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ABSTRACT

This thesis examines the changes in public and press perceptions of the criminal Bar over the duration of the Victorian period. The reputational spectrum ranges from the intense criticism of the Bar and its institutions in the 1840s and 1850s, particularly as a consequence of the 1836 Prisoners’ Counsel Act which permitted defence counsel to address juries directly, to the more respectful regard from the 1880s onwards - by which time the public imagination had come to accept, and even laud, the leading practitioners as models who suited Victorian notions of professionalism. Ultimately, this work provides original insights into the
nascence of modern professional habits and the requirements of professional qualification – in other words, the defining characteristics of the modern barrister. The principal research objective has been to determine the reasons for this improvement in the criminal Bar’s public standing. The thesis is founded on a thorough analysis of primary sources, notably mainstream and popular newspapers, periodicals and professional journals, which establishes a causal continuity between these ostensibly contradictory images. The thematic novelty of this particular study lies in the fact that it analyses the two most important components in the criminal Bar’s negative reputation – its courtroom behaviour and inadequate education – and sets them together within an overall historical process of change and improvement. It finds that the betterment of the criminal Bar’s external image was the direct outcome of internal shifts in behaviour and culture. These shifts were, in turn, responses to vehement press criticism. Accordingly, the last quarter of the nineteenth century came to be characterised by the gradual adoption of more measured courtroom styles which occurred in tandem with a belated engagement by the Inns of Court with systematic legal education and quality control.
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SECTION A. – OPENING MATERIAL

CHAPTER 1 – INTRODUCTION, METHODOLOGY AND LITERATURE REVIEW

INTRODUCTION

This thesis examines the changes in public and press perceptions of the criminal Bar over the duration of the Victorian period. The reputational spectrum ranges from the intense castigation of the Bar and its institutions in the 1840s and 1850s to the more respectful regard from the 1880s onwards by which time the public imagination had come to accept, and even laud, the leading practitioners as models who suited Victorian notions of professionalism. Ultimately, this work provides original insights into the nascence of modern professional habits and the requirements of professional qualification – in other words, the defining characteristics of the modern barrister. The principal research question is: ‘What were the reasons for the changes in public perceptions of the Victorian criminal Bar from the opprobrium of the 1840s and 50s to the approval of the 1880’s and 90s?’

The thesis offers a singular contribution to modern scholarship by employing an in-depth analysis of primary sources which establishes a causal continuity between these ostensibly contradictory images. As they represent contemporary voices and opinions,

detailed quotations from the sources are an integral part of the evidence which supports the thesis. The scope of this study, therefore, constitutes an original enquiry which establishes a thematic connection between discrete topics of historical value.

One of the principal themes of this thesis is that a major causal contribution to the changes in the Bar’s courtroom behaviour and legal education respectively was the effect of press and public opinion. Frequently, this was expressly couched in terms of the desirability of improvement as a matter of serving the national public interest. To take two examples from many, in 1851 the *Liverpool Mercury* was arguing that no reform was ‘more necessary or of greater importance to the community than that which will effect a change in the mode of conveying the requisite amount of jurisprudential knowledge to those who intend making the law a profession’. In 1867 the *Law Journal*, criticising the exclusivity of the Bar, contended that ‘[It] has, or ought to have, for its object the protection, not of itself, but of society at large.’ Sentiments such as these chimed with Victorian notions of ‘utility’. In this sense, ‘utility’ to the nation was the most self-evident and expected measure of professional standards.

The core principles of ‘utility’ are most famously associated with *An Introduction to the Principles of Morals and Legislation* (1789) by Jeremy Bentham (1748-1832). At its most simplistic, Bentham’s ‘greatest happiness principle’ meant that the predominance of equally distributed ‘pleasure’ over ‘pain’ should determine the rational and moral worth of a course of action, system or institution. In other words, the true test of such worth was the extent to which an outcome produced a benefit, advantage or happiness to society and

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2 *Liverpool Mercury*, 14 October 1851, p.4; *Law Journal* (1867) 2 (16 August 1867) p.371; For further examples, see chapters 7 and 8.
avoided mischief, pain, evil or unhappiness. Bentham’s approach was subsequently refined by philosophers such as John Stuart Mill (1806-1873), author of *On Liberty* (1859) and *Utilitarianism* (1863), who had formed the Utilitarian Society in 1823. In these works, Mill argued, *inter alia*, that societal ‘utility’ was best determined according to the general experience of persons.

As evidenced by the type of assertions cited above, sections of the Victorian press, drawing upon popular understandings of utilitarianism, implicitly found that the deficiencies in the mid-century conduct of the Bar and its institutions offended against notions of utility and, therefore, moral worth. The present study charts the subsequent convergence of utilitarian acceptability with improvements in professional conduct and structures.

Accordingly, the research objective has been to explain the historical processes behind this metamorphosis and the reconciliation of these conflicting identities. The study draws heavily on primary sources such as mainstream and popular newspapers, periodicals and professional journals together with biographies, Parliamentary debates and committees and Royal Commissions. The resulting conclusion is that the improvement in the Bar’s external standing was the direct result of internal shifts in behaviour and culture, notably, the adoption of more measured courtroom styles which took place alongside belated engagement by the Inns of Court with systematic legal education and quality control. The reasons for both these phenomena are analysed in detail. It is argued, for example, that the 1836 Prisoners’ Counsel Act which introduced a general entitlement for defence counsel to address juries directly (‘full defence by counsel’), provided the crucible within which the boundaries

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of forensic propriety were stretched in a number of controversial cases. By the end of the century, modern rules and expectations of professional conduct were confirmed with the resolution of ethical uncertainties. The basic modern framework of quality control likewise evolved in this period in the shape of compulsory examinations administered by the Council of Legal Education – albeit as a diffident palliative on the part of the Inns intended to deflect a growing threat of legislative interference.

The choice of the Victorian period is not accidental as it coincides with seminal developments in the culture of the criminal Bar. At the start of the century, the standing of the criminal Bar, particularly at the Old Bailey, was already low but the formal instrument which unintentionally accelerated further decline was the 1836 Prisoners’ Counsel Act. Highly censorious press coverage was generated by the conduct of some leading counsel who tested their new freedom to address juries with devices such as assertions of personal belief in the client’s innocence, tactical allegations against innocent third parties known by counsel to be false, invocations of the deity and insincerely tearful declamations. Excessive, and even disingenuous, conduct was said to be validated by a supposed duty to defend a criminal client ‘by all expedient means’ – a reference to an assertion made by Henry Brougham in 1820 in his defence of Queen Caroline in her trial for adultery (see further below). Towards the end of the period, however, a more refined culture emerged with a new generation of senior criminal counsel whose successful styles inevitably spread to their junior colleagues. An additional component of the Bar’s negative image at the start of the period was the wilful indifference of its institutions towards any systematic reform of legal education. As the century progressed, considerable public concern was reflected in increasingly unfavourable comparisons with other professions. Criticism diminished towards the end of the century as

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5 ‘An Act for enabling Persons Indicted of Felony to make their Defence by Counsel or Attorney’ (6 & 7 Will.4, c. 114).
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Compulsory examinations were eventually introduced which signified the acceptance by the Inns, albeit reluctantly, of the importance of at least some form of quality control. The thesis is divided into five Sections. Section A sets out the Opening Material consisting of this introduction, an explanation of methodology; and a critical literature review. Section B is a survey of the landscape of contemporary press coverage of criminal advocacy. It firstly assesses the problems in calibrating quantitative levels of literacy and newspaper readership. The intention is to venture cautious judgements on the potential contribution of the press in the formation of public opinions. This is followed by a broad tour d’horizon of the characteristics and circulation of the principal Victorian newspapers, periodicals, popular Sundays and the legal journals.

Sections C and D curate the primary evidence which underpins the thesis. They each begin with depictions of the nature and reputations of criminal advocacy and of legal education respectively at the mid-point of the nineteenth century. Section C firstly outlines the background to the 1836 Prisoners’ Counsel Act. This followed by an extensive treatment both of the resulting courtroom behaviour of the 1840s and 1850s and of the extensive press and public condemnation which it attracted. The Section ends with a description of the improved image of the criminal Bar from the 1880s onwards and concludes that this outcome was itself the direct consequence of internal changes and improvements in forensic styles and behaviour. Previously unregulated professional standards and expectations became fixed and normalised. The press came to purposefully promote the ‘great advocates’ of the day as proper professional models.

Section D describes the poor state of legal education in the first half of the century and the critical reaction of both the popular and professional press. It features the unsuccessful efforts of reformers in the forty years between the 1840s and the 1880s. Unfavourable comparisons are made with the history of the professional education of the
medical profession and of attorneys and solicitors. The introduction of an element of quality control in the shape of compulsory examinations defused the principal cause of concern so far as the general public were concerned and, to a large extent, the pressure for further reform. The Inns had thus ‘bought off’ the threat of a school of law open to both branches of the legal profession thereby ensuring the continuance of the Bar’s existential singularity.

The thesis of this work is finally set out in Section E which fuses the conclusions of Sections C and D, namely that the improvements in courtroom behaviour and in legal education were simultaneous and direct reactions to public opinion – albeit late.

**METHODOLOGY**

**The Research Design**

This study combines legal research with additional interdisciplinary methodologies. Thus it concerns itself with the operation of law, forensic practice and quality control and, ultimately, the resulting societal and press responses. By way of example in Section C there is a discussion on the evolution and consequences of the 1836 Prisoners’ Counsel Act, but it is not founded in classic legal interpretation. The construction of the Act is straightforward and uncontroversial, and the research question does not demand doctrinal or theoretical interpretation of legal principle. The consequences of the Act for courtroom behaviour and for public opinion are treated as dynamic and interconnected social phenomena. Section D similarly traces the conflict between the public and press interest in legal education on the one hand and attitudinal resistance on the part of the Bar’s corporations on the other. Each of these Sections therefore amounts to an analysis of the behaviour of discrete socio-professional groups – of lawyers and institutions rather than law. Accordingly, while the study is both a history of the administration of justice and of legal education, it is
simultaneously a social history with sociological components. The thesis, therefore, sits under the broad umbrella of socio-legal studies.

The research design compares the Bar’s behaviour and processes with primary records of public and press reaction. Where relevant, secondary literature is cited to triangulate and support the primary sources. This design provides a tool with which to explain the mid-century tensions between the Bar and the public and, having done so, to determine and rationalise the causes of their synthesis towards the end of the century. The evidence firstly reveals press narratives almost universally critical of the criminal Bar and its institutions until the last quarter of the century. As the conduct of the Bar and the Inns improved in the 1880s and 1890s, so did their press depictions. The thesis argues that there was a direct causal link between the Bar’s behaviour and its reputation in each of these historical periods.

**Assessment of Public Opinion**

As stated above, one contemporary measure of the worth and morality of the behaviour of the Victorian Bar and its institutions was concordance with notions of ‘utility’. It is, therefore, pertinent that Jeremy Bentham had actually included the sanction of progressive public opinion, which he defined as ‘a system of law emanating from the body of the people’, as a check on ‘the pernicious exercise of the power of government’. For Bentham, public opinion found proper expression in a free press. However, the moment that the proposition has been stated, problems of definition immediately arise. For example, the notion that ‘public opinion’ may be conveniently packaged within phrases such as ‘the

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aggregation of the views of individuals in society’ is too simplistic. Given the profound social, political, educational and even geographical complexities of Victorian society, one cannot sensibly treat the Victorian reading public as if it were a continuous, homogenous and literate whole. Accordingly, it has been necessary to accept the obvious - that there could be no single social entity called ‘public opinion’ but rather to proceed on the basis that over the period as a whole there would have been multiple strands representative of different classes, political inclination and societal development.

The first task is to select representative samplings from the primary sources for the purposes of content analysis. However, objective appraisal or quantitative measurement present notorious difficulties. The most pressing methodological obstacle is that in this situation there is no research strategy that offers an empirical, quantitative method of calculating historical opinions from primary sources or data. There are neither experiments nor non-experimental studies such as surveys or polls which the researcher may deploy as snapshots in time. For example, in an age of incomplete suffrage, electoral outcomes cannot be taken to represent the extent of the various divisions in the population as a whole. Moreover, sampling on this large scale still leaves unresolved the major controversy inherent in most content analysis exercises, namely whether popular papers shaped or merely reflected current attitudes and whether, in fact, the newspaper was really ‘an accurate reflection of the people who read it - or merely a reflection of the sort of people its owners and writers thought they ought to be’. The opinions of commentators differ. Aspinall, for example, credited the newspaper press with being the ‘indispensable instrument’ behind the long periods of agitation which led to all the great reforms of the first half of the century, such as the abolition of slavery, Catholic emancipation, the 1832 Reform Act and the repeal of the

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corn laws.\textsuperscript{9} Jeremy Black agreed that, as early as the 1830s, the press was well-established as the principal forum for the expression of political opinion but he also suggested that ‘in many instances the intention was rather to preach to the converted than to convert the opposition’.\textsuperscript{10} Aled Jones adhered to the theme of symbiotic relationships between reader and newspaper which extending well into the century so that, even after abolition of Stamp Duty in 1855, newspapers were routinely assumed to act as mirrors that cast ‘their light back upon the public’.\textsuperscript{11} He stated ‘by 1859 we can detect a note of satisfaction, perhaps even of complacency’, in the belief that journalism reflected public feeling and opinion.\textsuperscript{12} In the same year the conservative \textit{Blackwood’s Magazine} was complaining that ‘the sphere of every new publication is more and more limited. Every class has its organ; every topic finds a journal; every interest has a friend in the press’.\textsuperscript{13} Even allowing for \textit{Blackwood’s} exaggeration, the underlying point has considerable importance for the present study. It implies that, by the middle of the century, one could roughly determine the views of readers of the various newspapers from the content of their chosen reading material. This approach may work better for some publications than for others.

Pausing there, Virginia Berridge’s extensive research on the hugely popular working class Sunday newspapers of the second half of the century is highly pertinent to this discussion because it discloses that they possessed characteristics which, in their case, do validate content analysis as a reliable indicator of their readers’ opinions. Her principal

\begin{flushleft}
\textsuperscript{12} Jones, p.91.
\textsuperscript{13}\textit{Blackwood’s Magazine}, February 1859, p.181.
\end{flushleft}
contention was that weekly national papers such as these Sundays, with circulations of 300,000 per week or more were proportionately more influential within society than the more limited and pricier mainstream papers. Prior to the coming of the ‘Northcliffe’ papers at the end of the century which made money from advertising revenue, newspaper profits had previously been determined by attracting and retaining the interest of readers. Berridge suggests it is, therefore, reasonable to assume that the content of the popular Sunday market would also reflect the interests and activities of the readers. Moreover, she contended that editorial opinion, ‘so frequently the only section used by historians’ is not necessarily useful in determining the views of readers of these papers because most readers would pay little attention to editorials. She also rejected the traditional analysis of correspondence and advertising columns as a means of deciphering attitudes. She argued that, in this particular market, these would simply reflect the preoccupations of literate or better-off readers respectively. Her conclusion was that, if one disregards editorial material, correspondence and advertising as probative of readers’ attitudes, then ‘the chicken and egg argument of which came first, readership attitudes or newspaper attitudes, is less convincing’.

Acknowledging the importance of Berridge’s work in respect of this particularly sizeable and socially significant portion of newspaper readership, there were too many variables in the class, education and political attitudes of newspaper readership overall for one simply to transpose the principle behind her findings into a rule of general methodological application, namely that the wider the circulation of a particular publication, the greater the number of ‘the public’ whose views it represented.

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15 Berridge, p.37.
A further practical obstacle is the fact that measurements of circulation ‘and, even more the readership, of newspapers are likely to remain shadowy subjects’. Although stamp duty records exist for the number of newspaper stamps sold before the abolition of duty in 1855, these, of course, did not record the number of unstamped publications – that is, publications which evaded the various statutory taxes. After that there are no official figures for distribution until the 1947-8 Royal Commission on the Press. Nevertheless, there is a considerable amount of reliable secondary material, such as proprietors’ own records, which, according to Lucy Brown, has ‘the merit of fitting ... into an intelligible structure’ and from which she herself has compiled a useful table. There remains the final complication that the readership of newspapers and periodicals cannot be calculated with precision from circulation figures alone because they were available to a multiplicity of secondary readers in locations such as members’ reading rooms, coffee-houses, public-houses and gin shops. Moreover, at the lower end of the social scale, they would be passed between members of households. Even so, one may draw the reasonable inference that there would have been a proportional relationship between the second-hand readership and the primary distribution.

Allowing for these quantitative difficulties, there remains a reasonable, ‘common sense’ appeal in combining the content of a publication with the approximate size of its circulation in order to deduce the reach and influence of the opinions implied in the content. Moreover, an inferential case can certainly be made that, in general, it is likely that there

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would have been an equivalence between the contents of a publication and the social and political outlook of its readership.

In order to avoid the problem of an over-generalised characterisation of public opinion, I have taken the additional precaution of particularising, wherever possible, the known positions of a selection of newspapers and journals across a spectrum of political opinion and social position, relying on the extensive secondary material in this field. Section B catalogues the circulation, readership and outlook of the most relevant publications within four discrete portions: ‘Mainstream Newspapers’, ‘Periodicals’, ‘The Popular Sundays’ and ‘The Legal Press’. The latter category has been included because the legal journals frequently articulated concerns which, although professional, also reflected wider critical public interest, not least in the deficiencies of legal education.

Overall, the Section is intended to serve primarily as a reference tool which provides the reader with a contextual understanding of the primary sources cited within the subsequent text. The chosen methodology results in a collation of valid and reliable primary evidence of the various strands of public opinion as expressed in the press over the course of the second half of the century. Combined with the use of primary and secondary sources mapping the

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actual development of legal education and advocacy, this approach allows one to trace the correspondence between changes in public attitudes and improvements in the behaviour of the Bar and its institutions towards the end of the century. By so doing, one reaches the broad answer to the research question. The deployment of primary sources in this way both confirms and explains the central thesis, namely that there was a direct causal link between the conduct of the Bar and public opinion.

**LITERATURE REVIEW**

**Introduction**

The conclusions of this thesis are principally based upon an examination of primary evidence and, in particular, contemporary press sources. This literature review serves two underlying purposes: firstly, to identify and evaluate the historiography which further informs the thesis and, secondly, to underscore where there are spaces in the existing scholarly discourse which the thesis attempts to occupy with original contributions. What is currently absent from the secondary literature is analysis of the causation behind the historical processes which culminated in the major reputational shift from public opprobrium to acceptance of criminal practitioners and their institutions. There is, in particular, no scholarship which analyses the effect of the consistently vehement press criticism of the mid-nineteenth century on the Bar’s behaviour and education. Equally, there is no work which combines the contributions of improved courtroom styles and of quality control as joint explanations for the Bar’s enhanced reputation of the late century.

The sequence of the review reflects a thematic selection of the literature which broadly corresponds with the subject matter of the thesis: (a) the nature and influence of the
Victorian press, (b) the conduct of the criminal Bar and (c) legal education. In the latter section, the review alludes briefly to the historiography of Victorian medical training by way of comparison with the professional training of barristers. Within that framework, the review considers publications in chronological sequence so that the reader may understand the evolution of the scholarly discourse and the key theories.

**Literacy and Secondary Readership**

Chapter Two attempts to calculate levels of adult literacy and of secondary readership in the period covered in order to arrive at a broad perspective on the reach and, therefore, on the potential influence of the various publications. It is to be noted that ‘reach’ is not the equivalent of circulation. The chapter draws upon two standard studies of Victorian literacy. The first, Robert Webb’s iconoclastic 1950 article, ‘Working Class Readers in Early Victorian England’ challenged the prevailing orthodoxy that nineteenth-century working-class literacy levels were generally low. He held that historians’ emphasis on the state of formal schooling had obscured the realities of adult literacy which he construed as simply meaning the ability to read.\(^{20}\) His own extensive research led him to ‘guess’ at an overall estimate of reading ability in the 1840s of around two-thirds to three-quarters of the working classes, ‘perhaps nearer the latter than the former’, considerably higher than previous figures.\(^{21}\)

It was a nearly fifty years later when the significance of Webb’s findings was revisited with Richard Altick’s major work, *The English Common Reader: a Social History of the Mass Reading Public, 1800-1900*. He argued, inter alia, that, while Webb’s calculations were quantitatively accurate, they did not reflect the full spectrum of individual reading skills.


\(^{21}\) Webb, p.349.
'There was a large fringe area of the population which, though technically literate, could barely spell out the simplest kind of writing'.\textsuperscript{22} Moreover, Altick believed that the conventional reputation of the 1870 Elementary Education Act as a great developmental landmark in the history of the reading public has been exaggerated.\textsuperscript{23} The Act provided for teaching for all children in England and Wales between the ages of five and twelve wherever voluntary provision was insufficient. Looking at the statistics, Altick argued that, while it may have made schooling easier to obtain, the Act did not particularly hasten the rate at which literacy improved. Taking these two works together, it follows that it is impossible to make finite calculations of national levels of reading and understanding over the period covered in the present study. Even so, when one factors in the phenomenon of secondary readership of newspapers which is addressed later in the chapter, it is safe to proceed on the basis that a majority of the population would at least be cognisant of the social and political issues of the day which were addressed by the press.

Accordingly, the chapter next considers the extent to which the contents of newspapers and journals were indirectly accessible to the general public. As mentioned in the discussion on methodology, Lucy Brown’s book, \textit{Victorian News and Newspapers}, made the point that no formal records of even first-hand sales exist between the abolition of stamp duty in 1855 and the 1947-8 Royal Commission on the Press.\textsuperscript{24} The earlier records, of course, did not record the number of unstamped publications. It follows that any estimate of the size of additional secondary readerships must be somewhat conjectural.

Much has been gleaned from classic authorities such as Aspinall’s 1946 article, ‘The Circulation of Newspapers in the Early Nineteenth Century,’ and Altick’s 1998 \textit{The

\textsuperscript{22} Richard Altick, \textit{The English Common Reader: a Social history of the Mass Reading Public, 1800-1900} (2\textsuperscript{nd} ed.) (Columbus: Ohio State University Press, 1998), p.171.

\textsuperscript{23} \textit{An Act to provide Elementary Education in England and Wales}, 33 & 34 Vict c.75.

By mid-century, political clubs and subscription reading rooms were supplemented by a proliferation of commercial coffee houses. For those who had neither local access nor an inclination to avail themselves of the quiet formality of reading rooms, urban and rural public houses supplied the needs of workers who could either read or have newspapers read to them.

