under this neo-classical conception of a gentlemen's profession "detached from pursuit of lucre,"<sup>80</sup> rules of etiquette developed that prohibited social contact with solicitors,<sup>81</sup> presumed that barristers' services were honorary,<sup>82</sup> and conferred immunity from suit for malpractice.<sup>83</sup>

While consciously elevating its own status over that of solicitors, the bar adeptly avoided antagonizing the lower branch by conferring an assured supply of remunerative work to those who "had the humility to become a 'ministerial person of an inferior nature.'"<sup>84</sup> Thus, by the mid-seventeenth century there was defined bifurcation of tasks: attorneys and solicitors prepared pleadings and met with clients, while barristers handled the formal advocacy in court.<sup>85</sup> By the mid-nineteenth century, a class-based, mutually advantageous, division of territory had evolved between the two branches:

[t]he Bar by obliging the lay client to place himself in the first instance in the hands of the attorney had vested in him the patronage of the profession; it was only through his goodwill that a barrister could hope to succeed. For the general public the result

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77. Baker, *supra* note 65, at 117.

78. Megarry, *supra* note 15, at 32. Prest's sociological study of the medieval bar noted that sons of upper gentry and nobility are underrepresented among barristers and benchers (highest members of Inns, often judges), as compared with sons of other professionals, merchants and plebeians. Prest, *supra* note 59, at 88-89. Status in Elizabethan society was not determined solely with regard to occupational standing and varied by extent of property ownership, fortuitous marriage, inter alia. *Id.* at 89-95; see also Kirk, *supra* note 45, at 3 (citing an article from *The Times* (London), Nov. 1, 1851: "The Bar had ceased to be a profession; it had become an inheritance. The attorneys sent their sons and other male relations to the Bar and these were the men who succeeded there regardless of their ability.").

79. See Baker, *supra* note 65, at 116-17, 123.

80. *Id.* at 118.

81. *Id.* (quoting Lord Keeper Finch's instructions to serjeants in 1637, not to "hugg an attorney, nor make an attorneys' feast and soe drawe them by those base meanes to bringe them clyents").

82. See *id.* at 118-23 (discussing honorarium doctrine, which eventually led to presumption that barristers' services were honorary).

83. See *id.* at 122 (discussing immunity).

84. *Id.* at 117.

85. See *id.* at 114-16 n.12 (stating that by 1662, it was customary for solicitors "to breviate causes").

was that it had to pay to the attorneys a toll before it could reach the seat of justice.<sup>86</sup>

This is not to suggest that harmony reigned in the legal community. Solicitors resented the favoritism shown to barristers by Parliament.<sup>87</sup> Meanwhile, a surplus of barristers and the development of County Courts in which solicitors had rights of audience “virtually annihilated” the practice of the common law bar.<sup>88</sup> The junior members of the bar—those who had not taken silk or been elevated to the bench—had no representative body to look out for their collective professional and economic interests.<sup>89</sup> As early as 1846, some junior barristers advocated fusion in the hopes that their practices could be revived if they were permitted to take instructions directly from clients.<sup>90</sup> Solicitors’ views were diffuse: while many resented their degraded status as a result of their exclusion from Inns of Court,<sup>91</sup> the country solicitors were “busy adapting” to their rights of audience in County Courts, and London solicitors were relatively content with the economic benefits of the arrangement.<sup>92</sup> Among solicitors, calls for amalgamation or fusion were openly voiced in 1867.<sup>93</sup> At around the same time, ongoing debates on legal education raised the possibility of a common course of instruction.<sup>94</sup> In 1872, the Attorney-General proposed that Parliament fuse the profession to remedy the Inns’ inadequate educational programs. The Inns responded defensively, adopting compulsory examinations for bar admissions.<sup>95</sup>

Already high litigation costs rose higher because of working rules that increased fees payable to barristers.<sup>96</sup> The 1875 Judicature Act eliminated the rank of serjeant and sought to unify the diverse court system.<sup>97</sup> In its implementation phase, a committee of judges (all senior barristers) drafted rules that streamlined procedure and vastly limited opportunities for junior barristers to pair with silks, thus depriving the junior bar of much work it had used as “stepping-stone[s] to further [their] practice.”<sup>98</sup> Realizing that the benchers would not protect their turf from encroachment, in 1883 the junior bar

86. Kirk, *supra* note 45, at 3 (citing *The Times*, Nov. 1, 1851).

87. Abel-Smith & Stevens, *supra* note 32, at 54.

88. *Id.* at 55.

89. *Id.* at 55-56.

90. *Id.* at 56-57.

91. *Id.* at 56; *see also* Kirk, *supra* note 45, at 5.

92. Kirk, *supra* note 45, at 4.

93. *Id.* at 6 (discussing 1867 dinner speech by a respected judge, Mr. Justice Hannen, at the Solicitors Benevolent Association and 1868 speech by a Mr. Jeavons to a Liverpool meeting of Northern law societies).

94. *See* Abel-Smith & Stevens, *supra* note 32, at 65-74.

95. *Id.* at 74-76.

96. *Id.* at 213.

97. *Id.* at 211-12.

98. *Id.* at 214 (internal quotations omitted).

formed an organization to represent the bar's collective interests.<sup>99</sup> And thus was born the Bar Committee—predecessor to the modern Bar Council. While it was too late to block the proposed rules, representatives of the Bar and the Law Society have had an active role in considering any future changes to court rules since 1894.<sup>100</sup> The Bar Council grew in strength and respectability, issuing rulings on etiquette that “cemented” financially beneficial restrictive practices.<sup>101</sup> The Council's most delicate work was handling the etiquette of relations between the two branches, and within its own ranks, between junior barristers and silks.<sup>102</sup> Because of its role as arbiter of “restrictive practices,” the Bar Council was considered by some as “the strongest trade union in the world.”<sup>103</sup>

Meanwhile, solicitors grew in stature and political power.<sup>104</sup> From around 1880 on, there was increased talk of fusing the professions from segments of both branches and from government.<sup>105</sup> The debate continued for the next 120 years, with increased official pressure making amalgamation of the two branches a substantial likelihood. Detailed consideration of those events, and of the interesting ethical questions raised by fusion must be deferred to another day. Please stay tuned.

#### CONCLUSION

It is often quipped that England and America are “[t]wo nations separated by a common language.”<sup>106</sup> Although America's legal system is derived from the English common law, its formation was not complicated by centuries of history, in which modern forms of practice evolved from historical accident and struggles over social status and turf protection by the predecessors of the two branches of legal practitioners. Viewed from an ethnocentric American perspective,

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99. *Id.* at 215.

100. *Id.* at 216, 218. The Bar Committee officially became the Bar Council in 1894-95. *Id.* at 218.

101. *Id.* at 219-21 (noting that these rulings especially protected the interests of the junior bar).

102. *Id.* at 221-24 (discussing gradual evolution of the rule prohibiting barristers from appearing as advocates without the intervention of a solicitor, formalized by 1905; requirement that a silk, or Q.C., be accompanied at trial by a junior and resulting division of fees between them; and prohibition of partnerships of barristers).

103. *Id.* at 225-26 (quoting Daily Telegraph (London), May 9, 1896).

104. *Id.* at 227-29.

105. *Id.* at 227-30.

106. See Nigel Rees, Quote . . . Unquote, at <http://www1c.btwebworld.com/quote-unquote/p0000149.htm> (discussing as variously attributed to George Bernard Shaw, Oscar Wilde, and Winston Churchill and hypothesizing that original quote may date back to Wilde's statement in *The Canterville Ghost*, “We have really everything in common with America nowadays except, of course, language.”) (last visited Jan. 18, 2003).

the divisions have a theoretical attraction based on the distinct roles served, but they also present dizzying complications that may unduly hamper the efficient and economic delivery of legal services. As a new country settled by refugees, melting-pot America enabled the development of a legal profession that was considerably more democratic and less hidebound than its predecessor. Over the last 170 years, American legal ethics improvised solutions to situations as they became problematic. By contrast, the English legal system and practice of law evolved over more than a thousand years, in a long course of specific, piecemeal adjustments. Given the exceedingly complex history, amalgamation of the two branches into one composite whole is a slow, uncertain, and very political process. Whether complete fusion will result is uncertain. Just as the American legal profession is stratified into subcategories of practitioners with distinct skills and practice areas, those functional separations are likely to remain in the British profession. It was beyond the scope of this brief essay to delve into the ethical issues presented by possible fusion. Hopefully it will spur further inquiry by American legal ethicists, who may share the wisdom of hindsight examination with our British counterparts responsible for writing the next page of history.



*Notes & Observations*