The hiring-out of newspapers was illegal but widely practised. Altick provided a snapshot of a London newspaper sent to a Devon surgeon which was then passed down to six further people until sent ‘among the common people’.  Finally, newspapers, notably the popular working-class Sundays, such as Reynolds’s or Lloyd’s Newspaper, were informally circulated within workforces or entire family networks. Altick reminded the reader that the Victorian household contained not only a sizable family but also one or more servants ‘with whom the paper wound up its travels’. By 1861 the total of domestic servants of both sexes is said to have been more than a million. It follows that the multiplicity of factors which need to be acknowledged in any attempt to quantify the overall extent of secondary newspaper readerships make calculation highly problematical. However, what the secondary literature makes plain is that a great variety of news pathways deeply penetrated all levels of Victorian society.

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27 Altick, p.83.
Particular Newspapers and Journals

Chapter Three consists of a discussion of the characteristics of the main publications which feature in the main body of the work. It reviews mainstream newspapers, periodicals, popular proletarian or ‘working-class’ Sunday newspapers and legal journals.

The chapter firstly sets the scene at the commencement of the Victorian period with a brief outline of the nature and role of mainstream papers up to that point. Hannah Barker has made the point in *Newspapers, Politics and Public Opinion in Late Eighteenth-Century England*, that, at the turn of the eighteenth century, it was newspapers which informed political debate for most of the general population. Once again, Altick made a valuable contribution in his treatment of governmental suppression of radical publications and the counter-emergence of papers such as William Cobbett’s highly successful *Political Register* and its successors such as the *Black Dwarf*. This phenomenon has significance for the present study as it provides good evidence of a consistent market for radical journalism and, accordingly, suggests that support for radical causes was a recognisable component of public opinion. In 1819 the government response included the notorious ‘Six Acts’ which included the Newspaper and Stamp Duties Act, aimed at making the radical press economically unsustainable, and the Blasphemous and Seditious Libels Act which increased sentences for offending authors and publishers. Kelvin Gilmartin’s 1996 *The Press and Radical Opposition in Early Nineteenth Century England* described how some radical publications evaded Stamp Duties by relying on an exemption for papers containing only commentary on the news without purportedly reporting the news itself. Moreover, according to Altick,

29 Altick, p.328.
throughout the 1820s public interest in political issues such as electoral reform and Catholic emancipation sustained a growing market for regular news as supplied by the main ‘stamped’ dailies. Meanwhile, the government’s heavy-handedness ensured that radical journalism prospered in the years between 1831 and 1836. In 1834 the House of Commons was told that 130,000 copies of unstamped papers were sold every week.31 However, it turned out that, when the tax was reduced from four pence to one penny in 1836, it only increased the monopoly of the richer publishers because the continuing cost of stamping and the requirement for expensive indemnities against libel still wiped out the profits of smaller publishers. According to Brian Lake’s British Newspapers: A History and Guide for Collectors, mainstream English newspaper circulation is said to have risen from 39 million in 1836 to 122 million by 1854.32

Turning to individual publications. Virginia Berridge’ impressive 1976 doctoral thesis ‘Popular Journalism and Working Class Attitudes, 1854-1886’ stated in passing that the best-selling national daily at the beginning of the century had been the Morning Chronicle, the Morning Post and The Times.33 Notwithstanding individual party political differences, each predominately catered for upper and middle classes interests. They were, in any event, too expensive for the poorer classes. The present study then briefly outlines the origins and persuasions of these three papers, drawing in particular upon Lucy Brown’s chapter, ‘The British Press 1800-1860’ in The Encyclopedia of the British Press, 1422-1992 and George Boyce’s chapter, ‘The Fourth Estate: the Reappraisal of a Concept’ in the 1978, Newspaper

31 Altick, p.341; Hansard, Ser. 3, XXIII (1834), col. 1208.
33 Berridge, p.8.
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*History from the Seventeenth Century to the Present Day.*\(^{34}\) Boyce made an interesting challenge to what he described as a self-invented ‘political myth’ that the mainstream mid-century press constituted an authentic representations of public opinion. His argument was that the press’ cynical commercial objective was to position itself as an indispensable link between the public and the governing institutions of the country.\(^{35}\) In addition, Altick maintained that, while most newspapers avoided direct government interference for the first half of the century, many were ‘simply the hired mouthpieces of one party or the other’ until the value of advertising freed them from both subsidised government and party control.\(^{36}\)

One notable exception which, when it started, made a point of abjuring all advertising was the *Examiner*. This respected radical weekly occupies a central position in the present study because it was the most persistent commentator on the criminal Bar in the most dynamic period covered, namely the 1840s. It first appeared in 1808, edited by Leigh Hunt and published by his brother, John. *The Oxford Dictionary of National Biography* includes key bibliographic material and primary sources on Leigh Hunt and the editors who succeeded him. It describes Hunt’s editorship as ‘a high point in the history of English journalism’. Albany Fonblanque took over between 1828 and 1847. In *The Bar and the Old Bailey*, Allyson May has observed that, under Fonblanque, the paper even earned the respect of Tories for its integrity.\(^{37}\) Fonblanque was succeeded in 1847 by John Forster, a friend of


\(^{35}\) Boyce, pp.20-21.

\(^{36}\) Altick, p.322.

Dickens. Under both Fonblanque and Forster the *Examiner* was unforgiving in its criticism of the Bar.\(^{38}\)

By the 1850s and 1860s most of the mainstream papers with the exception of *The Times*, the *Daily Telegraph* and the *Daily Chronicle* favoured particular political groups. Aspinall and Brown have provided details of individual allegiances. In *Powers of the Press: Newspapers, Power and the Public in Nineteenth-Century England*, Aled Jones has provided a useful account of how, with the drop in price following the abolition of all duties by 1861, new publications proliferated. He, in turn, has relied on the *Newspaper Press Census for 1861*.\(^{39}\) Altick and Berridge contribute further copious detail of developments up to the 1870s when *The Times*’ circulation was overtaken by that of the *Daily News* and the *Daily Telegraph*.\(^{40}\)

Modern scholastic theory has addressed the dynamics of the newspaper industry at the end of the century. J.O. Baylen’s 1992 analysis ‘The British Press: 1861-1914’ concluded that between 1861 and 1890, traditionally regarded as ‘the Golden Age of the British Press’, alliances between press and politicians meant that political partisanship was ‘a dominant characteristic’ of the newspaper media.\(^{41}\) A more recent contribution by James Curran has investigated the invocation of ‘public opinion’ as a social and political force. In his 2002 article, ‘Media and the Making of British Society, c. 1700-2000’, he argued that what he called ‘the political nation’ expanded geographically and socially so that ‘rivalries and disagreements within the politically dominant, landed elite were played out through the press.

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\(^{38}\) May, p.225-6.


\(^{40}\) Altick p.354; Berridge, p.35; .

in front of a widening audience’ with a consequent increase in claims to represent ‘public opinion’. He identified three ‘liberal interpretations’ of how the expansion in newspaper readers affected the distribution of power in the nineteenth century. The first suggestion was that an independent press free of government and party interests empowered a popular ‘voice’. The second interpretation presented the press as the vehicle of dynamic social groups pursuing an extended democracy system. The third notion is that of a forum for a societal debate allowing for ‘continuity and gradual change’. At the same time, he noted an historical process through which radical publications were, in fact, excluded from mass markets as a result of increased costs between 1850 and 1918, by the prejudice of advertisers and the development of a capitalist press ‘oligopoly’. Radical activists were less well adapted to market requirements than capitalist entrepreneurs.

Periodicals

This study also incorporates material citations from cultured nineteenth-century periodicals. Brown has pointed out that the continued existence of quarterlies amounts to ‘impeccable evidence of the resilience and stamina of the educated reading public’. Inevitably, it is Webb and Altick who have provided the best estimates of circulation. Webb believed that periodical circulation in general increased by fifteen times over the century. However, as Altick admitted, the reliability of sources ‘is seldom beyond challenge’. He concluded that the primary significance of the available evidence ‘lies not in the circulation

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43 Curran, p.137.
44 Curran, p.147.
figures for individual periodicals but in its reflection of the magnitude of sales which various classes of periodicals had at various times.\textsuperscript{47} He also suggested that, with improvements in printing methods, postal services and transport, the original market expanded to include artisans and small shopkeepers.\textsuperscript{48}

There has been a renewal of academic interest in this topic in recent times. For example, Andrew King and John Plunkett in their 2005 collection, \emph{Victorian Print Media: A Reader} described how these various ‘reviews’ connected cultural and political decision-makers who consolidated around specific publications.\textsuperscript{49} Famously there was the stark ideological contest between the radical Whig \emph{Edinburgh Review} founded in 1802 and the Tory \emph{Quarterly Review} which was started in deliberate opposition in 1809. These were complemented in 1817 by \emph{Blackwood’s Edinburgh Review}, which was intended to undercut both. Last of this important group was the radical quarterly, the \emph{Westminster Review}, set up in 1824 as the organ of the ‘Philosophical Radicals’ led by James Mill and Jeremy Bentham, The Tory publications denounced mass-market reading as socially inflammatory; the Whigs and radicals asserted the potential of an affordable media to ‘raise’ thinking as a means of avoiding revolution rather than fomenting it.

Of acute relevance to this study is the fact that the morality of criminal law and its practice were matters which profoundly interested this influential readership. According to Donald Daintree’s M.A. dissertation, ‘The Legal Periodical: A Study in the Communication of Information’, a persistent feature of the liberal journals was a devotion to law reform issues and to the correction of legal abuses and the misconduct of practitioners. For example, in its first ten years after 1824 the \emph{Westminster Review} published twenty eight articles on legal

\textsuperscript{47} Altick, p.31.
\textsuperscript{48} Altick, p.330.
\textsuperscript{49} Andrew King and John Plunkett, (eds), \emph{Victorian Print Media: A Reader}, (Oxford: OUP, 2005), p.12.
procedure. For its part, the Edinburgh Review persisted with law reform causes ‘in issue after issue with a tenacity of purpose, an unflagging optimism and a masterly ability’. In 1830 it claimed that ‘[T]he all-important subject of judicial reform has of later years happily occupied almost the undivided attention of thinking men in every part of the country’.

Some of the later periodicals purported to be less partisan. The weekly Saturday Review, established in 1855, contained a balance of distinguished liberal and conservative contributors, most notably Sir James Fitzjames Stephen, the legal theorist, whose biography claimed that the journal rapidly gained a reputation ‘for a unique blend of abrasiveness with a stinging irreverence towards popular heroes and institutions’. John Mason’s comprehensive coverage in his 1978 article, ‘Monthly and Quarterly Reviews’ mentioned the Fortnightly Review which first appeared ten years later proclaiming its independence. Despite increasingly radical views, it then managed to become the most distinguished journal of the late century, appealing to a professional intelligentsia critical of the landed classes and bourgeois nonconformists alike. It was imitated by competitors such as the Contemporary Review, sympathetic to social reform, and the Nineteenth Century with a circulation of ten thousand and an estimated readership of a massive fifty thousand at its peak. Mason’s research, therefore, adds to the evidence that, despite received modern images of Victorian

52 Edinburgh Review (July 1830) p.478.
conservatism, liberal attitudes pervaded large sections of the educated public.

Conversely, according to another survey, J. Don Vann’s ‘Comic Periodicals’ in *Victorian Periodicals and Victorian Society*, most of the overtly satirical publications did not generally achieve large circulations. As examples, he cites the *Age*, a Tory paper which managed a maximum of between 8,000 and 10,000 and the *Satirist*, a Whig publication which achieved only half that figure. However, the magazine which is repeatedly quoted in the present study and was easily the most influential satirical magazine of the second half of the century was *Punch* which was established in 1841. It relied heavily on humour and what it termed ‘cartoons’. *Punch*’s sophisticated readership ranged from the middle class to the upper reaches of society. According to Altick’s 1997 book, *Punch: The Lively Youth of a British Institution, 1841–1851*, its targets were selective and ‘radical only in the sense of vehemently expressed dissatisfaction over a few or many aspects of contemporary society’. Among these was the legal profession and Altick has suggested that ‘[w]hat most troubled *Punch* ... was the yawning chasm that separated abstract justice and the day-to-day application of law.’ It owes its prominence in the present study to the numerous examples taken from its heyday in the 1840s and 1850s of pointed characterisations of the Bar as mercenary, hypocritical and, in the shape of the caricature, ‘Mr. Briefless’, unprofessional and ignorant.

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The underlying truths implicit in *Punch’s* sarcasm go to the heart of this study as they contextualise the public disdain for the criminal Bar’s deficiencies in both its behaviour and its education.

**The Sunday Newspapers**

The secondary literature establishes that the contents of the essentially working-class Sunday newspapers are broadly illustrative of the outlook of another significant section of the English public. The most popular papers were *Lloyd’s Weekly Newspaper*, *The News of the World*, and *Reynold’s Weekly Newspaper*, all founded between 1842 and 1850. Two aspects are particularly important. Firstly, the papers between them maintained very high circulation levels suggestive of considerable reach and influence and, secondly, their successful business model combined popular interests such as sport and court reports with accessible radical and socialist polemic.

David Vincent’s *Literacy and Popular Culture, England 1750-1914* provided convincing explanations for their success. Firstly, literate workers were already familiar with the combination of political discussion and entertainment and the papers maintained ‘crucial elements of continuity with the old radical press’. They mixed sensational fiction with the residual political appeal of weeklies such as Cobbett’s mass circulation *Political Register* which had not long closed in 1835. 59 Secondly, *Reynold’s*, in particular, persisted with the tone of personal address employed by successful open-air orators. Lastly, their canny publishers built upon earlier commercial practices. 60 Berridge’s account featured detailed characterisations of the various editors. Her painstaking analyses of correspondence and advertising in these papers allowed her to draw broad conclusions as to readers’ occupations

59 Berridge, p.2; Vincent, p.251.
60 Vincent, pp.252-3.
and social class.\textsuperscript{61} She also detailed the papers’ enormous circulations, concluding that the size of their market is also explained by the speed with which they positioned themselves favourably in relation to the dailies by lowering their prices in keeping with reductions in taxation.\textsuperscript{62} Her methodology was to sample five copies of each newspaper in every fourth year and to calculate the percentage of political content in each.\textsuperscript{63} The overall tone was acutely critical of royalty, the aristocracy and the political establishment. Significantly for present purposes, there is good evidence of hostility towards the legal system. For example, a \textit{Reynold’s} editorial from 1878 described it as ‘a disgrace to civilization’.\textsuperscript{64} A more recent work, Rosalind Crone’s 2012 chapter, ‘Publishing Courtroom Drama for the Masses, 1820–1855’, considered that, for its part, ‘\textit{Lloyd’s} format and style which criticised counsel and the Inns’ lack of concern over legal education had a profound impact on […] popular conceptions of criminal justice’.\textsuperscript{65}

It is, therefore, obvious that the work of Berridge and Crone are invaluable research assets, confirming that the popular Sundays provide inferential evidence of the attitudes of a large portion of the population. As important, is Berridge’s finding that, by the mid-1880s, there had been an emphatic change in that criticism of the Bar and its institutions appeared to fall away, is consistent with the conclusions of the present study.

\textsuperscript{61} Berridge, pp.2, 62, 71, 95, 98.
\textsuperscript{62} Berridge, p.41.
\textsuperscript{63} Berridge, p. 330.
\textsuperscript{64} \textit{Reynold’s Weekly Newspaper}, 19 May 1878, p.5.
In his section on ‘The Education of Lawyers’ in *The Oxford History of the Laws of England*, Patrick Polden commented that the very volume of nineteenth-century legal journals represented ‘a deterrent to the researcher’. According to Stefan Vogenauer’s 2008 article, ‘Law Journals in Nineteenth-Century England’, at least 101 publications which could possibly be classified as legal journals on the basis of their titles were established during the course of the century.

As a matter of necessity, therefore, this thesis has relied on three general studies: Vogenauer’s article, Daintree’s 1975 thesis, and William Hines’ 1985 M.A. Dissertation, ‘The Development of Legal Periodical Publishing in Great Britain between 1750 and 1939’. It follows that there appears to be only one published article on this important subject matter. Accordingly, by focusing specifically on the attitudes of these journals to forensic conduct and legal education, the present study offers a unique perspective.

Vogenauer has offered three classifications: ‘(1) periodicals aimed purely at practitioners, (2) periodicals with an educational aim, and (3) periodicals with academic aspirations’. This division was approximated by Polden who identified the ‘informational’ (‘designed to disseminate useful information to the legal profession generally or to some specific branch of it’), ‘the discursive’ (‘with lengthy essays and commonly a transparent political voice’), and

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69 Vogenauer, p.35.
'the pedagogic’ (‘aimed at law students’). My own research suggests that many of the practically-minded publications also included commentary on proposed or required reforms. Thus, the 1827 editorial policy of the first of the new species of discursive journals, The *Jurist, or Quarterly Journal of Jurisprudence and Legislation*, declared that ‘to investigate and explain the true principles of legislation, and to apply the philosophy of law, will constitute a main feature in its plan.’ Hines pointed out that estimates of circulations are difficult because some took advantage of free mail delivery for stamped papers making calculations based upon stamp returns unreliable. The *Law Times* was exceptional in publishing detailed figures showing that it reached sales of two thousand per week. Few weeklies achieved similar volumes.

Daintree’s thesis is useful in tracing the origins and development of these journals, the first dating from 1761. Reductions in production and transportation costs meant that during the 1840s, for example, twelve new titles were launched. There was no journal specifically dedicated to the Bar. Publications catered for solicitors, albeit with a barristerial readership. For example, the precursor of the present-day *Solicitors’ Journal*, originally the *Legal Observer* founded in 1830, was ‘the mouthpiece of the [Law Society’s] council’. Its great rival, the *Law Times*, first appeared in 1843 with what Vogenauer has described as ‘unsurpassed’ success. Its editorials regularly featured the problems of legal education and it is quoted more frequently herein than of any of its contemporaries.

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70 Polden, p.1203.
72 Hines, pp.259, 261.
73 Daintree, Preface, p.viii..
The Reputation of the Criminal Bar

Despite the predominately negative image of the mid-century criminal Bar, there was an element of ambiguity in the public’s historical consciousness because the Bar, as a long-standing constitutional fixture, still occupied the apex of the professional hierarchy. The fact of its status, not to be confused with its reputation, is not controversial and is well-supported in the secondary literature. Writing in 1933, *The Professions* by A.M. Carr-Saunders and P.A. Wilson usefully compared the development of 26 different professions - ‘Lawyers’ came first in the list. This was explained by the close association with politics which had characterised the English Bar since the sixteenth and seventeenth centuries. In *Professional Men: The Rise of the Professional Classes in Nineteenth-Century England*, W.J. Reader made the additional point that that ‘the barrister’s claim [to superior social standing] was derived primarily from the fundamental importance of the law in the constitution’. David Lemmings’ essay, ‘Ritual. Majesty and Mystery: Collective Life and Culture among English Barristers, Serjeants and Judges, c1500-c. 1830’ explained how, with the decline in the popularity of the monarchy, the ‘increasingly ritualistic’ administration of the criminal law and theatrical statements such as the assizes’ opening parades with robes and trumpets, became potent devices for transmitting and legitimising the power of the landed ruling classes. Lemmings clearly identified a correlation between senior barristers’ increased power and their unattractive complacency but he did not then fully analyse how this duality stoked the public

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resentment which is evident in the primary sources. Further research is required on the extent to which the Bar’s visible association with government increased or diminished public respect.

A central tenet of the present thesis is that one consequence of the 1836 Prisoners’ Counsel Act was a deterioration in courtroom behaviour which, in turn, exacerbated negative public opinion. As stated in the Introduction, by giving defence counsel the right to address juries directly, the Act cast them as principal actors in the trial process. In order to understand the full implications of this novelty, an examination of defence counsel’s involvement in trials before that date is required. In fact, the eighteenth century has been the focus of the greatest amount of scholarship on the Bar’s history. It is noticeable, however, that the scope of most of these studies concluded immediately prior to the passing of the 1836 Act. This is probably explained by the fact that commentators have tended to locate the seminal origins of adversarial trial in the late-eighteenth and early-nineteenth centuries, the period which featured the growth of cross-examination and exclusionary rules of evidence.

In 1983 Stephen Landsman in his ‘Brief Survey on the Development of the Adversary System’ offered a broad historical sweep beginning with the eleventh century.\textsuperscript{78} He argued, for example, that a shift away from the oppressive bias associated with the Stuart judges of the seventeenth century meant a more balanced exercise of judicial discretion in the allowances made in the use of counsel so that the English Bar of the eighteenth-century became ‘highly-skilled and well-established’.\textsuperscript{79} Seven years later in ‘The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England’, he identified three


incremental phases of increased representation. In his first phase, upto 1730, there was ‘little adversarial action of any sort’. In the second, barristers’ participation intensified in a small number of cases with the increase in arguments addressing deficient indictments and the admissibility of confessions, hearsay and accomplice testimony. He went so far as to suggest that in the final phase, the last quarter of the century, barristers had become ‘the dominant courtroom force’, citing the examples of Garrow and Erskine. However, as a generality, the assertion overlooked the fact that the great majority of defendants still remained unrepresented. David Cairns, for example, in *Advocacy and the Making of the Criminal Trial; 1800-1865*, cited the poverty of defendants, the low level of representation and the felony counsel restriction itself as features which made the Old Bailey ‘unlikely soil for the flowering of advocacy’ in the late-eighteenth and early-nineteenth centuries. Cairns has also questioned an over-reliance by Landsman, Langbein and, subsequently, Beattie (see below) on the Old Bailey Sessions Papers. These were contemporary accounts of trials published between 1670 and 1913. They were originally sold on the streets for public consumption but by the later eighteenth century they had gained the sponsorship of the City of London to become quasi-official reports of court business. Cairns criticism is that they were purely metropolitan records and often factually incomplete. Of course, the other side of that point must be that, if anything, the OBSP’s incompleteness leaves open the possibility that defence counsel may have been more prevalent than recorded.

81 Landsman, p.557, 562.
83 Cairns, *Advocacy*, p.32-3.
In his 1991 article, ‘Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries’, J.M. Beattie provided a table also based upon the OBSP plus ‘a few cases in which internal evidence makes it almost certain that lawyers took part’, showing that defence representation in Old Bailey cases rose from 2.1 per cent in 1775 to 27.9 per cent by 1800, an increase of more than thirteensfold, although it is not clear whether the increase was real or merely the result of more complete reporting of trial proceedings.\textsuperscript{84} He also pointed to an apparently coincidental change in behaviour with some defenders becoming more aggressively committed to their clients’ interests, not least in the shape of less deference to the judiciary. This may, of itself, explain the increase in the instruction of counsel. He suggested that the timing may have been part of a general response to a widespread belief that England was threatened by a tyrannical and oppressive Georgian regime.\textsuperscript{85} In his 2006 article, ‘The Mystery of Old Bailey Counsel’ T. Gallanis attempted to unravel the ‘persistent mystery’ of why the numbers of defence lawyers at the Old Bailey increased noticeably in the last quarter of the eighteenth century.\textsuperscript{86} ‘Something was afoot in the late eighteenth century, for it was at that time, and not earlier, that we see the emergence of an Old Bailey bar’.\textsuperscript{87} He dismisses five ‘red herring’ explanations which he argued did not seem to be supported by analysis of dates and developments. This is surprising as the explanations which he rejects appear credible and include changes in the substantive criminal law, an increase in the overall number of lawyers, a rise in the standard of living, changes in attitude among judicial personnel, and the growing


\textsuperscript{87} Gallanis, p.163.
use of prosecution counsel. His preferred explanation was that in 1770 defence counsel rarely appeared in non-capital trials whereas by 1790, they featured in such cases in roughly equal proportions to capital cases. This, he connected with the increasing use of punishments short of death such as transportation and imprisonment. He also pointed to the successes of the likes of Garrow and the self-evident benefits of employing counsel.  

Langbein himself has written two thoroughly-researched studies of eighteenth century trial procedures which made pioneering use of the OBSP. Both his 1978 article, ‘The Criminal Trial before the Lawyers’, and his 2003 book, *The Origins of Adversary Criminal Trial*, argued that the beginnings of ‘adversarialism’ (which he plainly regards as a defective process, appearing to prefer inquisitorial systems) can be traced back to the developments in the eighteenth and early-nineteenth centuries.

A number of studies (such as those by Duman and Lemmings, discussed further below) have considered whether the Bar’s distinctly autonomous identity had been established before the nineteenth century or whether it evolved at the same time as the growth of the Victorian professions in general. The actual timing of the emergence of the Bar’s distinctiveness may not necessarily be that important for the present thesis but the consequences do matter. Its confidence in its historical status and its self-regarding, although not self-conscious, singularity, were embedded by and throughout the Victorian period, not least in the 1840s and 50s. They explain, for example, its self-referencing forensic conduct, its resistance to external interference in its affairs and, in particular, its preference for absorption through the generations of gentlemanly values rather than systematic legal education.

88 Gallanis, p.173.
In his 1979 article, ‘The Creation and Diffusion of a Professional Ideology in Nineteenth Century England’, Daniel Duman argued that, taken collectively, the Victorian professions emerged as ‘a distinct social class’ to be set alongside the old landed aristocracy, the new entrepreneurial classes and ‘the working classes waiting in the wings for their chance’. He suggested that the consequent evolution of a common service ideal with social functions and ethical obligations provided moral justification for a claim to high social status.

However, a year later in ‘Pathway to Professionalism: The English Bar in the Eighteenth and Nineteenth Centuries’, Duman appeared to disassociate the Bar from the general professional revolution of the nineteenth century, arguing that it had taken its own independent course long before then, ‘evolving at a different pace and in a different direction’ from other professions. By the eighteenth century it already possessed a large measure of authority, autonomy and dominance. He did find similarities with the highest grade in the medical profession, the physicians, who were also ‘based on the ideal of the independent practitioner, [...] were accorded high status [...], had well established professional societies, and [...] were small, elite, London-based branches of larger professions’. For both, remuneration was by way of a notional honorarium rather than a fee as befitted the status of a gentleman. Even so, he makes the telling point that while wealthy patients felt perfectly entitled to evaluate the various treatments prescribed, barristers’ clients were probably much more ‘hesitant to interfere with the mysteries of the law, which was clothed in a jargon that

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made it almost incomprehensible to the uninitiated'. This aspect has considerable significance for the present study because it illustrates how the inaccessibility and exclusivity of legal knowledge enabled the Bar to maintain its (literal) value notwithstanding public reservations about its habits. In ‘The English Bar in the Georgian Era’ Duman found that, by the eve of the industrial revolution, a new model of professionalism was developing following changes in the Bar’s social composition. Having examined Middle Temple records between 1715 and 1744, he concluded that, by the end of that period, the landed classes constituted no more than 40 per cent of entrants. The result was the creation of ‘the prototype of the modern profession’ of barrister.

Published in 2000, David Lemmings’, Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century, described this period as one of decreasing litigation and professional under-enrolment accompanied by sustained attacks on the Bar’s social and scholarly merits. In the mid-eighteenth century the Inns were contributing little to the development of a professional identity which, by the nineteenth, came instead from affiliation with the common law circuits or the Chancery Bar. This caused Lemmings to question why it was that the Bar’s elitism had become so well-established by 1830. He suggested that the reasons included high fees, a probable increase in high value work, the investment of more state power in the judiciary and revival of litigation. Barristers had become ‘secure in their social pretensions [...] successful counsel were more wealthy by far and fortified by

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93 Duman, ‘Pathway to Professionalism’. pp. 616, 618.
95 Duman, ‘The Georgian Era’, p.104
association with the sons of the elite at public schools, the two universities and the
Inns’. 97 ‘The law was essentially a continuous discourse among generations of great
men [...] and emphatically law was the lawyers’ business.’98

The 1836 Prisoners Counsel Act

This review now turns to those works dealing with the 1836 Prisoners’ Counsel Act
itself. As with the studies referred to above which mainly focused on the half-century before
the Act, the bulk of scholarly discourse on the Act has also tended to centre on an issue which
is tangential to the present thesis, namely whether the passing of the Act itself marks a
seminal point in the historical narrative out of which emerged the modern form of adversarial
criminal trial. The foremost proponent of the argument that it did is David Cairns. In his 1998
book, Advocacy and the Making of the Adversarial Criminal Trial, 1800–1865, he
complained that the Act had not received the attention it deserved because of a previous bias
in legal historical scholarship, notably on the part of Langbein, Landsman and Beattie who
erroneously compared eighteenth century developments with modern ‘rights’ models,
resulting in an over-hasty characterisation of the late-eighteenth century criminal trial as part
of a linear development up to the modern day.99 However, the defendant-centred model of a
contest with opposing parties, increasingly represented by participating counsel and
‘refereed’ by a judge, was already evident by the eighteenth century and qualitatively
distinguishable from the continental form of inquisition. Elements of modernity were also in
place with the growth of cross-examination and exclusionary rules of evidence. The statutory
addition of a defence speech in 1836 sculpted the contest but did not reshape it as a new

97 Lemmings, Professors of the Law, pp.305-314.
concept. It remained the fact that felony defendants were not permitted to give evidence for a further sixty years until the Criminal Evidence Act 1898. Moreover, Cairns has made extended claims which require further scrutiny. For example, he contended that the Act ‘ushered in a form of trial that maintained public confidence for over half a century,’\(^{100}\) On the contrary, the present thesis argues that patriotic claims for jury trial as a superior national model were already entrenched in the popular imagination well before the passing of the Act. Conversely, for decades afterwards, the speechmaking excesses enabled by the Act actually exacerbated the already poor perception of the daily adversarial competitions at the Old Bailey.

In ‘Scales of Justice’, Beattie provided biographies of the leading reformers and a detailed analysis of the various Parliamentary proposals for the introduction of defence speeches between 1821 and 1836, all of which confirm that the impetus for reform did not come from the mainstream legal profession. As the debates developed from 1821 onwards, they turned increasingly on the dangers of the trial being reduced to a contest between lawyers rather than the ‘pure administration of justice’ so that prosecutors would abandon a plain narrative of the evidence and strive harder for convictions. However, by the time of the 1830s debates, reformers were urging that the fullest possible advocacy by both sides would correct errors in both directions.

In ‘Reluctant Advocates: the Legal Profession and the Prisoners’ Counsel Act of 1836’, Allyson May set out on ‘a preliminary exploration of the reactions of the legal profession, in particular, Old Bailey counsel and attorneys’\(^{101}\). Her conclusion was that the

\(^{100}\) Cairns, *Advocacy*, p.176.

profession and the judiciary were ‘decidedly hostile’.\textsuperscript{102} She rejected the idea that this could be explained purely in terms of self-interest, notwithstanding that the Act greatly increased the workload of counsel by requiring them to prepare and deliver speeches. She maintained instead that contemporary practitioners were themselves mistrustful of the effect of full-blown professional oratory in criminal trials. However, she pointed out that, given the lack of funding for access to counsel, the Act was ‘cruelly irrelevant’ to the majority of defendants.\textsuperscript{103} Nor did she find any evidence which suggested that any sustained public support for a measure granting accused felons the right to counsel.

In ‘The Prisoners’ Counsel Act 1836: Doctrine, Advocacy and the Criminal Trial’ Cerian Griffiths also investigated the Bar’s diffident attitude to the reform.\textsuperscript{104} Beyond Hansard’s reportage of the two sets of parliamentary debates in the 1820s and 1830s, Griffiths found little in the way of ‘first hand responses’ by rank and file practitioners to ‘such a significant piece of legislation’. She ventured two explanations: firstly, the disparate and independent nature of the practising Bar militated against a coherent, unified position and secondly, of much greater significance for the present study, ‘the widespread distrust for and unpopularity of the Bar understandably inhibited individual barristers from putting their heads above the parapet during such a time of upheaval’.\textsuperscript{105} She also suggested that the more successful barristers, who would have either been pursuing political careers or aspiring to official appointments, had no incentive to concern themselves with the mundane parameters and Truth-Seeking in the Old Bailey Courtroom’ \textit{Journal of Legal History}, 26 (1) (2005), pp. 83-90.

\textsuperscript{102} May, ‘Reluctant Advocates’, pp. 188, 190.


\textsuperscript{105} Griffiths, p.32.
of daily advocacy in the criminal courts. In fact, competition for promotion militated against fraternity. She further cautioned that it would be ‘misleading’ to understand the reforms simply in terms of a contest fought by liberal, progressive Whigs opposed by paternalistic Tories. This chimes with Beattie’s analysis. Charles Phillips, for example, the leading counsel of the mid-century and a Whig, strenuously argued that defendants, deprived of the discretionary safeguards inherent in the old system such as pardons and ‘pious perjury’ by juries, would find the certainties of the ‘pursuit of truth’ more oppressive. Griffiths concluded overall that, in any event, a politically and socially conservative Bar inevitably preferred long-established rules and would resent external interference by politicians.106

Griffiths’ second insight, which is confirmed by the primary evidence in the present study, was that ‘the reputation of the criminal Bar with the public, the media, Parliament and within the legal profession itself, was exceptionally negative’ and barristers were reluctant to court further obloquy by visibly supporting a measure which might well be perceived as an attempt to increase their incomes.107 ‘In an age of self-conscious rationalisation, an unpopular profession reliant on tradition as a rationale for its existence, was in a precarious position’.108 She challenged earlier research to the effect that the first round of debates in the 1820s had received little public and press attention, citing consistent coverage and readers’ correspondence complaining of barristers’ behaviour.109 Observing that an apparently passive response on the part of the Bar does not necessarily indicate acquiescence in the reform, one of her suggestions was that further research was required on the reaction of the profession. The present study has provided some indication of professional attitudes with citations from a number of contemporary publications. Among the legal journals, opinions were divided. As

106 Griffiths, pp.39-40.
107 Griffiths, p.42
108 Griffiths, p.44-5.
stated above, there was no publication specifically catering for barristers but it is noteworthy that the *Legal Observer*, the metropolitan solicitors’ house magazine, supported reform.\(^{110}\)

**The ‘Licence of Counsel Controversies’**

This review next considers the secondary literature which covers the falling reputation of the criminal Bar in the decades immediately following the Act – the period of ‘the licence of counsel controversies’ (discussed in detail in Chapter Five). Jan-Melissa Schramm’s 1984 article, ‘The Anatomy of a Barrister’s Tongue: Rhetoric, Satire and the Victorian Bar’, considered literary and press images of the nineteenth-century Bar.\(^{111}\) She provided evidence of the vehemence of the extensive criticism of the Bar which confirms the present study. Popular literature’s reaction to the ‘lawyerisation’ of the criminal trial after the 1836 Act featured ‘a new antagonistic vigor (sic) into the social commentary of authors such as Charles Dickens’.\(^{112}\) Schramm then turned to the ‘licence of counsel controversies’ of the 1840s and 1850s which sit at the heart of the present thesis. She focused particularly on the ‘immense public debate’ which followed the *Courvoisier* case of 1840 in which, despite his client’s private confession of guilt, Charles Phillips had not only continued to act but also implied the guilt of an innocent third party.\(^{113}\) Schramm then reviewed the prominent critical role played by *Punch*, founded in the following year, citing many examples of acerbic caricature which feed directly into the present thesis.

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\(^{112}\) Schramm, p.287.

\(^{113}\) Schramm, pp.290-3.
In her 2011 article, ‘The Way We Lived Then: The Legal Profession and the 19th-Century Novel’, Nicola Lacey examined the Victorian novel ‘as an interpretive resource in legal and social history [and] on an issue which appears to have been neglected amid the rich skeins of recent debate’, namely the ethical standards of criminal advocacy.\textsuperscript{114} She used her analysis of the cultural shifts evident over time in Trollope’s realist novels as reflections of contemporaneous societal values, concluding that the Victorians remained attached to ‘the ancient symbols of status and credit amid the rationalistic marks of professional credibility which they were so active in inventing’.\textsuperscript{115} However, with the numerical expansion of the Bar and the simultaneous loosening of the influence of the circuit mess, criminal defenders suffered from what she has termed ‘legitimation problems’.\textsuperscript{116} The tension between the Bar’s fiercely maintained claims to gentility and integrity, on the one hand, and commercial reality, on the other, meant that criminal barristers were fair game for the allegations of hypocrisy of the sort frequently made in the primary sources.\textsuperscript{117}

Craig Newbery-Jones’ 2017 doctoral thesis, ‘Constructing a Popular Public Image: Press Representation of the Barrister in Nineteenth Century England’ should be read as a companion-piece alongside the work of Schramm and Lacey. His principal contention was that the barrister was the ‘first recognisable source of mass popular culture’ and he supported this with a comprehensive citation of popular sources upon which the present study has


\textsuperscript{115} Lacey, p.604.

\textsuperscript{116} Lacey, p.616.

\textsuperscript{117} Lacey, p.617;
The work is a collation rather than an analytical narrative and, unfortunately, he provides no pagination in his references.

At the time of writing, the most recent work considered was Andrew Watson’s 2019 *Speaking in Court: Developments in Court Advocacy from the Seventeenth to the Twenty-First Century*. As the title suggests, this covered forensic conduct and culture over four centuries and the result was a considerable *tour de force*. He examined how ‘public opinion, developing rules of professional etiquette, and the judiciary came to limit the bounds of the [resulting] forensic licence’. The popular press of the last two decades of the century turned to portrayal of trials as instructive narratives with intense respect for the leading players: the ‘great advocates’ of the day. Alongside primary press sources, the present study relies at this point on autobiographies, the recollections of contemporaries and on the copious and invaluable data available in *The Oxford Dictionary of National Biography*.

**Education**

The next Section of the thesis is a study of public attitudes to the apparent indifference of the Bar’s institutions towards systematic legal education and quality control. It follows a timeline which corresponds with the preceding Section on courtroom behaviour. In other words, it commences with mid-century press reaction to the deficiencies of legal education, moves through the subsequent decades of reformers’ efforts and resistance by the Inns of Court, and concludes with the end-of-century improvements. There is a paucity of

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119 Andrew Watson, *Speaking in Court: Developments in Court Advocacy from the Seventeenth to the Twenty-First Century* (Cham: Palgrave and Macmillan, 2019).
120 Watson, pp.68,138.
secondary material on this subject-matter. One exception is Patrick Polden’s comprehensive contribution to *The Oxford History of the Laws of England* which provided this writer with a valuable springboard for further research. As a result, this study was able to locate significant primary evidence in both the mainstream and professional press which confirmed that the Inns’ lack of interest in quality control was a matter of national concern.

The absence of an effective educational system for barristers contrasted with the systemised and compulsory training of attorneys and solicitors and with that of the medical professions. These comparisons make important contributions to this thesis as they point up the extent to which the indifference of the Bar’s institutions was out of step with Victorian expectations of utilitarian professionalism. The primary sources are full of criticism, much of which shows that concerns were not confined to the specialist legal journals but were widely shared by the mainstream press.

Pausing there, there is a theme in some of the 1950s and 1960s historiography which suggested that the Bar’s educational processes had kept pace with those of the other professions. For example, the comprehensive but Whiggish *locus classicus*, Charles Newman’s *The Evolution of Medical Education in the Nineteenth Century* published in 1957, argued that by the middle of the century there was ‘a new awakening [...] a general movement of self-regulation among the professions as a whole’ in which he included the Bar. In support, he cited the fact that in 1846 the reforming barrister, Richard Bethell, advocated a comprehensive system of legal education, ‘as a result of which lectures were

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122 See Chapters 7 and 8.
started and a Council of Legal Education set up'. In fact, the sensible recommendations of the 1846 Parliamentary Committee, which Bethell had instigated, were ignored by the Inns and the legislature as were those of an 1855 Royal Commission. Although the Council for Legal Education (CLE) was reluctantly set up by the Inns in 1852, it was ineffectual and aspiring barristers took little interest.

There may have been some ambiguity in S.W.F. Holloway’s 1964 article, ‘Medical Education in England, 1830-1858: A Sociological Analysis’ when he made the specific assertion that fundamental changes in the education of ‘lawyers’ between 1830 and 1858 were part of the general development of professional training in England. He cited the fact that in the 1830s the judiciary brought in rules requiring all candidates for admission as attorneys and solicitors to pass a written examination. This implies that he only had the ‘junior branch’ of the legal profession in mind. In fact, there were no comparable requirements for the Bar for a further forty years which further proves its exceptionality.

Daniel Duman more accurately disassociated the Bar from the general professional revolution of the nineteenth century in his 1980 article, ‘Pathway to Professionalism’. He argued that it had taken its own independent course long before, ‘evolving at a different pace and in a different direction’ from other professions. By the eighteenth-century, it was already manifesting its own ‘authority, autonomy and dominance’. He, too, believed that only a minority of practitioners chose to concern themselves with the day-to-day governance of their profession. But, equally, neither the public nor the politicians were prepared to

124 Newman, p.112.
125 Polden, p.1183.
challenge its traditional privileges. In ‘The English Bar in the Georgian Era’, he therefore found it unsurprising that leading members of the profession remained staunch defenders of the legal establishment. This was not simply a matter of reaping personal advantage but rather a reflection of ‘ingrained social attitudes and incomprehension at the plight of the lower classes, combined with perhaps an over-zealous devotion to order and stability instilled in members of the bar by their professional training and environment.’

In The English and Colonial Bars in the Nineteenth Century, Duman further suggested that ‘the interpenetration of legal and political elites [was] one reason for the immunity of the Bar from the general reformist mood of the time with ministers feeling it was not in their power to impose reform on the Inns with their centuries-old tradition of absolute control over the certification of barristers’.

Also written in the 1980s, Raymond Cocks’ book, Foundations of the Modern Bar, reiterated the constant motif that the Bar’s indifference towards education stemmed from its ‘vague but strong form of individualism’. The nineteenth-century Bar was ‘content with its everyday life’ - partly from the fact that its members ‘were engaged in the common pursuit of wealth’ and ‘able to function without an overwhelming amount of internal dissent and without very much concern for public opinion’. In fact, public opinion was becoming increasingly hostile and the new legal journals were campaigning for better education, discipline, and standards of advocacy with proposals for moderate structural reforms. Cocks

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identified the fact that the Inns started to realise that a ‘private question was beginning to turn into a public one’.132

There were, however, some improvements elsewhere. Andrew Boon and Julian Webb in their 2008 study, ‘Legal Education and Training in England and Wales: Back to the Future’, noted that various universities established law schools from the 1850s onwards. The Inns, however, still showed no desire to associate themselves with a more developmental relationship with the academic establishments. Reformers’ proposals for a school of law for both branches of the legal profession were repeatedly rebuffed.133 The Bar’s resistance to ‘fusion’ is a constant theme of its relationship with the junior branch.

**Attorneys and Solicitors**

A number of works cover the conceptual and mechanical differences between the status, governance and education of solicitors and attorneys and that of barristers. In *Professors of the Law*, David Lemmings traced the origins of the Bar’s ‘assumption of superiority’ to three centuries earlier and associates it with ‘assumed differences in social standing as much as any separation of functions’.134 Chapter Seven of the present study sets out how, unlike independent barrister advocates, the occupations of both attorneys and solicitors originated (and remain) as ‘officers of the court’ performing functional duties and subject to control by the common law and chancery courts respectively. It is noteworthy that one reviewer of Lemmings’ work commented that the roles of solicitors and barristers might have been ‘better distinguished’ and that ‘a better account of their evolving separation seems

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132 Cocks, p.154.
justified’. In ‘Ritual. Majesty and Mystery’, Lemmings added that by 1762 in the ‘final phase in the long drawn out process’ the Inns excluded practising attorneys from membership and for their part, the circuits forbade social contact. He conjectured that these considerations tended to prevent ‘consumer-led grass-roots reform’.

Two works, both compendious treatments of the growth of the nineteenth-century professions generally, are particularly helpful in describing the self-driven development of the junior branch of the legal profession. In the first, The Professions, written ninety years ago, Carr-Saunders and Wilson singled out the 1729 Solicitors and Attornies Act as a defining event. This stipulated a five-year articled clerkship, akin to the trade guilds’ apprenticeship, while registration on the court ‘roll’ gave attorneys and solicitors a tangible professional consciousness and, in turn, generated a movement for self-government. Like the Bar, they were desirous of exclusivity but, unlike the Bar, sought it through quality regulation. In 1966 in Professional Men: The Rise of the Professional Classes in Nineteenth-Century England, W.J. Reader provided the insight that the lower branches of both law and medicine in the early part of the nineteenth century were ‘acutely anxious for full professional status, and [...] they had realized that the way to get what they wanted was to

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establish, among other things, a regular system of professional education’. In 1825 the precursor of the Law Society was founded. By 1845 the Law Society was incorporated by Royal Charter to purposively promote ‘professional improvement and [...] the acquisition of professional knowledge’. All of this contrasts starkly with the Bar’s resistance to systematic education.

The Medical Profession

The structural complexities and internal nineteenth-century struggles within the medical professions make it difficult to find simple analogies with either of the two branches of the legal profession. Nevertheless, the basic, unchallengeable conclusion which is highly relevant to the present thesis is that regulation and quality control of the practice of medicine preceded reform of the Bar by decades.

Newman provided a useful characterisation of the professional layers of medicine at the beginning of the nineteenth century. For physicians, like barristers, ‘[t]he ideal aimed at was a cultured and highly educated gentleman with, quite secondarily, an adequate knowledge of medicine.’ For surgeons, the ideal was the ‘general anatomist’ - a ‘sound operator’ able to act with speed and dexterity. Historically, the lowest level of medical professional was the apothecary. However, professional boundaries were becoming blurred as the century progressed with the growth of a mixed breed of unregulated ‘surgeon-apothecaries’ (later known as ‘general practitioners’) who combined surgery with the provision of medicines.

139 Reader, p.54.
140 Carr-Saunders pp.44-7.
141 Newman, p.4.
143 Newman, pp.21-22.
The legislative response to their demands for protective regulation was the Apothecaries’ Act 1815. Historians’ interpretations of the practical implications of the Act differ considerably. It required those who combined medical treatment with the provision of medication, that is, the general apothecary-surgeons, who by then made up the majority of the medical profession, to complete the five-year apprenticeship, usual for apothecaries, and to pass the examinations of the Society of Apothecaries. Newman now stands alone in his belief that the Act benefited general practitioners because it entrusted the examination of and responsibility for ‘the great majority of medical practitioners to the [Apothecaries] Society’ which, in his judgement, meant that the two Royal Colleges were ‘completely sidestepped’.

This is emphatically not the view of Holloway who concluded that the Act ‘tended to degrade rather than elevate the rank and file’ because it was designed to re-assert the historical structure at a time when this did not reflect the social realities. Continuing Holloway’s theme in 1986, Irvine Loudon’s Medical Care and the General Practitioner, 1750-1850 found Holloway’s ‘wholly convincing’ critical assessment and to be ‘largely accepted’. As the title suggests, Ivan Waddington’s 1977 article, ‘General Practitioners and Consultants in Early Nineteenth-Century England: the Sociology of Intra-Professional Conflict’, focused on the division between general practitioners and consultants rather than the formal tripartite divisions. The Royal Colleges persistently refused to make provision

144 55 Geo.3. c.194.
147 Loudon, pp.163-70.
for the type of education required for general practice. As with solicitors, the outcome was a reform movement from within the ranks of general practitioners themselves.\textsuperscript{149} This, he found, was ‘strikingly’ similar to conflicts within the legal profession as barristers and physicians respectively, ‘having attained great power and prestige, attempted to inhibit the development of general practitioners [...] they tried to keep them subservient and the history of both professions is largely concerned with the problems so brought about’.\textsuperscript{150}

Academic opinions also differ as to whether the 1858 Medical Act radically improved the status of general practitioners.\textsuperscript{151} Newman described it as a ‘great relief to moderate-minded persons who were utterly tired of the long-protracted tussle’ between the Royal corporations and general practitioners.\textsuperscript{152} The Act created the General Council for Medical Education and Registration with the task of supervising and co-ordinating medical education throughout the United Kingdom. A register of all qualified practitioners was compiled and all whose names appeared in it were accorded the same legal status. Nevertheless, the objectives of the reform movement, led chiefly by the editor of the \textit{Lancet}, Thomas Wakely, had not been fully achieved. Loudon contends that the 1858 Act was in fact, a ‘bitter disappointment’ for the majority of practitioners. The continued exclusion of general practitioners from most hospitals, together with ‘the peculiarly British’ principle of referral, ‘are the keys to understanding the medical profession in Britain’.\textsuperscript{153} It is to be noted that the requirement of referral by a solicitor has, until the recent introduction of limited forms of


\textsuperscript{149} Waddington, p.182.


\textsuperscript{151} Medical Act, 1858 (21 & 22 Vic., c.90).

\textsuperscript{152} Newman, pp.187-193.

\textsuperscript{153} Loudon, pp.297-300.
direct access, partly explained the Bar’s elevated status.

For the sake of completeness, one should mention the recent work, *The Rise of the Medical Profession*, by Noel and Jose Parry.\(^{154}\) Part 1 addresses the problem of ‘how to relate the study of professionalism to class theory’. Part II is a chronological review of developments in the profession from 1790 onwards and therefore covers the relevant period. However, there is no citation of primary sources and, instead, the reader is presented with an unselfconscious and almost total reliance on copious quotation from other historians.

To conclude this part of the review, there is little secondary material which specifically offers a narrative explaining the causal links between public attitudes to the deficiencies in legal education and the ultimate acceptance by the profession of limited reform.

SECTION B – THE VICTORIAN PRESS

Chapter 2 – Literacy and Secondary Readership

This Section is an overview of the Victorian press and sets out the principal characteristics of the mainstream newspapers, periodicals, the popular ‘Sundays’ and the specialist legal journals. This initial chapter serves as a reminder of the additional but unquantifiable contributions to the amalgam of Victorian public opinion of two other inchoate classifications – firstly, the illiterate or semi-literate, ‘the unknown public’, many of whom would have received their ‘news’ from public and private readings by others and, secondly, the secondary readership which flourished in libraries, clubs, alehouses and within the home. Although the extent of each of these constituencies is immeasurable, an acknowledgement of their existence is important because it supports the simple point that the reach of popular publications and, inferentially, the corresponding views held by the public based upon their contents were far more extensive than their first-hand circulations.

Literacy Levels

The prevailing orthodoxy, that nineteenth-century working-class literacy levels were generally low, was significantly revised by Robert Webb in the 1950s. He accepted as fact the historical circumstance on which this judgment had been based, namely that formal schooling had been ‘capricious and uncertain and frequently appallingly bad’, but he held that historians’ emphasis on the state of the schools had obscured the realities of adult literacy which he construed as meaning ‘in its narrowest, [...] most significant sense simply as the

ability to read.\textsuperscript{156} Reading skills, albeit at a low level, could be acquired in many other varieties of teaching environments, notably Sunday schools. Moreover, economic betterment and social incentives stimulated individual improvement which might range from deliberate recourse to newspapers in the rapidly increasing number of coffee houses to accidental exposure to street literature, ‘in improved forms of artificial lighting, and even in such humble things as the advertising posters which appeared on nearly every wall’.\textsuperscript{157} The national record of the simple capacity merely to sign a marriage register indicated that in 1839 66\% of men and 50.95\% of women signed registers in one form or another; by 1873 the figures had risen to 81.2\% and 74.6\% respectively; by 1893 it was 95\% and 94.3\%. Webb’s own research led him to conclude from these and many other diverse figures that, as ‘a guess’, an overall estimate of reading ability in the 1840s ‘would seem to hover about two-thirds to three-quarters of the working classes, perhaps nearer the latter than the former – considerably higher than the 1839 marriage register level.\textsuperscript{158}

Writing forty years after Webb, Richard Altick argued that Webb’s figures, albeit a reasonably accurate reflection of the numbers able to read in some form, overestimated the quality of their abilities. Altick himself made a swingeing assessment of the benefits of Victorian schooling and, perhaps understandably, avoided quantitative calculations of literacy other than to state: ‘There was a large fringe area of the population which, though technically literate, could barely spell out the simplest kind of writing’.\textsuperscript{159} For example, he believed that the conventional reputation of the 1870 Elementary Education Act (‘Forster’s Act) as a great

\begin{flushleft}
\textsuperscript{157} Ibid.
\textsuperscript{158} Webb, p.349.
\textsuperscript{159}Richard Altick, \textit{The English Common Reader : a Social history of the Mass Reading Public, 1800-1900} (2\textsuperscript{nd} ed.) (Columbus: Ohio State University Press, 1998), p.171.
\end{flushleft}
landmark in the developmental history of the reading public has been exaggerated. The Act was the climax of agitation for a national school system with governmental responsibility for providing education overseen by local education authorities for all children in England and Wales between the ages of five and twelve wherever voluntary effort was insufficient. Altick argued that, while it may have made schooling easier to obtain (and less easy to avoid), the statistics do not reveal much improvement in literacy rates. In the previous two decades the rate for males had increased by 11.3 per cent and that for females by 18.4 per cent. Twenty years after the Act, the 1891 census showed increases of 13.0 and 19.5 respectively. In other words, by the end of the period under consideration in this study, the rate at which literacy was spreading had not been significantly hastened by the Act. In Altick’s judgement, the Act simply served as a ‘mopping-up operation’ by which very poor slum or rural children were taught to read.

Secondary Readership

Because of the cost of individual daily purchases of stamped newspapers and periodicals, nationwide subscription reading rooms became common by the first quarter of the nineteenth century. The taxation of publications and pamphlets had been first introduced in 1712 at the rate of a halfpenny each. Thereafter, governments incrementally levied taxes such as stamp duty, advertisement duty and paper duty not only to raise revenue but also to suppress readership of radical literature by making it too expensive to be widely bought. Advertisement duty was abolished in 1853, followed by

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160 An Act to provide Elementary Education in England and Wales, 33 & 34 Vict. c.75.
161 Altick, p.172.
newspaper stamp duty in 1855. The paper duty was finally removed in 1861.\(^{162}\) The reading of pamphlets and 'independent' newspapers at Sunday and evening meetings was a frequent response to government repression in the first quarter of the century. Reading rooms like this were sometimes dismissed as ‘union’ or ‘reformers’ rooms.\(^{163}\)

In 1829 the *Westminster Review* calculated that every London newspaper was read by an average of thirty people.\(^{164}\) By 1830 every town had at least one reading room, commonly charging a guinea per year.\(^{165}\) Some were extensive establishments. Manchester, for example, boasted a coffee and newsroom attached to a bookshop which, as advertised in the *Salford and Manchester Advertiser* in March 1833, was open from six in the morning until ten at night. It subscribed to ninety-six newspapers which every week included the principal Manchester and London papers, some from Dublin, Belfast, Liverpool, Glasgow, and Leeds, and even the Edinburgh Review and the Westminster Review.\(^{166}\) Its owner, John Doherty, was, in fact, a radical trade union leader who also subscribed to unstamped, illegal papers but the style of the advertisement says much of the respectable image to which he aspired:

This establishment affords advantages never before offered to the Manchester public, combining economy, health, temperance and instruction, in having a wholesome and exhilarating beverage at a small expense, instead of the noxious and intoxicating stuff usually supplied at the alehouse and dramshop, together with the privilege of


\(^{166}\) Aspinall, p.30; Altick, 342.
perusing the most able and popular publications of the day, whether political, literary or scientific, in a comfortable and genteel apartment, in the evening brilliantly lighted with gas.\footnote{Aspinall, p. 31, citing R. Cassirer, ‘The Irish Influence on the Liberal Movement in England’, (Unpublished Ph.D.thesis, Univ. of London), p.546.}

There followed an exponential rise in the number of commercial coffee houses. The 1841 Committee on Import Duties was told that in 1815 there were no more than a dozen in London. According to William Lovett, leader of metropolitan artisan radicalism, joint author of The People's Charter, and a ‘moral force chartist’, comparatively few of these were frequented by working men who generally ate in public houses.\footnote{William Lovett, The Life and Struggles of W.Lovett, Vol. i, (London: Trubner, 1876), p. 32.} However, coffee houses providing reading material proliferated following the 1836 reduction in stamp duty to one penny. Before the 1851 Select Committee on Newspaper Stamps James Pamphilon, keeper of the Crown Coffee House in London’s Haymarket, claimed a clientele of between 1,500 and 1,800 per day, charging each one and a half pence for coffee. The price allowed customers, the majority of whom were artisans, access to a selection of forty-three dailies, (including eight copies of the Morning Chronicle, home to Charles Dickens and, later, Charles Mayhew), several provincial and foreign papers, twenty-four magazines, four quarterlies, and eleven weeklies. The 'more respectable' classes used the two best of his three rooms.\footnote{Report of Select Committee on Newspaper Stamps PP 1851, Qq. 1678, 1773-75, 2832-83.}

For those who had neither local access nor an inclination to patronize formal reading rooms, public houses offered an alternative. In particular, rural workers, many illiterate, met in village alehouses where they could read or have newspapers read to them. The combination of reading and alcohol was not free from controversy and there appears to
have been a belief in some circles that a thirst for knowledge fuelled a more insidious type of thirst. So much so that a witness before the 1851 Select Committee on Newspaper Stamps felt able to swear that he knew personally ‘the cases of men who never would have been drunkards but for going to public houses to read the newspaper’.  

The further alternative of hiring-out of newspapers was illegal but widely practised. It has been claimed that a London newsman might lend out copies of The Times as many as seventy or eighty times on the day of publication for a penny an hour, after which copies would be posted to provincial subscribers who paid threepence, if mailed that day, or twopence, if sent the next day. Altick cited an example dating from 1799 of the Courier being sent to a Devon surgeon which was then passed down to six further people until sent ‘among the common people’. These networks later led to structured ‘newspaper societies’ often consisting of between six and twelve families who would jointly subscribe to London or local newspapers. According to the Monthly Magazine, there were ‘not less than 5,000’ such groups in 1821 ‘serving with mental food at least 50,000 families’.  

Lastly, there were wholly informal methods by which newspapers circulated within working or family networks. A weekly purchase of a popular Sunday such as Reynold’s or Lloyd’s Newspaper would be read in the home by or to entire families on ‘the day of rest’. For those in service, the master’s discarded purchases would be passed downwards through

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173 Monthly Magazine, LI (1821), 397-98.
the servant hierarchy. In 1836, a Tory MP, Henry Goulburn, actually used the prevalence of this phenomenon as an argument against the need for a reduction in paper tax. ‘The class of individuals who were in the habit of associating for the purpose of reading the newspapers in common’ could not afford a newspaper even at a reduced tax rate. ‘A newspaper was generally taken in by the master whom they served; having been used by him, it went to his servants, and from them it found its way to the labourers; and thus the information which newspapers afforded was diffused amongst the population. The effect then, of the reduction of the duty would be to relieve the master’.174

Whatever the merits of the argument, the practice must have added considerably to a newspaper’s readership. As Altick puts it, ‘In estimating the number of hands through which a given copy of a middle-class paper, or even a cheap book, might pass, one must not forget that the Victorian household contained not only a sizable family but also one or more servants with whom the paper wound up its travels’. By 1861 the total of domestic servants of both sexes is said to have been more than a million.175 The obvious counter is, however, that the outlook of the newspaper chosen and purchased by the master would not necessarily reflect the tastes and opinions of this secondary ‘staff’ readership. Factors such as this reveal the complex difficulties in any attempt to quantify the overall extent of secondary newspaper readerships. Perhaps the only point which can be made with real certainty is that it would have considerably exceeded the amount of initial purchases.

174 1836 34 P.D. 641 (20 June 1836).
175 Altick, p.83.
CHAPTER 3 – NEWSPAPERS AND JOURNALS

This Chapter reviews four types of press material: (a) mainstream, principally daily, newspapers, (b) periodicals, (c) popular proletarian or ‘working-class’ Sunday newspapers and (d) legal journals. Based on the evidence, the case is made that, in general, there was usually an equivalence between the contents of a publication and the social and political outlook of its readership.

The Mainstream Press

The historiography of the press in the early years of the nineteenth century has relevance to this study as it aids an understanding of subsequent developments. For example, government suppression of a radical press in these early years served to consolidate the pre-eminence of mainstream daily newspapers, notwithstanding their expensive taxation. By the late 1770s the leading daily newspapers catered for a diverse political culture which, albeit severely limited socially, existed outwith that of the ruling parliamentary elite.

The claims of many newspapers to represent ‘public opinion’ contained the implicit assertion that their readers were more than mere subjects but rather citizens with a participatory interest in public affairs. Elastic contemporary interpretations of ‘the public’ or ‘the people’, could variously mean those ‘whose constitutional standing, education or wealth gave them a legitimate say in the nation’s affairs’ or, from a reactionary perspective, the unthinking ‘mob’.176 As Hannah Barker has argued, for most of the general population, it was information and ideas gleaned from the newspapers themselves ‘which made possible any kind of informed political debate’ in this period.177 However, in the late-eighteenth century,

177 Barker, p.2.
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beyond London the circulation and influence of independent provincial papers in the late-eighteenth century was limited.

The ordinary man outside London [...] was not a newspaper reader. The newspaper was still far from being the indispensable adjunct to everyday life it later became. The few columns of news it contained were almost swallowed by advertisements. As an instrument of free public opinion it was impotent, for every paper was on the payroll either of the government or of the opposition.178

The Pitt government notoriously sought to silence the radical press with prosecutions and tax increases between 1802 and 1815, but economic conditions and widespread unemployment following the peace of 1815 occasioned a revival in which William Cobbett’s Political Register, in particular, posed a widely-circulated radical challenge. The seminal success of the Register is significant because it testifies to the existence of a public taste for radical journalism which was later sustained in part by the massive circulations of the popular working-class Sundays later in the century. Ironically, the Register started life in 1802 as an anti-Jacobin organ founded with support from ‘the New Opposition’, a Tory parliamentary group that opposed a peace settlement with France. By 1806 Cobbett had converted to the cause of electoral reform.179 Stamped copies were expensive at a shilling halfpenny but working men clubbed together to read it to each other in alehouses. In November 1816, Cobbett transformed it into a pamphlet thereby avoiding stamp duty so that it cost only twopence. Now read at home by families, circulation of this cheaper version rose

178 Altick, p. 48.
179 https://www.britishnewspaperarchive.co.uk/titles/cobbetts-weekly-political-register . [Accessed 17 August 2023].
within months ‘to forty or fifty thousand, and perhaps as high as seventy thousand, thus completely eclipsing every other journal of the day’.\textsuperscript{180} It is said that, as a result of its trenchant style, Cobbett’s journalism reached workers who had previously been indifferent to political news in which they had little interest. ‘Here at last, at a crucial moment in the history of the English common people, was a writer on political matters who tried to speak to the people instead of speaking for them, to lead them instead of patronising them, and to educate them instead of lecturing their unheeding Government.’\textsuperscript{181}

In 1817, faced with arrest, Cobbett fled to America but crucially left behind him a newly invigorated journalism of protest. In the next two years, at least a score of radical papers were started including Wooler’s \textit{Black Dwarf}, circulation estimated in 1819 at 12,000, and Hone’s \textit{Register}. Overall circulation is difficult to gauge as crowds would gather to hear public readings whenever copies arrived in an alehouse or at country crossroads.\textsuperscript{182} The poet, Robert Southey, having been appointed Conservative poet Laureate following the abandonment of his earlier radical beliefs, had no doubt that in this way popular unrest was being fomented by ‘the weekly epistles of sedition’.

It is the weekly paper which finds its way into the pot-houses in town, and the ale house in the country [...] disturbing the quiet attachment of the peasant to those institutions under which he and his fathers have dwelt in peace. He receives no account of

\textsuperscript{180} Altick. pp.324-326.
public affairs [...] but what comes through these polluted sources.\textsuperscript{183}

The government response to anticipated insurrection included the Newspaper and Stamp Duties Act, one of the repressive ‘Six Acts’ of 1819 aimed squarely at disabling a demagogic radical press.\textsuperscript{184} These also included, inter alia, the Blasphemous and Seditious Libels Act or ‘Criminal Libel Act’ which increased sentences for the authors and publishers of writings deemed to offend.\textsuperscript{185} The rights of the press now became ‘the fulcrum of the radical movement’.\textsuperscript{186}

A ‘newspaper’ was defined as any publication containing ‘news’ or comments on the news which was published more often than every 26 days on two sheets or less and cost less than sixpence.\textsuperscript{187} The immediate outcomes were that offending printers, booksellers, and hawkers were swiftly prosecuted and severely sentenced. Many radical papers died away while others including the \textit{Black Dwarf}, Carlile’s \textit{Republican}, and the \textit{Political Register}, put up prices to meet the stamp duty and circulation fell off. Some, but not all, unstamped weeklies got round the law by relying on an exemption which allowed papers containing only

\begin{itemize}
\item \textsuperscript{183} Robert Southey, \textit{Essays, Moral and Political, vol 1}, (London: John Murray, 1832), pp.120, 132-3.
\item \textsuperscript{184} 60 George 3 & 1 George 4 c.9: ‘An Act to subject certain Publications to the Duties of Stamps upon Newspapers, and to make other Regulations for restraining the Abuses arising from the Publication of blasphemous and seditious Libels’.
\item \textsuperscript{185} 60 George 3 & 1 George 4 c.8: ‘An Act for the more effectual Prevention and Punishment of blasphemous and seditious Libels’.
\item \textsuperscript{187} Altick, p.328.
\end{itemize}
commentary on the news without reporting the news itself. Sometimes these were more like pamphlets built around a single editorial.\(^{188}\)

However, throughout the 1820s political issues such as electoral reform, the trial of Queen Caroline and the controversy over Catholic emancipation continued to excite popular interest. Now that the radical press had again been temporarily muted, the demand for regular newspapers grew, despite their prohibitive cost to individual purchasers.’ As a result, by 1829 circulation of the main dailies reached new levels. The seven London morning papers together circulated 28,000 and the six evening papers 11,000. Sunday papers had an aggregate sale of 110,000 a week.\(^{189}\)

This did not mean that agitation for a cheaper press had ended. For a period, it actually gathered momentum. In 1831 Henry Hetherington, a radical printer, distributed the *Poor Man’s Guardian*, an unstamped penny weekly consciously intended to engage with and defy the law. Hundreds of other unstamped papers rapidly followed. The government’s reaction was fierce. Within three and a half years, over 800 vendors had been arrested, some fined and others imprisoned. Hetherington himself served three prison terms imposed by magistrates. Finally, he was tried before Lord Lyndhurst and a special jury in 1834. He was acquitted when, with the judge’s approval, the jury found that the *Poor Man’s Guardian* was not a newspaper within the statutory definition.\(^{190}\) The government’s heavy-handedness and agitation over the Reform Bill ensured that radical journalism prospered in the years between 1831 and 1836. In 1834 the House of Commons was told that 130,000 copies of unstamped papers were sold every week—a figure which the *London Review* shortly raised to

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\(^{189}\) Altick, p.328.  
\(^{190}\) Altick, p.339.
However, when the tax was finally reduced from four pence to one penny in 1836, it only served to entrench the monopoly of the richer publishers because the cost of stamping and the requirement for expensive indemnities against libel ate into the profits of smaller publishers. The circulation of English newspapers is said to have risen from thirty nine million in 1836 to one hundred and twenty two million by 1854.\(^{192}\)

Turning now to consider individual publications, the best-selling national dailies at the beginning of the century had been the *Morning Chronicle* (circulation: 3,000), the *Morning Post* (4,500) and *The Times* (3-4,000).\(^{193}\) The social composition of their readership tended to be fairly uniform. Notwithstanding party political differences, each catered predominately for interests common to the upper and middle classes. Moreover, as stated, as daily item of expenditure, their price made them unaffordable for the poorer classes. *The Times*, for example, cost seven pence before the reduction of taxes.

The *Morning Chronicle* had started as a Whig paper in 1769. It later gave regular employment to the radical, William Hazlitt as a reporter and to Charles Dickens as a journalist. In the 1840s it featured regular articles by Henry Mayhew which were subsequently published in book form as *London Labour and the London Poor*.\(^{194}\) However, in

\(^{191}\) Altick, p.341; 1834 23 P.D. 1208; *London Review*, II (1835), 345.


1848 it was bought out by a Peelite consortium. Similarly, the Morning Post was first supported the Whigs but converted to moderate Toryism in 1795. Circulation immediately rose tenfold in seven years. Contributors included Coleridge, Lamb, Southey and Wordsworth in their later conservative manifestations. It was ‘believed to be the preferred reading of the aristocracy’. Between 1838 and 1864 it enjoyed a close relationship with Palmerston. Lucy Brown has noted that political parties would use the device of establishing new papers naming managers as ostensible proprietors thereby concealing the identity of the true owners. Liberals owned most of the leading provincial papers including the Liverpool Daily Post, the Birmingham Daily Post, the Scotsman, the Manchester Guardian and the Leeds Mercury.

It has been argued that the independence of The Times owed itself to the fact that it had been omitted from the 1805 list of publications approved for government advertising and continued to be so until the 1890s. This meant that, while it lost income, it also avoided the financial necessity to bow to government influence. It rose to prominence in the 1840s and 50s and appeared to embody all the virtues of a ‘Fourth Estate’ newspaper – in other words, it purported to represent enlightened, educated middle-class opinion free of government influence and control. ‘It enjoyed the journalistic resources which were essential for the

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collection and transmission of news on a comprehensive scale.’ W.H. Russell’s critical
dispatches from the Crimean War in 1854-6 are frequently cited as an example of its capacity
to affect public opinion and government policy. With a circulation which vastly exceeded that
of its competitors, at least until the 1870s, it may justifiably be treated as a legitimate
barometer of the outlook of its socially pre-eminent readership. Its regular and critical interest
in the activities of barristers and its undeniable influence in pursuance of its lordly mission to
shape public opinion, make it invaluable as an evidential source. Its leading articles often
attacked the Bar ‘with savage intensity’. ‘Its editorial column thundered against the abuses
of the system and the beneficiaries of these abuses’. The paper unquestionably saw itself as
holding the stewardship of ‘the enlightened force of public opinion – anticipating if possible
the march of events – standing upon the breach between the present and the future, and
extending its survey to the horizon of the world’. The self-regard of the thinly-disguised
‘Jupiter’ was acidly satirised by Trollope in 1855 in The Warden:

The Jupiter is never wrong. [...] With what pride do we regard our
chief ministers, the great servants of state, the oligarchs of the
nation on whose wisdom we lean, to whom we look for guidance
in our difficulties! But what are they to the writers of The
Jupiter?  

200 George Boyce, ‘The Fourth Estate, the Reappraisal of a Concept’ in Newspaper History:
from the 17th Century to the Present Day, Boyce, Curran and Wingate (eds), (London:
201 Raymond Cocks, Foundations of the Modern Bar, (London: Sweet
George Boyce’s 1978 ‘Reappraisal’ challenged the legitimacy of the notion of an independent ‘fourth estate’ and its fabricated theme that the mainstream mid-century press provided authentic representations of public opinion. He argued that, for commercial reasons, the press invented a ‘political myth’ in which they were an “indispensable” link between public opinion and the governing institutions of the country.\textsuperscript{205}

In reality, while most newspapers had largely avoided direct government interference for the first half of the nineteenth century, many had been ‘simply the hired mouthpieces of one party or the other’ until the value of advertising freed them from both subsidised government and party control.\textsuperscript{206}

One notable exception was the \textit{Examiner}. It features prominently in the present work and, accordingly, in this chapter, because it was not only the most respected and well-written weekly radical paper but also the most trenchant scourge of the criminal Bar. Published on Sundays and Mondays, it first appeared in January 1808, edited by the campaigning journalist and poet Leigh Hunt, and published by his brother, John. It was initially sub-titled ‘a Sunday paper, on politics, domestic economy, and theatricals’ and the first editorial was an assertion of its political independence: ‘A crowd is no place for steady observation. The \textit{Examiner} has escaped from the throng and bustle, but he will seat himself by the way-side and contemplate the moving multitude as they wrangle and wrestle along’.\textsuperscript{207} In its early period advertising was not allowed. By the end of its first year, it had built up a circulation of 2,200 and had become the leading radical publication. Jeremy Bentham believed that circulation had increased to between 7000 and 8000 by 1812, adding that it was the weekly most popular

\begin{flushleft}
\textsuperscript{206} Altick, p.322.
\textsuperscript{207} \textit{Examiner}, 3 January 1808, p.7.
\end{flushleft}
'especially among the high political men'. Over its lifetime it featured contributions from Byron, Shelley, Keats, Hazlitt, John Stuart Mill, Thackeray and Dickens. The brothers’ forthright support for radical causes resulted in a number of prosecutions between 1808 and 1812. In 1811, for example, they were unsuccessfully prosecuted over an article entitled ‘One Thousand Lashes’ which had condemned military flogging. The following year both were imprisoned by the famously Tory judge, Lord Ellenborough, for ‘a foul, atrocious, and malignant’ libel after the paper had described the Prince Regent as ‘a libertine over head and ears in debt and disgrace, a despiser of domestic ties, the companion of gamblers and demireps, a man who has just closed half a century without one single claim on the gratitude of his country or the respect of posterity!’ Having spent three years in prison, an unwell Leigh Hunt gave up his editorship in 1821. In the same year, his brother was again imprisoned for publishing an attack on corrupt parliamentarians who comprised ‘a far greater proportion of Public Criminals than Public Guardians’. Leigh Hunt travelled to Italy to join Shelley and Byron intending to collaborate on a literary periodical, the Liberal. Following Shelley’s death and a deterioration in his relationship with Byron, Hunt returned to England in 1828. Until his death in 1859, he was a leading ‘man of letters’ in literary circles, writing poetry and essays for numerous journals. According to the *Oxford Dictionary of National..."
Biography, his editorship of the Examiner ‘was a high point in the history of English journalism’. 213

In 1828 the paper was given over to Albany Fonblanque, the paper’s political commentator. He remained editor until 1847, selling his interest in 1865. 214 Fonblanque’s journalistic career had begun in 1812 when aged nineteen. He was subsequently a staff writer for The Times and the Morning Chronicle while simultaneously contributing to the London Magazine and the Westminster Review. According to Allyson May, the Examiner under Fonblanque had even earned the respect of Tories who recognised its integrity. 215 J. S. Mill praised his ‘verve and talent, as well as fine wit’, qualities which Mill put alongside ‘the ardour of his sympathy with the hard-handed many’ 216 Thomas Carlyle thought his journalism made him ‘the cleverest man living of that craft at present’ but one who also seemed ‘obliged to turn all his fine spirit into contemptuous bitterness’. 217 Fonblanque was succeeded as editor between 1847 and 1855 by John Forster, a friend of Dickens. Under his direction the paper moved away from its radical past. It has been said that he was obsessed ‘with dignity and respectability derived from a Unitarian upbringing’ but that ‘his sense of morality was outraged by [...] the conduct of the criminal bar’. 218 Overall, the Examiner was now best

213 Roe, ‘Hunt, (James Henry) Leigh (1784–1859)’, ODNB,
215 May, p.217.
described as ‘a liberal paper with Whiggish leanings’. Thereafter, the Examiner repeatedly changed hands and political allegiance, resulting in a rapid decline in readership and loss of purpose. It ceased publication in February 1881.

Up until the 1850s and 1860s most of the mainstream papers, with the exception of The Times, the Daily Telegraph and the Clerkenwell News (later the Daily Chronicle) were indebted, in one way or another, to political groups. In 1821 the Manchester Guardian had been set up by non-conformist businessmen as being ‘less amenable to [party] pressure’ than the Morning Chronicle. The Standard and the Daily News, for example, were linked to Conservative parliamentary machines. The Telegraph on the other hand was then a straightforward commercial enterprise and too successful to need political subsidy.

There was considerable demographic change in England thereafter. In the first half of the nineteenth century the population doubled from 8.9 million to 17.9 million rising to 32.5 million by 1901. In no decade was the rate of increase less than 11.7 per cent. The favoured contemporary rule of thumb was that the ‘working class’, combining the lower-middle and lower classes together, made up least three-quarters of the total population.

In 1851 a select parliamentary committee, instigated by the liberal reformers, Richard Cobden and Milner Gibson, was appointed to consider the merits of a cheaper newspaper press. The clear objective was to reduce the power of the conservative dailies. Mindful of the criticism that lower prices could also cheapen content in the widest sense, the Cobdenites maintained that it would also further the development of improving newspapers which

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220 Aspinall, p.295.
222 Altick, p.81.
223 *Select Committee on Newspaper Stamps*, (HMSO, 1851).
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‘would give the humble reader what he wanted even more, a sober, well-balanced panorama of current events; and [...] the "good" publications would soon drive the "bad" from circulation.’

By 1855 ‘most Whigs and many Conservatives had reached the conclusion that, with the passing of the unstamped [radical] papers and Chartist emergencies, the growth of a commercial press could now be assumed to be safe from radical intent to warrant a legal status unfettered by taxation’. Even The Times had been converted, holding that stamp duty was ‘a tax on knowledge [...] a tax on light, a tax on education, a tax on truth, a tax on public opinion, a tax on good order and good government, a tax on society, a tax on the progress of human affairs, and on the working of human institutions’.

Advertisement duty was abolished in 1853; after incremental reductions, stamp duty was abolished in 1855 and paper duty in 1861. With the duty lifted, prices fell. As a result, while 126 papers had been established between 1800 and 1830, 415 more appeared between 1830 and 1855; by 1861 the figure had reached 492, of which 137 titles were published in 123 towns in England where none had previously existed. The massive sales surge of Sunday papers catering for the lower-middle and working classes is dealt with later in this Chapter. The Daily Telegraph was reduced to a penny in 1856 followed by the Standard, the Daily News, the Morning Post and the Daily Chronicle. London had its own halfpenny evening papers: The Echo (1868), Evening News (1881) and the Star (1887). These should be distinguished from the clubland evening papers such as the Pall Mall Gazette, St James Gazette and the Westminster Gazette.

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224 Altick, p.350.
225 Jones, pp.7, 22.
226 Quoted in Hansard, Ser. 3, CXXXVII (1855), col.811.
which catered for ‘a narrow political public and were primarily journals of comment’. The dailies were now well within the reach of the main middle-class market. In the 1850s *The Times* had been selling four times as many copies as its three other ‘senior’ London dailies but by the 1870s its sales of between 50 and 60,000 had been overtaken by those of the *Daily News* (150,000) and the *Daily Telegraph* (200,000). Moreover, from the late 1830s onwards the costs of distribution had been falling with the growth of the railways. In 1830 there had been fewer than 100 miles of track; by 1850 there were 6,600. Delivery time between London and the provinces fell from four days to twelve hours and costs went down by 80 per cent. ‘A mass circulation, nationally distributed press was now feasible’ and it follows that citations from this period onwards have the greatest evidential worth for the present study because of their greater reach.

By the 1860s a far larger market had resulted from the fall in taxation and the unprecedented population increase. According to Lucy Brown, one effect of the improvements in inland transport between 1830 and 1860 was that the London papers came to dominate the market. King and Plunkett, on the other hand, have noted increases in the circulation of provincial papers. Following the tax reductions, many which had previously been published bi-weekly or thrice-weekly, became dailies serving ‘most provincial cities’. The conversion of the *Manchester Guardian*, founded in 1821, from twice weekly to daily issues tends to support the latter view.

However, the liberal hope that it would be the working-class who would most benefit from lower prices did not match the reality. Unless there was an execution or royal wedding,

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228 Berridge, p.35.
229 Altick p.354.
231 Berridge, p. 28
233 King and Plunkett, p.340.
workers did not buy the penny dailies for thirty or more years after the tax was reduced preferring to the once-weekly Sundays. A daily paper took six pence per week out of a labourer’s wage of about twenty-one shillings. Moreover, the mainstream papers did not go out of their way to add a new market to their existing upper and middle-class readership, with most space still given to political news while topics of mass interest such as sport and crime were less important.

Initially, readership was still mostly centred in urban areas. No daily papers were published outside London until after 1855 so that comparatively fresh national and world news was only available to those who had access, at second or third hand, to copies of London papers sent down by post. Even so, the expansion of the press inevitably stretched the boundaries of ‘the political nation, both horizontally to incorporate peripheral areas distant from London, and also vertically to include people lower down the social scale so that rivalries and disagreements within the politically dominant, landed elite were played out through the press in front of a widening audience’. One result was the contemporary increase in the invocation of ‘public opinion’. The generality of this social construct did not go unchallenged. In 1868 the liberal essayist, Leslie Stephen, questioned the right of newspapers to represent ‘that strange abstraction’ which ‘embodied only a very narrow range of metropolitan clubland opinion, and reflected the sensibilities primarily of the particular social group among which copies were intended to circulate’.

One cynical commentator of the 1880s, George Salmon, made a doubting assessment of the place of daily newspapers and periodicals in working-class culture:

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235 Altick, p.324.
To cast one’s eye over the pile of papers and serials in the first stationer’s one comes to, is to receive the impression that the working classes must be the most omnivorous devourers of mental food ever known. A market which a century since was exclusively controlled by the aristocracy is now open to the democrat or the socialist. [...] A workman gets his letter to the editor printed in *The Times* and the national newspaper even advocates the cause of the all-prescient proletariat [...] The working classes must be “won” over or, it is believed, success is impossible [...] The daily press is conducted in the interests of the people, because it is believed the people read the daily press. The belief rests on very slender grounds. The working class concern themselves little about any newspapers save those issued on the Sabbath. The great daily papers do not fall much into the hands of the masses.

Salmon purported to provide an analysis of the readership of particular papers. For example, working men bought the *Telegraph* and the *Daily Chronicle*, ‘chiefly for their advertisements’, whereas publicans took in *The Times* or the *Morning Advertizer*, the *Daily Telegraph* and a special edition of the *Evening Standard*; coffee shops additionally took the *Daily Chronicle* and *Daily News*. Two dailies, the *Echo* and the *Evening News* were bought regularly. The *Echo* was ‘radical and revolutionary in its tendency and was believed faithfully to represent the views of the working classes [...]’ it did nothing of the kind and, except in the case of an infinitesimal minority, had no influence and was purchased merely for its record of

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events’ The *Evening News* was increasingly read in preference ‘because it was more amusing’. He commented on the pernicious influence of Sunday papers such as *Lloyd’s* and *Reynold’s*. The *Dispatch*, famed for light sketches, was read by half the population of rural England with villagers subscribing to the sixpence cost. It periodically indulged in ‘tirades against the oppression of the few but not of the intolerant and Republican type’. Conservative Sunday papers like *The Sunday Times* were poorly supported. However, Salmon’s overall conclusion was that ‘[I]f the influence of the working-man’s paper were as great as many imagine, the whole fabric of British wealth and society would be immediately undermined, destroyed and reorganised on a socialist, or semi-socialist, basis. In truth that influence is small’. Only in the 1890’s, when the influence of the Harmsworths made itself felt, did mass readership of the dailies take off. By 1899 sales of the *Daily Mail* reached 543,000.

James Curran identified what he termed ‘three rival, though overlapping, liberal interpretations’ of how the expansion of the ‘political community’ of newspaper readers affected the dynamics of power in the nineteenth century. The first suggestion was that the press became independent, not only from government, but also from party interests, thus empowering a popular ‘voice’ able to hold government to account. The second interpretation presented the press as the vehicle of dynamic social groups pursuing an extended democratic system. The third notion was that of a forum for a societal debate allowing for ‘continuity and gradual change’. Curran does not pass judgement on which, if any, of these evidently ‘Whiggish’ constructions is the most accurate. He does no more than note the alternative perspective of an historical process through which radical interests were, in fact, excluded.

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239 Ibid.
240 Salmon, p.114
241 Altick, p.355.
242 Curran, p.137.
from mass markets ‘by the rapid escalation of press costs that took place between 1850 and 1918’, by advertising prejudice and the development of a press ‘oligopoly’. Radical activists were less able to adapt to market requirements than capitalist entrepreneurs. ‘As a consequence, ownership of the popular press was increasingly monopolized by conservative or liberal business people from the mid-nineteenth century onwards’.  

This did not mean that newspapers did not pursue individual party agendas. According to J.O. Baylen, in the period between 1861 and 1890, described as ‘the Golden Age of the British Press’, alliances between press and politicians meant that partisanship was ‘a dominant characteristic’ of the newspaper media. Even so, Baylen claimed that it was not until the late 1880s that the Tories ‘fully realised’ that the press could exert considerable influence on the electorate.

A synthesis of the Victorian mainstream press deservedly fulfils a prominent role in this thesis as it reveals considerable public interest, not only in the daily proceedings of the criminal courts, but also in judgments on the morality of the professional participants. Arguably, there is no equivalence in modern court reporting. Taken together, the various citations which follow support the conclusion that, until the final quarter of the century, the mainstream press was often critical of the stylistic habits of the unregulated criminal Bar. The severe censure evident in the pages of The Times and the Examiner respectively is an indication that negative opinions were not confined to any particular point on the political spectrum.

243 Curran, p.147.
Periodicals

Lucy Brown made the obvious point that the continued existence of serious nineteenth-century quarterlies amounts to ‘impeccable evidence of the resilience and stamina of the educated reading public’. A near-unanimous characteristic of the liberal journals, noteworthy for present purposes, was devotion to law reform issues and to the correction of legal abuses and the misconduct of practitioners. For example, in its first ten years after 1824 the Westminster Review published 28 articles on legal procedure. It is said that the Edinburgh Review persisted with law reform causes ‘in issue after issue with a tenacity of purpose, an unfaltering optimism and a masterly ability’. So much so that it could claim in 1830 that ‘the all-important subject of judicial reform has of later years happily occupied almost the undivided attention of thinking men in every part of the country.’ By the second half of the century, the journal was in ‘full-cry’ over legal abuses. Reviews such as these were influential and their coverage is another indication of evident interest on the part of the public in legal issues.

At six shillings they were expensive and circulated only in their thousands but these ‘reviews’ connected networks of like-minded cultural and political decision-makers which consolidated themselves around specific publications which offered extended dissertations upon the political, religious, and social issues of the day. The best-remembered example of this phenomenon is the overt ideological contest between the radical Whig Edinburgh

246 Daintree, p. 84.
248 Edinburgh Review (July 1830) p.478.
250 King and Plunkett, p.12.
Review, co-founded by Henry Brougham in 1802, and the Tory Quarterly Review which was started in deliberate opposition in 1809. These were complemented by Blackwood’s Edinburgh Review, known as ‘Maga’, founded in 1817 as a monthly intended to undercut both. Published by a Scottish Tory, William Blackwood, this also was intended to counter the Edinburgh Review and, lighter in tone than the others, quickly built up a larger readership.

Last of this important group was the London-based radical quarterly, the Westminster Review, set up in 1824 as the organ of the ‘Philosophical Radicals’, a group of Utilitarians led by James Mill and Jeremy Bentham. The Tory publications denounced mass-market reading as socially inflammatory; the Whigs and radicals asserted the potential of affordable media to ‘raise’ thinking as a means of avoiding revolution rather than fomenting it. ‘Mutant forms of these differing but equally anxious visions’ continued throughout the century but fixed party-political attachments loosened.251

Altick arguably provides the best estimates of circulations. However, as he admitted:

Apart from official stamp returns (which are themselves not always an accurate indication of the true sales of a paper), the figures given [...] are drawn from sources whose reliability is seldom beyond challenge. Only a few, unfortunately, come from the private correspondence of publishers and others who not only were in a position to know the truth but had—at least in personal letters—no motive for distorting it. The rest have their origin in current trade rumour and long-term legend, paid advertisements, unpaid puffery, casual gossip, and outright speculation. [...] Thus the primary

251 King and Plunkett, pp. 11-30.
significance [...] lies not in the circulation figures for individual periodicals but in its reflection of the magnitude of sales which various classes of periodicals had at various times in the nineteenth century.\footnote{Altick, p.31.}

That being so, he offered the following statistics for (a) the Edinburgh Review; 1807: 7,000, 1814: 13,000, 1818: 12,000, 1824-6: 11,000, and (b) the Quarterly Review; 1810: 5,000, 1817-18: 12,000-14,000; 1830s, 9,000-10,000.\footnote{Altick, p.392} The political and social turmoil of the years between Waterloo and the first Reform Bill greatly increased the demand for intelligent periodicals.\footnote{Altick, p.330.} Webb estimated that periodical circulation in general increased by fifteen times over the century.\footnote{Robert Webb, ‘Working Class Readers in Early Victorian England’, English Historical Review, vol. 65, no. 256, (1950), 333–35, (p.335).} Sustained by improvements in printing methods, postal services and transport, the demand now came from the rising numbers of the literate who could afford to buy or subscribe and most of the new recruits to the periodical-reading public came from the class of artisans and small shopkeepers.\footnote{Altick, p.330.} Publishing still remained an almost exclusively metropolitan business.\footnote{Patrick Polden, ‘The Education of Lawyers’ in The Oxford History of the Laws of England, Volume XI, 1820-1914, English Legal System, (Oxford: OUP, 2005), p1202.}

Other notable periodicals which feature later in the present work include the *Saturday Review of Politics, Literature, Science, and Art* (‘the Saturday Review’), a London weekly newspaper established in 1855. Generally speaking, it was a Peelite organ, intended to challenge the influence of *The Times* and, unlike the mainstream Conservative party,
supportive of free trade. Its contributors were, therefore, a balance of distinguished Liberals and Conservatives, most notably Sir James Fitzjames Stephen, the legal theorist. It rapidly gained a reputation ‘for a unique blend of abrasiveness with a stinging irreverence towards popular heroes and institutions. Its self-assigned mission was to stir up controversy, to focus debate, and broadly to generate the right intellectual and moral climate’.258

Monthly reviews became highly successful in the second half of the century. Many now featured articles signed by the author and thus breaking with the quarterlies’ tradition of anonymity.259 The Fortnightly Review first appeared in 1865 but, lacking initial popularity, it was printed monthly from 1866 onwards. Proclaiming political independence, but, in fact, turning increasingly radical, it became the most distinguished journal of the late century. It appealed to a professional intelligentsia critical of both the landed classes and bourgeois nonconformists.260 This market was sufficient to spawn significant imitators such as the Contemporary Review (1866), sympathetic to social reform, and the Nineteenth Century (1877), with a circulation of 10,000 and an estimated readership of 50,000 at its peak, making the monthly reviews ‘the most popular serious periodical journals of the day’.261 The National Review, on the other hand, remained committed to the ascendancy of the aristocracy and made no claim to stand outside existing economic and social systems. In 1890 the Review of Reviews started to provide a regular ‘compendium’ of the best monthly

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260 Mason, p.281
261 Mason, p.283.
Satirical publications did not generally achieve large circulations. For example, the Age, a Tory paper ‘ready to libel anyone with Liberal leanings’ only managed a maximum of between 8,000 and 10,000. At the opposite end of the political spectrum, for the Satirist, ‘a Whig publication eagerly defaming Tories’, the figure was between 4,000 and 5,000.

Easily the most important satirical periodical was the weekly Punch, or the London Charivari established in 1841 by the author and social reformer, Henry Mayhew, and the wood-engraver Ebenezer Landells. It was most influential in the 1840s and 1850s relying heavily on humour and ‘cartoons’, a term which it coined for humorous illustrations in 1843. According to Altick’s history of the magazine, ‘Mr. Punch’, its eponymous cartoon character ‘often took on the role of a radical St George, bent on slaying the dragons of privilege, corruption and humbug.’ Altick suggested, however, that its targets were selective and ‘radical only in the sense of vehemently expressed dissatisfaction over a few or many aspects of contemporary society.’ It became a household word within a year or two of its founding, ‘beginning in the middle class and soon reaching the pinnacle of society, royalty itself’. Its style was disingenuously claimed to be humour ‘without one atom of malice’ and it has been argued that its readers would have understood this as part of

262 Ibid.
265 Altick, Punchp.186.
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an underlying but ultimately benign house-style.  

However, its written and visual depictions of its targets could be severe. Barristers, for example, were regularly drawn as reptilian, physically monstrous or simply and evidently ignorant. It is, therefore, a most useful source of sophisticated middle-class attitudes. Issues from the 1840s, the decade when the Bar’s reputation was at its lowest, will be referenced repeatedly hereafter. According to Altick, ‘What most troubled Punch ... was the yawning chasm that separated abstract justice and the day-to-day application of law.’ Even so, it is an irresistible temptation to speculate that Mayhew’s antipathy towards lawyers may also have stemmed in part from the fact that his disciplinarian, solicitor father had disinherited him for failing to live up to expectation as an articled clerk.

The Sunday Newspapers

Without question, the most significant feature of the reading habits of the nineteenth-century working and lower middle-classes, skilled and unskilled, in the second half of the century was the regular purchase of mass-market Sunday newspapers, a habit which continued well into the next century. For example, Raymond Williams has argued that the ‘real history’ of the nineteenth-century popular press has to be centred in the development of

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268 Altick, Punch, p.229.

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the Sunday paper rather than on ‘the cheap papers’ of Northcliffe and his contemporaries’. This chapter argues that their huge and continuous circulations, taken together with their contents, provide cogent evidence of opinions held by a large and important portion of the English public. To put it another way, the contrary view that the political views generally expressed in these papers were merely those of publishers and editors superimposed on an otherwise neutral and passive readership would amount to an unlikely denial of the agency of thousands of sentient people over a period of 50 years or more. As explored in the Methodology portion of Chapter One, Virginia Berridge has made a convincing, reasoned argument that the outlook and interests expressed in their pages tended to reflect those of their readers.

The most popular papers were the News of the World (1843-2011), Lloyd’s Weekly Newspaper (1842–1918), and Reynold’s Weekly Newspaper (1850-1967). The publishers shrewdly targeted the mass of readers who were either unable to afford a daily paper or who did not have the leisure time to read one. Two aspects of this phenomenon are important to the present study. First, the papers between them maintained very high circulation levels suggestive of considerable reach and influence and, secondly, the successful business model, certainly of Lloyd’s and Reynold’s, managed to combine a diet of scandal, crime, sport and popular pastimes such as gardening alongside accessible radical and socialist positions.

David Vincent has identified three continuities with the old radical press. Firstly, literate workers were already accustomed to mixing political discussion alongside entertainment. Next, Reynold’s, in particular, retained a ‘tone of personal address’ familiar from a ‘demotic style of open air speech’. Lastly, the commercial element of the new press in

which volume of sales mattered ‘was largely an extension of earlier practices rather than a
decisive break’.  

Berridge’s painstaking analyses of correspondence and advertising in these papers
broadly concludes that Lloyd’s attracted a general lower middle class readership which
included small shopkeepers, publicans, landlords, small property owners and a large number
of women. There was a considerable emphasis on London. Reynolds’s base, on the other hand,
lay in the northern factory towns and other provincial, mainly urban, centres. ‘A good
proportion’ of its readers appear to have been skilled workers mainly in the old handicraft
trades such as tailors, shoemakers and building workers but also including some newer
occupations such as engineering and semi-skilled jobs like mining and railway work.
Tellingly, many were financially secure enough to be interested in friendly societies. An
armed forces readership may reflect the paper’s opposition to flogging and the paper was
unsuccessfully banned by some regiments. Most internal evidence suggests a more
prosperous readership in the 1870s and 80s with moves to property ownership, either a house
or a business, However, ‘the big expansion in commercial and financial occupations in [the
1880s] seems largely to have passed the paper by’. 

An obvious reason for their market success was the speed with which they positioned
themselves favourably in relation to the national dailies and political weeklies by lowering
their prices in response to reductions in taxation. By 1815, following incremental increases,
newspaper duty stood at fourpence a copy, advertisement tax at three shillings and sixpence

271 David Vincent, Literacy and Popular Culture, England 1750-1914 (Cambridge,
272 Berridge, pp.2, 62, 71, 95, 98.
273 See, for example, ‘Flogging in the Army and Navy – Sir F.Williams, the Hero of the Cat
O’Nine Tails’, Reynolds’s, 3 January 1858, p.7.
274 Berridge, p.96.
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per advertisement, and paper duty at one penny. Reynold’s first price was fourpence which was reduced sequentially to threepence and then to twopence following the abolition of stamp duty in 1855 and ultimately to one penny when paper duty was removed in 1861. This was well below The Times, for example, which had itself reduced its price from fourpence to threepence. As a result, Reynold’s already large circulation of 49 to 50,000 per issue before 1855, rose to 100,000 in the second half of the 1850’s, to 150,000 before the removal of paper duty in 1861 and to over 300,000 in the 1860s and beyond. Even before the repeal of stamp duty, Lloyd’s was selling 90,000 per week, once rising to 100-150,000 in November, 1852 on the death of the Duke of Wellington. Sales exceeded 350,000 after the removal of the paper tax in 1861, eventually rising to over 600,000 in the early 1900s. In 1896, the paper was the first to circulate a million copies.

The other principal ingredient in their success, certainly that of the two most-read Sundays, Lloyd’s and Reynold’s, was to mix the Victorian taste for ‘the world of sensational fiction’ with the residual appeal of outworn radical weeklies such as Cobbett’s Political Register which had closed in 1835 and the Northern Star which had been established in Leeds by Feargus O’Connor two years later and lasted until 1852. Within a year of its beginning, the latter had become the most widely circulated provincial paper in the land and effectively Chartism’s official journal, espousing the violent rhetoric of what was termed ‘physical force Chartism’ and publishing O’Connor’s weekly letter addressed to the ‘unshaved

276 King and Plunkett, p.340.
277 Fox-Bourne, p.124; Reynold’s, 27 July 1856; 17 July 1859.
278 Berridge, p.41.
chins, blistered hands, and fustian jackets'. In 1880 the Tory *Quarterly Review* distinguished *Lloyd’s* and *Reynold’s* from ‘respectable’ Sundays such as the *Observer* and *Sunday Times*, chiefly by ‘the violence and even brutality of their tone’: ‘the staple of the leading articles [in Lloyd’s] is discontent with everything which is not of the lowest workingman level [...] *Reynold’s* was even worse than *Lloyd’s*.’

*Lloyd’s* publisher, Edward Lloyd, retained control of the paper using various editors until his death in 1896. He had begun with a succession of cheap ‘bloodstained’ periodicals such as *Lloyd’s Penny Sunday Times* and *People’s Police Gazette* which evaded stamp duty by disguising news as fiction which, it was said, were ‘the natural accompaniments of the gin glass and beer pot’. *Lloyd’s Weekly Newspaper* itself grew out of *Lloyd’s Illustrated London Newspaper* which had been brought out to challenge the success of *The Illustrated London News*, the world’s first illustrated newspaper. Lloyd was commercially astute. He boosted circulation with pioneering printing processes such as stereotyping and modern presses and even went to the extent of leasing land in Algeria and Spain in order to grow esparto grass to replace cotton rags in paper production.

His rival, George W. Reynolds, editor of *Reynold’s* until 1879, acquired a mixed reputation which undermined the apparent sincerity of his published opinions. Like O’Connor, he had been described in 1848 as a leader of the ‘physical force chartists’, that is, those who, unlike the ‘moral force chartists’, were supposedly prepared to use force to achieve electoral reform. However, he also acquired a reputation for trickery and

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unscrupulousness. According to a contemporary, 'it was rather as a charlatan and a trader than as a genuine politician that George Reynolds was seen by the majority of the [chartist] movement'.

Like Lloyd, he had previously achieved success by publishing cheap commercial titles such as *The Mysteries of London* and *The Mysteries of the Court of London*. Even so, he is said to have been ‘as consistent an advocate of the interests of the working man as any of its more idealistic predecessors, and a fiercer, not to say more abusive, critic of the working man’s enemies than any of the radical journals’. In the 1870s, *Reynold’s* was labelled ‘by far the most important political newspaper among the working class’. Thus identified, it was a magnet for vilification by arch-conservative commentators. Take, for example, the observation of one, Charles Wingate, in 1875: ‘The projector of this paper recognized the fact that the average working man is an animal, with but little intellect’. The paper’s reciprocal distaste for the aristocracy was once dismissed as 'ludicrous in its extravagance'. Moreover, this ‘chief organ of republicanism' was feared in some quarters as posing a real threat to the constitution and to the fabric of civil society and, if anyone doubted ‘that this paper really has influence among the working classes, they have only to go into almost any large work shop on a Monday morning, and they will speedily be convinced that it has. They will find men gleefully [...] of opinion that 'Reynold's' is the boy for them -

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284 Berridge, p.39.
“them” being the upper and middle classes in general, and the government and royalty in particular’.  

The fact of the matter is that these newspapers did express radical opinions to varying degrees. Berridge has also made detailed and helpful analyses of their political content. It is an invaluable research asset, notwithstanding that her study does not go beyond 1886. She suggests that ‘certainly Reynold’s readers were more likely to be politically aware than those of Lloyd’s’. ‘Working class’ news occupied only 6 per cent of non-advertising content, whereas political news and editorials took up 13-18 per cent.  

She found that Reynold’s, in particular, consistently voiced concerns over the conduct of the royal family. Between 1854 and 1866 there were an average of two to three reports in each issue which rose sharply between 1870 and 1882 to between five and nine reports, principally as a result of increased republican reaction to the Queen's withdrawal from public life. Early on, Prince Albert was accused of meddling in foreign and state affairs. He was taken to task for interference in scientific matters, and for his failure adequately to carry out his duties as Commander-in-Chief of the army. However, the royal topics most favoured by Reynold’s were the lack of an adequate return for the public expenditure and the scandals of the royal family's private life. According to Berridge, ‘the ultimate synthesis of radical opinion and radical scandal’ was the coverage of the Prince of Wales involvement in an 1870 divorce case. Victoria’s own attachment to her 'Highland servant', John Brown, was the subject of open innuendo. The cost of royal marriages frequently featured. Significantly for our purposes, an 1878 editorial in Reynold’s managed to conflate hostility both to the legal system and to royalty. The former was described as ‘a disgrace to civilization’ before the

289 Wright, pp.181 and 346.
290 Berridge, p. 330.
291 Berridge, pp.323-4.
writer moved on to lash out at the extravagance of a marriage between the Queen's son, the Duke of Connaught, and a Prussian princess:

Who finds the money for all the royal splendours we read so much of? Why, the people - that people which has tens of thousands amongst them on the brink of starvation! [...] So if those who govern us are desirous of restraining the progress of Socialism, let them take care that nothing shall be done to create Socialists.\(^{292}\)

However, it was the aristocracy and landed classes who appeared most regularly. Berridge calculated that they occupied around ninety per cent of Reynold’s editorial and news coverage.\(^{293}\) It is consistent with the thrust of this thesis that there appears to have been a change of emphasis in the mid-1880s. Berridge did not detect an increase in favourable references as such but points instead to a decline in the proportion of critical material. For example, there were only five editorial references to royalty in the five tested 1886 issues of Reynold’s – a reduction from 28 in 1874. Percentage figures in Lloyd’s, ‘never very high’, had dropped to around 0.3 to 0.5 in the 1880s.\(^{294}\) By 1880 landed families no longer provided the majority of M.P.’s in the Commons and newspaper attacks on the aristocracy shifted away from their governmental role to their social degeneracy and abuse of land entitlement.\(^{295}\) In this respect, the focus of the popular working-class newspapers had migrated from criticism of the aristocracy as an oppressive constitutional fixture to coverage of individual excesses.

Lloyd’s was generally regarded as less strident than Reynold’s. One contemporary described it as ‘the most reliable of its class, the most patriotic and loyal, taking a determined

\(^{292}\) Reynold’s, 19 May 1878, p.5.
\(^{293}\) Berridge, p.332.
\(^{294}\) Berridge, p.335.
\(^{295}\) Berridge, pp. 338-9.
stand against Home Rule [...] It indulges periodically in tirades against the oppression of the few but not of the intolerant and Republican type of Reynolds’s Newspaper’. In 1871 it was said that ‘the politics of Lloyd’s are thoroughly liberal, but not so extreme in that direction as those of some others of its weekly contemporaries’. Nevertheless, nine years later the conservative Quarterly Review dismissed the paper as the organ of the worst sections of the working classes: ‘The staple of the leading articles is discontent - discontent with the laws, with the constitution, with the governing classes, with the employers of labour, with everything, in short, which is not of the lowest working man level’.

Lloyd’s presaged later styles of newspaper coverage by focusing on the sentencing remarks of named judges and to the speeches of counsel. This would inevitably include criticism of the habits of both branches of the legal profession and the shortcomings of their institutions. Rosalind Crone has argued that the format and style of Lloyd’s contributed to the alienation of ordinary people from the justice system because counsel were identified and their speeches reported in detail so that the proportion of the paper devoted to criminal intelligence had a profound impact on popular conceptions of criminal justice. A typical example from Lloyd’s took aim at drunkenness at court. It claimed that when a named barrister was asked why he had consumed a large amount of beer on the morning of a ‘great trial’, he answered that ‘he was trying to lower himself to the level of his judges.’

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296 Salmon, p.108.
300 Lloyd’s, 27 June 1858, p.5.
example pointedly satirised the unaccountability of the Inns and their lack of concern over legal education:

The benchers, self-elected heads of these societies, hold the keys of entrance to the highest branch of the profession. Whom they please they let in; and whom they please they exclude. ... He may enter the profession and assume its solemn-looking insignia without ever having opened a law-book in his life. [...] thus, the aspirant to, the degree of “barrister-at-law” may pay and eat his way to it without once being compelled either to hear or to read one word of the mysteries of the profession he assumes.  

The corrosive influence of lawyers in Parliament was a constant refrain. *Reynold’s* complained that the expenses and delays of the law ‘could not be if the legislature were composed of honest and independent men, unswayed by the palaver of subtle, oily-tongued, selfish lawyers’.  

Solicitors too were counted among the ‘vested interests’ pandered to by Parliament:

In the front of any real reform of the law stand five trades' unions, the five worst in England. They are called the Honourable Societies of Lincoln's Inn, the Inner Temple, the Middle Temple, and Gray's Inn, and the Incorporated Law Society [...] The profession sends a great number of its order into parliament [...] It is idle to hope for any real

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301 *Lloyd’s*, 18 January 1846, p.9.
302 *Reynold’s*, 9 November 1856, p.9.
law reform from such a parliament, because the first
consideration to the men who represent the law is to take
care that the vested interests are protected from any such
sensation as a desire for cheap and speedy justice.  

One letter writer complained that ‘when the robbers are the law-makers, it is only
natural that every species of robbery by which they are enriched should have the sanction of
law’. Dishonesty was a persistent theme:

To such a pass has the administration of the law come that
the very mention of a lawyer suggests a dishonest man. To
speak of an “honest lawyer ” indicates an unusual amount of
innocence and credulity on the part of the person who utters
the paradox [...] Solicitors or barristers, they are all tarred
with the same brush, and the tar is smeared over them pretty
thickly.  

Pausing there, do extracts such as these provide reliable evidence of the opinions of
large sections of the working and lower middle-classes? One must be careful to avoid
conclusions based solely upon a ‘top-down’ reliance on editorial content. However, this study
again broadly adopts Berridge’s conclusions on this aspect, namely that the likelihood is that
the views of at least a large portion of the readership must have chimed with those expressed
by the papers themselves. The first persuasive point is that the readership ran into many
thousands and it is a reasonable inference, therefore, that large numbers of readers must have
agreed with what they were reading. Moreover, the voluminous sales figures given earlier in
this chapter, do not take any account of the size of the secondary readership which is

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303 Reynold’s, 20 July 1873, p.1.
304 Reynold’s, 26 July 1868, p.5.
305 Reynold’s 22 March 1891, p.4.
discussed elsewhere in this Section. It may be that these populist and sensationalist newspapers would not have been encouraged within working men’s institutes and libraries. However, copies would have certainly circulated in clubs and public houses. Noting also that these were Sunday papers, their availability within the family home must have greatly augmented the size of the readership. When one melds the constancy of their radicalism, at least until the end of the century, with their huge circulations, it is safe to conclude that their negative attitudes towards establishment structures such as the Bar represented a powerful strand of public opinion which rightfully occupies a place in this study.

**The Legal Press**

Much of the primary evidence upon which this study relies is derived from the many legal journals of the latter half of the nineteenth century. Even so, the selection merely represents a fraction of the material available from a time when ‘the legal periodical became woven into the fabric of Victorian legal culture’, and was ‘[a] staple of professional life’ which ‘[r]eflected the virtues of practicality and pragmatism that the profession prized’. 306 So much so that ‘its very volume, particularly in the weeklies, remains a deterrent to the researcher’. 307 It is believed that, over the course of the century, at least 101 publications were established which, on the basis of their titles could possibly be classified as legal journals. Focusing on the second half of the century, the intention of

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307 Polden, p.1202.
this part of this chapter is to provide details of the readership and editorial aims of the more influential journals so that the choice of citations in following chapters is rendered more meaningful. One should not overestimate the significance of the fact that in the period concerned there were no titles specifically devoted to the Bar. There were insufficient numbers to make such a publication viable.\(^{308}\) Moreover, as will be seen, the affairs of the Bar and the Inns tended to be covered by many of the general and solicitors’ magazines.

William Hines has pointed out that any attempt to estimate the circulation of nineteenth-century legal periodicals is problematical as some took advantage of free mail delivery for stamped papers so that calculations based upon stamp returns are uncertain.\(^{309}\) Only the \textit{Law Times} published detailed figures showing that it reached sales of 2,000 per week. In its early years the \textit{Jurist} was equally successful, but changes in the system of reporting cases in the 1860s led ‘directly’ to its demise. Few weeklies achieved such sales.\(^{310}\)

Daintree dated the first recorded legal periodical to 1761: the \textit{Lawyer’s Magazine or Attorney’s and Solicitors Universal Library}.\(^{311}\) Until the 1820s the few journals that subsequently appeared featured matters of general as well as solely legal interest. Thereafter, reductions in prices as a result of new printing processes, a cheap railway and postal system and changes in the taxation of printed material, taken together with solicitors’ need for readily accessible knowledge meant that numbers increased considerably. By the time one reaches the 1840s, twelve new titles were launched in that single decade.

The first of a new species of discursive journals put down a marker for change in

\(^{308}\)Daintree, p.177.


\(^{310}\) Hines, p.261.

\(^{311}\) Daintree, Preface p.viii.
1827: the *Jurist, or Quarterly Journal of Jurisprudence and Legislation*. The editorial policy was announced as follows:

It is proposed […] to take up the ground hitherto unoccupied in the periodical literature of England […] the legislature has turned its attention to the defective state of our code […] The public mind is anxious, directed to the subject, and information is sought with avidity […] The projected work will embrace the science of jurisprudence in its widest extent. To investigate and explain the true principles of legislation, and to apply the philosophy of law, will constitute a main feature in its plan.  

It was enthusiastically supportive of law reform. Unfortunately, the editorial proved over-optimistic. There was an insufficiently profitable market for its lofty, liberal content and it failed within five years. This is an early manifestation of the tangible tension between the teaching of legal principle and the more mundane concerns of practitioners which dogged attempts to reform legal education until the end of the century and which, arguably, persist today.

In the following thirty years there were a number of new titles, changes of title and mergers. In the *Jurist’s* first year a rival appeared: The *Law Magazine and Quarterly Review of Jurisprudence*. Also liberal in outlook, it offered a more approachable balance of content. Its editor, Abraham Hayward, mixed scholarly pieces with legal gossip (‘Notes of the Quarter’), biographies and a substantial digest of recent case law.  

In 1844, a third determinedly reformist publication came out. The specific purpose of the *Law Review* 

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312 *Jurist, or Quarterly Journal of Jurisprudence and Legislation*, 1 (1827), iii.
and Quarterly Journal of British and Foreign Jurisprudence was to represent the voice of the Lord Brougham’s Law Amendment Society. Two years’ later, a campaign by the Society led to the 1846 Parliamentary Select Committee on Legal Education.\textsuperscript{314} Although the Committee’s report was a swingeing indictment of the deficiencies in legal education, its recommendations were largely ignored by the Inns and the legislature.\textsuperscript{315} The Law Review ‘gradually languished’ until 1856 when it was absorbed by the older Law Magazine. The resulting Law Magazine and Law Review continued to be published until the twentieth century with two further name-changes. It ‘clearly saw involvement in legal reform to be one of its major tasks’.\textsuperscript{316} Its survival suggests that there had remained a market for an intelligent review although it was ‘a seemingly inelastic one’.\textsuperscript{317}

At this point in this survey an understanding of the historical context requires a return to 1830 and the foundation of the Legal Observer, the precursor of the present-day Solicitors’ Journal. It was created by Robert Maugham, secretary of the Law Society, and served as ‘the mouthpiece of the [Law Society’s] council’.\textsuperscript{318} The Society itself evolved out of the London Law Institution which had been intended to raise the reputation and standards of London solicitors. However, 'London' was dropped from the title in 1825 to reflect the fact that the Institution had national aspirations. Notwithstanding the fact that Maugham hoped to recruit provincial solicitors, the journal tended to promote the interests of the metropolitan elite. It favoured ‘cautious incrementalism’ in law reform.\textsuperscript{319}

\begin{footnotes}
\item[314] Report from the Select Committee on Legal Education’, HCPP; 25 August 1846
\item[315] See Chapter Seven.
\item[316] Hines, p.148.
\item[317] Polden, p.1204.
\item[319] Polden, p.1206.
\end{footnotes}
Its ultimate rival, the *Law Times*, first appeared in 1843 with what Vogenauer has described as ‘unsurpassed’ success. According to Raymond Cocks, the editor, Edward Cox, was ‘a remarkable man’ - ‘barrister, journalist, scientist, thinker, entrepreneur and, in general, alert man of affairs’. Above all, his approach was pragmatic. In the preface to the first edition he promised that his magazine would be ‘a purely practical one, and that it will not contain essays on abstract or speculative subjects; the publication we want is one which will teach us law and protect the interests of the profession’. In fact he discovered that the requirements of the readership were even narrower and he ‘speedily’ reduced the weekly contents to ‘brief case notes, short articles on aspects of English law and practice, current news, and coverage of financial and property matters of direct relevance to his target audience’. That audience was largely ‘the disgruntled rural attorney’. Early in its life, subscribers numbered 1313 country solicitors against 191 London based solicitors and only 43 barristers. Even so, he made a point of defending the interests of the junior Bar.

Cox managed to raise circulation sufficiently to attract advertisements and to make a profit, a rarity among legal periodicals since the costs of production made success difficult to achieve. Cox's own journalism is said to have offered 'pithy brevity rather than intelligent discussion, and he was forthright and pugnacious in presenting his editorial view,' The fact

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322 *Law Times* 1 (1843) 3.
323 Polden, p.1207.
324 Cocks, p.65.
326 Polden, p.1208.
that his editorials regularly focused on legal education probably explains why they are quoted more frequently in this thesis than those of any other legal journal.

The *Law Times* and *Legal Observer* co-existed in a ‘cosy relationship’ with each other until the latter re-launched as the *Solicitors Journal* and a direct rival to the *Law Times* in 1856/7.327 The *Law Times* was accused of favouring the Bar and provincial solicitors over London practitioners. The *Solicitors’ Journal* sought to emphasize professional communality rather than differences in interests. This resulted in a ferocious dispute in which the *Solicitors’ Journal* was the victor. At one point it even accused Cox of circulating a false assertion that it had ceased publication:

> We allude to one of the most unfair and disgraceful attempts ever known to the world of journalism to damage the interests of an opponent. A great number of our subscribers have sent us a circular, which they have just received from the office of the *Law Times*, and which it appears has been industriously circulated throughout the country within the last three or four days. It commences with the statement that "the Solicitors’ Journal, started in opposition to the *Law Times*, has failed after a struggle of six years;" and then after numerous other mis-statements it proceeds to solicit a more general support for the *Law Times.*328

As stated above, 1856 was also the year in which the *Law Review* and the *Law Magazine and Law Review* combined, ultimately to become the *Law Magazine*. In the

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327 Anderson, p.98.
328 *Solicitors’ Journal* 6 (7 December 1861) p.81.
long term it was the only successful publication lasting until the twentieth century. In 1885, however, a new era began when the Law Quarterly Review was launched by Frederick Pollock as a direct reaction to widespread dissatisfaction with the quality of English legal literature. In its first year, it published ‘virtually all of the academic leaders of the up-and-coming Oxford law faculty’ such as Anson, Bryce, Dicey, Vinogradoff and Holland.\textsuperscript{329} It was intended to provide the entire legal profession, both practitioner and academic, with contributions aimed ‘at the promotion of legal science without neglect of practice’.\textsuperscript{330} It included, \textit{inter alia}, erudite notes on cases and pieces on law reform and legal education.\textsuperscript{331} The journal changed the emphases of legal education and jurisprudence. However, it failed to achieve particular influence over the judiciary who, it must be remembered, came from the ranks of practitioners.

The Law Gazette which followed in 1890 was intended ‘to represent the profession as a whole… and to combine the two essential points of cheapness and excellence’.\textsuperscript{332} It retailed at one penny offering twelve pages of ‘carefully written articles on important legal questions from the pens of leading members of both branches’ and would include a law students’ gazette.\textsuperscript{333} It lasted less than four years. Attempts by the Law (1874–5) and Pump Court (1883–6) to attract a monthly Bar readership also failed.\textsuperscript{334}

In conclusion, it may be that one cannot better Polden’s primary assertion that the influence of the journals, particularly the weeklies was ‘subtle and indirect’:

\textsuperscript{329} Vogenauer, p.58.
\textsuperscript{330} Vogenauer, p.58.
\textsuperscript{331} Polden, p.1206.
\textsuperscript{332} Law Gazette 1 (1890) 6.
\textsuperscript{333} Ibid.
\textsuperscript{334} Polden, p.1206.
For example, they brought the defects, and sometimes the virtues too, of local courts before the profession and in so doing helped to subject their judges to the values and doctrines of the higher courts. They disseminated opinions on professional ethics and practices. They subjected the profession's own organizations to a critical scrutiny.\footnote{Polden, p.1210.}

However, this writer must disagree not only with Polden’s further claim in the same passage that ‘by their narrowly national focus and general indifference (sometimes downright contempt) to jurisprudence and developments elsewhere, they contributed to the insularity which characterized English law’ but also with Cosgrove’s similar argument that, in many cases the true purpose of what was presented as legal argument was, in fact, to resist public pressure for reform: ‘Ill-concealed agendas that turned legal issues into political advocacy’.\footnote{Cosgrove, p.14.}

On the contrary, Chapters Seven and Eight will describe how journals such as the Law Magazine and the Law Times were vocal and persistent critics of the Inns and the absence of systematic legal education, thus contributing to the campaigns for reform.
SECTION C

THE MORALITY AND REPUTATION OF MID-CENTURY CRIMINAL ADVOCACY

INTRODUCTION

This Section charts the developments in criminal advocacy between the passing of the 1836 Prisoners’ Counsel Act and the end of the century. The Act removed the historic ‘felony rule’ which had prevented defence counsel from addressing juries directly in most felony trials. This shift dismantled the traditional ‘the accused speaks’ mode of trial whereby the truth of guilt or innocence could be determined from the defendant’s unfiltered response to the charge. The principal cultural consequence of the Act was that control and presentation of the defence case was essentially ceded to counsel through the medium of the closing address.

The Section concludes that, after a turbulent period of public disdain and press criticism during which the proper limits of forensic conduct were scoped and tested, the criminal Bar arrived at an accommodation with the professional licence that had been offered by the 1836 Act which was acceptable to the Victorian public and to the profession alike. This process of ‘working through’ over this period explains how modern expectations of propriety came to be settled by the end of the century.

Three sequential aspects are considered in separate chapters in this Section. Firstly, Chapter Four sets out the historical landscape before the Act and discusses the circumstances and arguments behind its passage. Chapter Five largely focuses on the following two decades. The novelty of speaking directly to criminal juries provided the leaders of the Bar with a blank performative page awaiting inscription. The chapter chronicles the emergence of the more egregious advocacy of the 1840s and 1850s in which devices such as statements of personal belief and false assertions of fact featured. The paradigm example was the conduct of Charles Phillips K.C. in the case of Courvoisier when he appeared to cast blame for a
murder on a third party whom he knew from his instructions to be innocent. The chapter makes extensive use of primary sources to prove an underlying theme of this thesis, namely that there was an obvious causal link between this sort of behaviour and the highly negative attitudes to the criminal Bar on the part of the popular press and public. The Section concludes in Chapter Six by illustrating that, by the end of the century, the introduction of more restrained courtroom conventions and behaviour led to public acceptance of the leaders of the Bar as fitting professional models for the late-Victorian age. This concluding chapter answers the principal research question by suggesting that there was also a direct causal connection between improvements in courtroom culture and the change in public opinions from mid-century obloquy to late-century admiration.
CHAPTER 4 – THE 1836 PRISONERS’ COUNSEL ACT

Background - Misdemeanours and Treason Trials

Prior to 1836 the criminal justice system accommodated two anomalous scenarios in which defence counsel were permitted to address the tribunal of fact – firstly, when the defendant was charged with a misdemeanour triable summarily and, secondly, at the other end of the criminal calendar, when s/he was indicted for treason or misprision of treason. Misprision of treason means knowingly failing to report treason to the authorities. To modern sensibilities, these exceptions to the general prohibition point up the irrationality and unfairness of the basic felony rule. At the time, however, each was justified by its own *sui generis* rationale.\(^{337}\)

The earliest of the two exceptions was rooted in the procedural differences between felonies and misdemeanours. Considerable uncertainty surrounds the origins of the distinction and it does not serve our purposes to attempt further historical detective work, even if possible. According to Cairns, the restriction on the involvement of defence counsel in felonies was ‘undoubtedly a descendant of the principle confusedly recorded by the author of the *Leges Henrici Primi* in the early twelfth century’ which applied in capital or very serious crimes or *causae capitales*.\(^{339}\) Within a century the mere fact of the conventional but nominal royal involvement in every trial on indictment provided an automatic reason for the exclusion to apply. For example, there is one oft-cited instance of a judge telling the prisoner that he could not have counsel ‘against the King’.\(^{340}\)

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\(^{337}\) *R v. Tonge*, (1662), 6 State Tr. 225.

\(^{338}\) Note that the entitlement to a defence speech always existed in civil actions.


\(^{340}\) Y.B. 30 & 31 Edward 1 (Rolls Series).
The picture is complicated by the fact that around this time the function of jurors developed from that of providers of local knowledge and/or witnesses of the defendant’s character into persons who determined the facts. The first treatise exclusively devoted to the criminal law, Staunford's, *Les Flees del Coron* of 1597, stated that the prisoner was denied counsel as to ‘the fact’. However, a better explanation for the distinction may stem from the fact that the umbrella term ‘misdemeanour’ encompassed types of litigation more akin to civil actions so that it was believed that the involvement of lawyers was more obviously required than in purely criminal allegations. The jurisdiction included, for example, archaic regulatory processes, civil disputes over matters such as the determination of individual or parish liability for the upkeep of highways and compensation for assault or riot. It may also be the case that a fundamental imperative in felony cases, which was to base the verdict on the manner of the defendant’s response to the charge (‘the accused speaks’ trial), was not suited to these various forms of summary proceeding. This is not to say that contemporaries were blind to the incongruity. John Langbein cites a seventeenth-century tract writer, John March, who questioned why a man should be allowed counsel ‘in the most petty, ordinary, and inconsiderable action [for it to] be denied him in a case of the highest concernment to him that can be, his life?’

The second formal difference applied exclusively to cases of high treason and misprision of treason, This was the express result of statute: the Treason Act 1695. This was enacted after the accession of William and Mary and was intended by the then dominant

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342 Langbein, pp.36-7.
344 ‘An Act for regulateing of Tryals in Cases of Treason and Misprision of Treason’, 7 & 8 Will 3 c 3.
Whig political class to redress ‘the perversions of justice occasioned by politically motivated prosecutions in the late seventeenth century’ such as ‘the Popish Plot (1678), ‘the Rye House Plot’ (1683) and ‘Monmouth’s Rebellion’ (1683). Interestingly, the Preamble to the 1696 Act does at least appear to acknowledge the unfairness of the imbalance in representation by one side only: ‘Nothing is more just and reasonable than that Persons prosecuted for High Treason [...] should not be debarred of all just and equal means for the defence of their innocencies in such Cases’. Further equalisation was intended by giving treason defendants, unlike felony defendants, the right to compel the attendance of witnesses ‘as is usually granted to compel Witnesses to appear against them’ and to be provided with the depositions. However, the Act should not be regarded as the first staging post in some linear process of improvement which was then to culminate in the 1836 Act. Langbein makes a persuasive case that the reform was neither an anachronistic notion of procedural fairness which was not to be reiterated for a further one hundred and thirty years, nor was it ‘an unprincipled piece of class legislation’ passed to protect a high political community which had little interest in safeguarding the criminal classes. Its exceptionality makes better sense when placed in a very particular contemporary context in which it was believed that treason cases presented unique problems requiring unique procedures in order to correct the deliberate political imbalance which had previously favoured the state. These problems had included the bias of the bench, as evidenced by the handpicking of the subservient late-Stuart judiciary, and the legal complexities of the offence of treason. The necessity for defendants to have counsel was all the more acute because the Crown itself instructed the leaders of the

347 Langbein, p.98.
profession who were frequently the law officers. Accordingly, the treason trial was effectively a self-contained forensic world of its own.

The Development of Counsel’s Role in the Eighteenth Century

By the eighteenth century, informal deconstruction of the prohibition against defence counsel was beginning. Around the 1730s, judges, particularly at the Old Bailey and Surrey Assizes, started to tolerate sporadic, organic encroachments by counsel into the trial process. This was, in part, a response to the fact that prosecutors, particularly public institutions, were increasingly using solicitors to investigate and manage their cases. Periodically, they instructed counsel. This was especially so in forgery prosecutions where the prosecutor was often a bank or merchant. In 1729 Parliament had determined that forgery of private financial instruments should be punishable by death thus removing the offence from the category of misdemeanour and depriving defendants of the right to counsel. Proceedings were becoming too complicated for a layman to resist unaided. As a result, many trials no longer resembled the classically simple altercation between unrepresented parties.

Secondly, there was legitimate public anxiety about the prevalence of perjured prosecution evidence. The judicial response appears to have been ‘relatively sudden’ and David Lemmings credits Langbein’s ‘astute detective work’ for the explanation. Langbein found that the shift followed on from a series of scandals in which innocent defendants had been prosecuted on the initiative of a combination of unscrupulous ‘thief-takers’, who were claiming statutory bounties for convictions in serious property crimes, and so-called ‘Newgate solicitors’ who invented evidence and coached witnesses with the aim of profiting

348 Langbein, pp.97-100.
349 May, p.27.
from rewards for convictions. Statutory rewards were sometimes augmented by specific
proclamation. Prosecuting highway robbers, for example, could be worth £140 a head,
£280 for a pair, or £420 for a three-person gang.\textsuperscript{351} These opportunities for very
considerable enrichment must have been hugely tempting for men who were already
professional criminals. The scandals, usually in capital cases, forced some judges to
accept that the balance needed to be redressed and that allowing professional cross-
examination was more likely to unpick tainted testimony than the efforts of the unaided
layman or the ostensibly disinterested judge himself. The other side of the coin was that juries
were reluctant to convict where abuse was suspected.\textsuperscript{352}

It is not clear, however, at what point the privilege of cross-examination became a settled
entitlement. As late as 1769 Blackstone noted that judges often permitted a defendant to
have counsel stand next to him and ‘even to ask questions for him, with respect to
matters of fact’. Yet it follows that Blackstone, with regret, still regarded this as a matter
of discretion. It was ‘a matter of too much importance to be left to the good pleasure of
any judge, and it is worthy [of] the interposition of the legislature’.\textsuperscript{353}

In timeless fashion, cross-examiners were judicially rebuked for taking the
opportunity to indulge in speechmaking by incorporating comments on the witness’
evidence during questioning which more properly belonged in a formal address. In this
context, there has been no scholarly consideration of the extent to which counsel made
full and disingenuous advantage of the professional duty to ‘put’ their case to an
opposing witness thereby making a speech in all but name. The obligation to put the case
to a witness applied where counsel intended to call evidence contradicting the witness so
that the opponent then had a fair chance to meet it. It is not known when the rule evolved

\textsuperscript{351} Beattie, pp.52-3.
\textsuperscript{352} Lemmings, p.75.
and it may have been a corollary of the principle of civil litigation that a party could not introduce an issue which had not been previously pleaded or raised. Certainly by 1893 the House of Lords unanimously affirmed the rule which Lord Herschell had ‘always understood’ to be ‘not only a rule of professional practice in the conduct of a case; but is essential to fair play and fair dealing with witnesses’.\(^{354}\) Another device which originated in the eighteenth century was to make submissions to the judge, ostensibly on the law, but which included observations on the facts in the presence of the jury - for example that the evidence had failed to establish a necessary ingredient of the offence. On one occasion in 1785, the trial judge remarked to the famously showboating William Garrow that he had ‘observed upon the evidence by a side wind, which you have done very sufficiently’.\(^{355}\)

These developments were, of course, occurring at a time when the appearance of defence counsel in felonies, although increasing, was still limited. Combining mentions in the Old Bailey Sessions Papers with contemporary Law Lists, Allyson May has calculated that in 1780 prosecution and defence counsel appeared in four per cent and seven per cent of Old Bailey trials respectively, whereas the figures were 21 and 28 per cent by 1800.\(^{356}\) One possibility is that the increase was in response to the effectiveness of penetrating cross-examination and, in particular, to the well-publicised, aggressive advocacy of Garrow and a small number of his contemporaries at the Old Bailey which served as advertisements for the desirability of representation. Further research on the correlation between the instruction of defence counsel and acquittal rates at the end of the eighteenth century may shed more light on the increase in counsel.

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\(^{354}\) *Browne v. Dunn* [1893] E R. 67, per Lord Herschell @ 71.

\(^{355}\) *R v William Hurt*, *OBSP*, January 1785 p.304.

\(^{356}\) Allyson May, *The Bar and the Old Bailey*, p.34.
‘The Pursuit of Truth’ and ‘The Accused Speaks’ Process

There were two sets of Parliamentary debates on ‘full defence by counsel’, as it was termed, in the 1820s and 1830s respectively. The arguments in each focused on which of two opposing procedures provided the most surefooted pathway in the ‘pursuit of truth’. The introduction of ‘full defence by counsel’ with the passing of the 1836 Act effectively demolished what had been the cornerstone of the felony trial for centuries - what Langbein has termed ‘the accused speaks’ theory of proof. According to this, the defendant’s unfiltered personal response to the charge was frequently regarded as the most decisive testimonial resource in the jury’s determination of guilt or innocence.\footnote{John Langbein, The Historical Origins of the Privilege Against Self-Incrimination at Common Law’, \textit{Michigan Law Review}, 92 (5), (1994) 1047-1085, (pp.1048 and 1054).} In law, defendants were not permitted to give sworn evidence on their own behalf until 1898 and so, ironically perhaps, the all-important defendant’s response had to be deduced from either what s/he had said when apprehended or from his/her unsworn oral statement at the end of the prosecution case.\footnote{With the limited exception enacted by \textit{The Criminal Law Amendment Act, 1895} (‘An Act to make further provision for the Protection of Women and Girls, the suppression of brothels, and other purposes’, (48 & 49 Vict. c.69) for those charged with certain sexual offences, felony defendants were not permitted to give sworn evidence on their own behalf until the 1898 Criminal Evidence Act.}

All of this necessarily reflected societal trust in the ability of jurors to decide guilt or otherwise from immediate impressions of the defendant’s character and propensities. In addition, until the eighteenth century the lawyer-free trial had generally been an unstructured altercation between prosecutor and defendant, controlled only by the judge, which allowed the jury relatively free access to incriminating evidence uninhibited by exclusionary rules of
evidence. The eighteenth-century jurist, Hawkins famously set great store by the unvarnished transparency of guilt or innocence revealed:

> It requires no manner of Skill to make a plain and Honest Defence, which [...] is always the best; the Simplicity and Innocence, artless and ingenuous Behaviour of one whose Conscience acquits him, having something in it more moving and convincing than the highest Eloquence of Persons speaking in a Cause not their own [...] Whereas on the other Side, the very Speech, Gesture and Countenance, and Manner of Defence of those who are Guilty, when they speak for themselves, may often help to disclose the Truth, which probably would not so well be discovered from the artificial Defence of others speaking for them.  

A more pragmatic justification was the imperative for the court to hear the defendant before sentencing, particularly when the prescribed penalty was execution. The passing of sentence and its actual implementation turned on an estimation of the defendant’s character and background often as much as it did on the nature of the offence. Radzinowicz estimated that between 1688 and 1820 the number of capital statutes rose from about 50 to over 200. However, despite the fact that this fundamental ideological component of penal policy, ‘the ‘bloody code’, lasted well into the early nineteenth century, in practice both judge and jury had extensive discretionary devices at their disposal to avoid or mitigate the death penalty. The workability of the system and public

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acceptance ultimately depended on limiting the overuse of the death penalty. For example, juries often convicted of lesser non-capital offences by committing the ‘pious perjury’ of undervaluing stolen goods, and judges, having formally passed sentences of death, frequently recommended royal pardons. All of this necessarily depended upon the defendant having made a quantifiable contribution to the proceedings in person.

Supporters of ‘the accused speaks’ process nevertheless overlooked the continuing existence of handicaps imposed on defendants by the Tudors in the sixteenth century. For example, committing magistrates were technically agents of the king charged with gathering only evidence against the defendant rather than judicial officers. The ‘Marian Statute’ of 1555 required justices to ‘take the examination of such Prisoner, and information of those that bring him […] as much thereof as shall be material to prove the felony’. Until well into the eighteenth century all cases were sent for trial without the defendant knowing the indictment and, until the nineteenth century, without being provided with copies of the prosecution depositions. Most were remanded in custody in conditions which made preparation of their defences difficult. The attendance at trial of all prosecution witnesses was ensured by binding them over to appear whereas those favourable to the defence were not compellable.

To some extent, the shift in Parliamentary opinion between the two sets of debates reflected the rather late ascendancy in England of the ‘enlightened’ view that uniform penal procedures with definite outcomes were preferable to these uncertain, discretionary mechanisms for determining guilt and punishment. Common to both sides was the objective of the prevention of crime. Reformers argued that increased certainty in the ‘truth’ of verdicts

361 May, p.116.
362 2 & 3 Phil. & Mar., c.10 (1555); Langbein, p.41.
363 Beattie, p.222-3.
when counsel were employed on both sides would result in more confidence in the trial process and, therefore, more convictions. For example, Sir James Mackintosh was arguing as early as 1821 that ‘[T]he utmost that could result from agreeing to this measure would be a greater number of guilty persons would be convicted, which must be regarded as a good and not an evil’. 364

Opponents of reform, on the other hand, argued that greater involvement of counsel would, if anything, cause more, not less, uncertainty. Hawkins had predicted that counsel ‘would be so covert in their speeches, and so shadow the matter with words, and so attenuate the proofes and evidence, that it would be hard or long to have truth appear’.365 His parliamentary successors of the nineteenth century predicted that, if counsel were permitted to address juries directly, they would inevitably set out to obstruct ‘the pursuit of truth’. These predictions would assume a well-publicised reality when, in the decades which immediately followed, a number of counsel tested their new speechmaking freedom to the limit. This, in turn, provoked intense criticism in the popular press. Accordingly, one direct consequence of the 1836 Act was that public confidence in the criminal Bar reached its nadir.

**The Origin of Adversarial Trial?**

The preponderance of scholarly discourse on the 1836 Act has tended to centre on the issue of whether it was the origin of the modern form of adversarial criminal trial. In 1998 David Cairns, the chief exponent of the argument that it was, complained that previous historical scholarship, notably on the part of Langbein, Landsman and Beattie, had wrongly characterised late-eighteenth century procedural accretions as markers of a singular route

364 (1821) 4 P.D. (HC) 1513-14.
365 Hawkins, book 2, ch. 39, s.2.
leading to the modern ‘rights-based’ trial. 366 Cerian Griffiths took matters a stage further with her argument that much of the academic discourse had been located ‘within a framework of Whig history’ which classically assumed that the Act was a step in a conscious ‘march’ towards a rational and foreseeable modernisation of criminal justice. She described this ‘deterministic’ thinking as ‘an assumption too far’ which has prevented consideration of alternative developments on the ‘underside to legal history’. 367

The present thesis accepts that there are obvious conceptual anachronisms which disqualify the Act from characterisation as the conscious launchpad of modern, rights-protective procedures. For example, the later Parliamentary debates were concerned more with how to achieve the ‘enlightened’ objectives of certainty and effectiveness in ‘the pursuit of truth’ than they were with ensuring procedural fairness. While the 1836 Act was unquestionably transformative in the sense that it ceded control of the proceedings to defence counsel through a new ability to manage the issues for the jury, it did not fundamentally alter the concept of the adversarial trial – namely that of a contest between parties. It may be said that the Act was the first legislative acknowledgement of the worth of adversarialism, but, by then, the concept of a prosecutor having to prove a case against a defendant was already solidly established in any event. Certainly, the adversarial framework of the trial, including the participation of counsel and the often-overlooked but all-important place of the burden of proof, were entrenched by the beginning of the nineteenth century. Thus, if the presence of an historical continuity may be objectively inferred from its consequences, albeit unintended, it becomes possible to

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treat the various iterations of adversarialism from the eighteenth century onwards, including the 1836 Act, as incremental stages in a continuous historical process – although not necessarily linear. Conversely, it is arguable that the 1898 Criminal Evidence Act, which gave all felony defendants the right to give sworn evidence on their own behalf, and on which they could be cross-examined, was the innovation which truly fashioned the norms of the modern trial. 368

Proponents of the 1836 reform acknowledged that the ‘pursuit of truth’ required full participation of counsel not merely for the defence but on both sides and they offered up a potential increase in the conviction rate as a desirable outcome: ‘[I]t was always urged that the effect of the Act would be to make [...] guilt more evident by causing a fuller investigation into it. No one ever desired that the rogues should escape, but simply that honest men should come by their own.’ 369 What the reformers did not intend, but what was predicted by their opponents, was the obstruction of ‘the pursuit of truth’ in the ‘licence of counsel controversies’ which immediately followed.

Public and Professional Attitudes to Reform

The 1836 reform was not the consequence of largescale dissatisfaction on the part of practising barristers themselves nor, indeed, of any clamorous public demand, but rather it was driven by a persistent but small group of Whig lawyer politicians who, as a group, also supported other liberal causes such as the abolition of slavery and capital punishment. For example, May only found limited examples of interest on the part of the public at large. She

368 Note that The Criminal Law Amendment Act, 1895 (‘An Act to make further provision for the Protection of Women and Girls, the suppression of brothels, and other purposes’, 48 & 49 Vict. C.69)) had exceptionally established this right in trials for certain sexual offences. Oscar Wilde was prosecuted under this legislation.

cites an advertisement in a 1781 edition of the *Morning Chronicle*: ‘Is that part of our criminal law just, which prevents a prisoner from making a full defence, as well as to matters of fact, as to matters of law by Counsel?’ She also quotes Henry Fielding’s character *Tom Jones* from 1789: ‘One thing I own I thought a little hard, that the prisoner’s counsel was not suffered to speak for him, though he desired only to be heard one very short word; but my lord would not hearken to him, though he suffered a counsellor to talk against him above half an hour’. However, she makes the general point that, while the public and press were increasingly vocal about the place of cross-examination in the prevention of perjury, on the whole they tended not to be great enthusiasts for improving undeserving defendants’ trial rights.

An insight into the thinking of an educated and liberal lay readership is to be found in the powerful polemic, assumed to have been written by its editor, Sydney Smith, which appeared in 1826 in the *Edinburgh Review* at the time of the first set of Parliamentary debates. Its conclusion was that there was little interest in reform ‘only because its bad effects are confined to the last and lowest of mankind.’ The article extravagantly approved of a petition calling for ‘full defence by counsel’ presented to Parliament by George Lamb, ‘a gentleman who is always the advocate of what is honest and liberal’ and which, it was claimed, came unbidden from ‘several Jurymen in the habit of serving as Jurors at the Old Bailey’. At this time a panel of jurors would experience multiple trials in a single sitting. The *Review* complained of ‘the most trite and the most absurd’ notion that ‘the judge is counsel for the prisoner’, which was an argument frequently advanced by opponents of reform, and judged that the law ‘is defended [...] by men who think it their duty to defend everything that is and

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370 Original italics.
372 See 1824 P.D. (HC) 11, 180
to dread everything which is not'.\textsuperscript{373} It suggested that the system could tolerate ‘a little disgust at professional tricks, if the solid advantage gained is a near approximation to truth.’\textsuperscript{374} By the 1830s public interest had evidently been engaged so that in 1836 the \textit{Law Magazine} could observe that the issue had ‘attracted much more of the public attention than is usually bestowed on legal matters’\textsuperscript{375}

For their part, the legal journals were divided. In March 1832 ahead of the second set of debates, the first edition of the \textit{Legal Examiner} complained that, under existing law, ‘a prisoner, from natural incapacity, or want of education, or even from an overwhelming sense of disgrace or danger, has not the power of speaking for himself. A man thus situated is judged, and perhaps condemned, unheard’. It predicted that this second attempt at reform would stand a better chance of success than the first.\textsuperscript{376}

The \textit{Legal Observer}, effectively the ‘house magazine’ for metropolitan solicitors, regularly supported the various Bills.\textsuperscript{377} The \textit{Law Magazine}, on the other hand, anticipated ‘much more evil than good from it if passed’. It posited three unwanted outcomes. In order, juries’ ‘own plain impressions [would be] disordered by the glosses counsel may put upon the facts’, judges would no longer ‘protect’ defendants, and prosecuting counsel would be ‘set free’ from their usual restraints. It concluded that ‘[t]he side that wins may be the right side, but it often, too often, wins by tact, by trickery, by manoeuvring, by chance’. The better

\begin{footnotesize}
\begin{enumerate}
\item Original italics
\item \textit{Law Magazine}, 15 (May 1836), p.394.
\item ‘Defence of Prisoners on Trial for Felony’, \textit{Legal Examiner}, 1 (3 March 1832), pp.601, 604.
\end{enumerate}
\end{footnotesize}
course, it suggested, was to appoint public agents to investigate charges on behalf of the prisoner. 378

There is little primary evidence of the junior Bar’s attitude. For example, the Inns hold no records of members’ responses. May proposed that the Bar’s silence was ‘at least suggestive of acceptance of the unreformed system’. 379 Griffiths, on the other hand, has offered two cogent explanations for this apparent quietude which, she suggests, should not be confused with acquiescence. Firstly, ‘the disparate and individualistic nature of the Bar’ militated against a collegiate response to change. The Inns resisted any corporate oversight or regulatory role and each circuit followed its own rules of etiquette. Secondly, the perennial public mistrust of lawyers deterred barristers from provoking unwanted public discussion and scrutiny. She makes the convincing point that, within a small profession, competition for judicial and political advancement operated to ‘break whatever fraternity previously existed’. 380 It is noticeable that in 1826, the Attorney General, Copley, asserted that most of the profession were hostile to reform. 381 However, after the Tories had lost office, Dr Lushington, a reformer, felt able to claim that the profession, including the Lord Chief Justice of the day, had effectively changed its mind. Moreover, in June of that year Copley himself, by now Lord Lyndhurst, had become confident that the profession was now more favourable to reform. 382 Griffiths accepts that these assertions may truly amount to proof that

379 May, p.189.
380 Griffiths, pp. 33. 47.
381 HC Deb, 25 April 1826, vol.15 cc.589-633.
382 HL Deb, 23 June 1836, vol.34 cc.760-78.
barristers were making their feelings known but she questions whether either Copley or Lushington were seriously speaking for the Bar as a whole or pursuing a political agenda.\textsuperscript{383}

Other judges were reticent – at least, in public. Only Lords Abinger and Denman spoke in the House of Lords and only three judges referred to full defence by counsel in evidence before the Select Committee on County Rates in 1834. They were not so coy within their close professional circle. Writing to Denman, a supporter of reform, Lord Brougham described the attitude of some of the judges as ‘rabid’.\textsuperscript{384} Lord Campbell's memoirs estimated that twelve out of the fifteen judges opposed the measure, with Mr. Justice Park apparently threatening to resign if it passed.\textsuperscript{385} Some of the judges had more nuanced reservations about the impact of barristerial eloquence, fearing that it might force them to descend into the arena as a necessary corrective to counsel’s powers of persuasion. In 1835, Mr Justice Williams, who in fact supported reform, wrote to Lord Brougham:

Suppose [...] that the Counsel has really made a clever & powerful speech, — perverting the great & leading facts of the Case: If the Judge have anything in him, can, ought this state of things be left without correction? Probably, you will say no. And if so, then I say, that, call it what you please, there will be, in effect, a \textit{Reply} by the Judge [...] the position of the judge will not be quite so amiable in the eyes of the people [...] as heretofore.\textsuperscript{386}

\textsuperscript{383} Griffiths, p.36.
\textsuperscript{384} Cairns, p.116-117.
\textsuperscript{386} July 1835, \textit{Brougham Papers, No. 14}, 438 cited by Cairns p.114.
In a similar vein, Mr Justice Park was concerned in 1834 that ‘there will be some young gentleman making speeches, and talking of things quite extraneous, and that will turn the judge immediately into the prosecutor's counsel, to prevent false topics being made use of to the defeat of justice’.  

The final Bill almost failed over the objection of the Lords to the defence having the right to the last speech in the trial. It was only on the penultimate day of the session that the Commons relented and, shorn of this entitlement, the Act became law. This ‘preserved the buffer’ between the prosecutor’s speech, which could correct inaccuracies, and the summing-up and meant that the judge need only intervene if the prosecutor overstepped the mark. Before setting out on their first spring circuit in 1837, the twelve royal judges issued a postscript in the shape of a Practice Memorandum ‘as to some points which were thought likely to occur at the assizes, in consequence of the recent act for allowing prisoners, indicted for felony, to make full defence by counsel’. It stipulated that, where the only defence evidence went to character, a prosecution reply was a matter of discretion. Where the case was prosecuted on behalf of the Crown by either the Attorney-General or Solicitor-General ‘and those who represent them’, they were ‘in strictness’ entitled to a reply whether or not any defence evidence had been called.

The Debates

The first phase of the Parliamentary debates started with the introduction of the Capital Crimes Defence Bill in 1821 proposed by Richard Martin (popularly known as

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387 *Report from the Select Committee on the Receipt and Expenditure of County Rates*, (1834) P.P., XIV, 1 at 141, cited by Cairns p.114.

‘Humanity Dick’) and lasted until 1828.\textsuperscript{389} The second phase lasted between 1833 and 1837. Martin's original Bills were simply one-clause proposals to allow those charged with capital felonies to make their defence by counsel. He was supported by Sir James Mackintosh, another longstanding proponent of liberal reforms, two future Whig ministers, Thomas Rice and George Lamb, and by two future judges, Lushington and Denman. They were consistently opposed and decisively defeated by the Tory government majority.\textsuperscript{390} In this first set of debates opposition stemmed as much from an innate resistance to change as it did from principled objection. Mackintosh explained this as ‘the partiality [...] that barristers [...] naturally felt for those forms of practice which they followed from the earliest days of their professional lives [...] under which they had earned both fortune and character’.\textsuperscript{391} He conceded that the majority of the legal profession was opposed. Others quoted figures such as ‘four-fifths’ or ‘nine-tenths’ of the Bar. One might also observe that the not-insignificant extra burden of preparing and delivering a closing address may not have been entirely welcomed.

The Tory government line was clear: the ingenuity and eloquence of counsel, whichever side they were on, were incompatible with a calm and dispassionate inquiry into the truth. Defence speeches would be ‘full of inflammation and exaggeration’, prosecution counsel would reply in kind, and ‘the trial of truth would be converted into a war of wit, ingenuity and eloquence’.\textsuperscript{392} The repeated argument was that reform would also encourage prosecutors to abandon the deliberate moderation which, it was claimed, they were duty-bound to display in their own opening and closing addresses. Thus, the Solicitor General


\textsuperscript{390} Beattie, ‘Scales of Justice’, pp.250-1.

\textsuperscript{391} P.D. (HC), 2nd ser., (1824) 11, 204; May, p.90.

\textsuperscript{392} (1824) 11 P.D. (HC) 208.
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claimed that prosecution counsel would feel obliged to operate ‘in some degree on their passions instead of their reason’. However, by the time of the 1830s debates, Copley, by then Lord Lyndhurst and out of office, argued that this sort of objection was ‘merely speculative’. At the time there was no consistent prosecution practice when opening cases on the various circuits. For example, by the early nineteenth century, Northern circuiteers ‘always’ opened their cases, whereas those on the Midland and Oxford circuits ‘scarcely ever’ did so. According to Cairns, ‘it remained a matter of circuit etiquette, judicial discretion, and the “good taste” and “right feeling” of counsel in individual cases.

Sandwiched between the two sets of debates was the 1836 Second Report of the Criminal Law Commissioners. The Commission had originally been set up by Brougham in 1833 with a view to codifying the criminal law in a single statute. This second report was a purposeful digression from its original intention and plainly meant to provide support for the proposed legislation. Only two of its five members were criminal specialists, Thomas Starkie and William Wightman. The others were acolytes of Brougham. Accurately described as ‘that thoroughly Benthamic body’ which produced ‘a partisan statement, from start to finish’, it made no attempt to value the merits of the existing ‘barbarous’ position.

The bulk of the evidence consisted of lengthy contributions from the likes of William Ewart, later sponsor of the parliamentary Bills, and Frederick Pollock, his supporter. Favourable witnesses were asked leading questions. Tellingly, the judges were not consulted. The report appeared in

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393 (1821) 4 P.D. (HC) 1513.
394 Cairns, pp. 37-44.
395 Second Report of His Majesty’s Commissioners on Criminal Law (1836), P.P. XXXVI 18; See also Prisoners’ Defence Bill. Minutes of Evidence Taken before the Select Committee of the House of Lords (1836) Lords’ Papers, 119.
June 1836 immediately before the debate in the House of Lords. It identified four areas of evidential complexity which required the intervention of defence counsel: where the evidence was circumstantial, where witnesses were corrupt, where cases involved ‘the haze and shadow’ of mixed law and fact and where there were multiple defendants.

Between 1833 and 1836 three Bills were passed by the Commons, the first two of which were rejected by the Lords. They were proposed by the liberal reformer, Ewart, supported by John Campbell and Frederick Pollock, both of whom rose to be Attorney-General. Ewart, described as ‘a keen little man’, had long been active in a wider movement for legal reform which included the complete abolition of the death penalty. Following the electoral success of the Whigs in 1830, sympathisers were now in positions of power. Brougham had been made Lord Chancellor in 1830, Denman became Lord Chief Justice in 1832 and in 1834 James Scarlett was appointed Chief Baron of the Exchequer as Lord Abinger. As noted above, even the principal opponent of the 1820s, Lord Lyndhurst was now a convert and actually piloted the 1836 Bill through the Lords. The agenda had also expanded since the 1820s. The various Bills now included provisions for free representation by counsel assigned by the judge, which failed to make the Act, and also supply of the depositions, which did. By now ‘the Commons was thoroughly acclimatised to the idea of reform’. At the heart of the debates ‘the Pursuit of Truth’ theme still dominated. Reformers now argued that advocacy on both sides would correct mutual flaws.

Some criminal advocates, past and present, feared a degradation of decorous standards. These included William, by now Baron, Garrow, the earlier exemplar of barristerial chicanery and Charles Phillips, ‘the Garrow of the 1830s’, who was later to attract

398 Cairns, p.71.
fearsome criticism for speechmaking excesses in the notorious Courvoisier case (see Chapter Five). In fairness, Phillips’ concern was that the process was more likely to result in convictions against the evidence. He wrote to Brougham that, as prosecutors generally had ‘the longest Purse’, prisoners would ‘labour under the grievance of having the best talents arrayed against them’ and verdicts would depend on eloquence rather than innocence. He also feared for the pressure on barristers to achieve results. In a small profession, lack of success meant lack of employment. Unselfconsciously drawing on Ciceronian rhetoric himself, he wrote: ‘if any momentary scruple should induce them to falter, they will feel their children pulling at their gowns, and calling to them for Bread’. With ironic prescience, he wrote to Brougham, ‘the most awful of considerations may become the victim of sophistry’. The next chapter in this study will permit the reader to judge the extent to which Phillips’ prophecy was fulfilled by his own conduct.

399 Brougham Papers, University College Library, 26,364.
400 Prisoners’ Defence Bill: Minutes of Evidence taken before the Select Committee of the House of Lords (1836), Lords’ Papers, p.7.
401 Brougham Papers, 26,364.
CHAPTER 5 – THE CONSEQUENCES OF THE 1836 ACT; LICENCE OF COUNSEL CONTROVERSIES AND PRESS ATTITUDES

Introduction

This chapter provides the primary evidence which supports a principal theme of this thesis – namely, that in the middle of the nineteenth century public estimation of the moral qualities of the criminal Bar and especially that of Old Bailey practitioners was almost entirely unfavourable. Instances where defence counsel had pushed the limits of their newly-acquired ability to address juries directly, the so-called ‘licence of counsel controversies’ generated trenchant criticism in the mainstream newspapers and periodicals. In the present study, a rigorous search for positivity in the primary sources has resulted in little that was approving of the prevailing courtroom culture. From the Bar’s perspective, at question was the extent of the supposed duty to deploy ‘all expedient means’ to secure an acquittal.

The Contemporary Image

The most notorious examples of questionable conduct following the 1836 Act did considerable reputational damage but this built on an already low public estimation of the morality of the criminal Bar. The first point of note is that there was already a considerable duality and ambivalence in public attitudes. On one hand, historians have consistently positioned the nineteenth-century Bar as the elite apex profession – a position it had occupied for several centuries. The orthodox account of the Bar’s primacy relies principally on the

fact that its highly developed status derived from a political narrative first constructed in the mid-seventeenth century which associated both the judiciary and a politicised senior Bar with the authority and power of government and Crown. At the other extreme, barristers had long been portrayed in print and caricature as bewigged, fee-hungry and literally monstrous creatures. A tentative resolution of this apparent paradox lies in the fact that ‘status’ and ‘popularity’ bear entirely different meanings. In broad terms, the Bar’s status was a consequence of power – firstly, its executive political power which was unmatched by any other profession or interest group except the aristocracy and, secondly, formidable power over the administration of public justice and, ultimately, over life or death. Its unpopularity derived from perennially negative tropes of lawyers and, as the nineteenth century developed, from its own behaviour.

W.J. Reader made a basic point that that ‘the barrister’s claim [...] to superior social and professional standing...] was derived primarily from the fundamental importance of the law in the constitution’ so that it ‘may perhaps be considered as the first of the lay professions to stand anywhere near the Church in public esteem’. 403 It was regulated by ancient custom rather than by precise written statutes, ‘which of course was enormously convenient for the lawyers, if for no one else.’ 404 David Lemmings traced the Bar’s constitutional significance back to the institutional rituals of the late medieval and early modern Inns out of which rose the rankings of serjeants-at-law, bencher and reader, ‘invested with dignity and symbolic importance by the performance of ceremonial acts’. The rank of serjeant was required for judicial appointment and they were termed ‘instruments of the Crown’. A more purposeful professional relationship with the Crown came with the introduction of a system of direct appointments of Queen’s Counsel, beginning in 1597 when Francis Bacon was appointed counsel to Queen Elizabeth. 405

Increasing use of royal prerogative powers was buttressed by a ‘cadre of dependent lawyers and judges’ for whom appointment as a King’s Counsel became the necessary route to political and judicial power. 406 In an overview of the development of 26 professions, written in 1933, A.M. Carr-Saunders and P.A. Wilson singled out the Bar for its ‘close association with politics which has ever since characterised the English Bar and fixed the ambition of its more successful members’. 407 According to Lemmings, the most senior

404 Reader, p.21.
Georgian judges were tried and trusted men who had served many years as crown counsel and law officers. Of the 28 Chief Justices between 1689 and 1820, 24 were former MPs, many of whom had served as principal government spokesmen.\(^{408}\) Lemmings quoted a contemporary claim that, by 1840, it could be said that ‘the high social position occupied by the bar in modern times is unquestionable. With the highest honours of the state open to him, the barrister is entitled to take rank amongst the gentry-classes of the kingdom.’\(^{409}\)

Lemmings was evidently not an admirer of these same judges and barristers, describing them as ‘a veritable mutual admiration society where eccentricity and self-aggrandisement were celebrated for their own sake’, who ‘seem to have come away from their own dinners, ceremonies and associations with little more than a heightened consciousness of their collective professional status and individual superiority’.\(^{410}\) Distanced from attorneys and solicitors and secure in their social pretensions, successful counsel were wealthy and ‘fortified by association with the sons of the elite at public schools, the two universities and the Inns’.\(^{411}\) They saw no need to regulate their conduct and habits by subservience to external authority. However, the outwardly unifying symbolism of robes and rituals, such as the opening parade of the Assizes, obscured the fact that, behind the spectacle visible to the public, there was no particular unity. In fact, the profession was disjointed with considerable regional variations in professional etiquette.\(^{412}\) This meant that, in the absence of clear and enforceable norms, ethical boundaries were inevitably uncertain - not least, for the new and uncharted territory of the defence speech which came with the 1836 Act. Although

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\(^{408}\) Lemmings, ‘Ritual Majesty’, p.50.
\(^{409}\) A. Polson, *Law and Lawyers; or Sketches and Illustrations of Legal History and Biography* (London: 1840), i. p.162; Lemmings, p.57.
\(^{410}\) Lemmings, ‘Ritual Majesty’, p.47.
\(^{412}\) Griffiths, p.33.
there was an important subculture of ‘liberal’ barristers associated with the Old Bailey and the City of London, the nineteenth-century Inns strove to repress and exclude radicals and reformers. ‘The law was essentially a continuous discourse among generations of great men [...] and emphatically law was the lawyers’ business.’  

Turning to standards of behaviour, both Landsman and Beattie have commented upon the fact that advocates’ deference towards the Bench in the first quarter of the eighteenth century gave way to a more assertive advocacy as that century progressed. ‘Zealous’ loyalty to clients, including prosecutors, was a frequent feature of trials between 1740 and 1780. Aggressive defiance towards judges was accentuated in the last twenty years of the century. Beattie believed that the timing may have been part of a general response to a widespread belief that England was threatened by a tyrannical and oppressive Georgian regime.

Certainly, some contemporary barristers acquired positive public reputations which have lasted until modern times. Thomas Erskine and William Garrow are the two most celebrated examples - but for very different qualities. The former was perceived as a righteous advocate for libertarian freedoms, having represented Tom Paine among others, and the latter was famous for pugnacious, sometimes bullying, cross examinations whose vigour made him much in demand as a defender. Apart from these celebrated exceptions, the standing of the Old Bailey Bar in the second half of the eighteenth century was generally

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415 Beattie pp.228-31.

416 Landsman, p.562.
low. As early as 1764, intending barristers were cautioned that ‘ignominious the name and character of a mere Old Bailey Counsel may justly appear’.

The Consequences of the Prisoners’ Counsel Act

Addressing the jury in the first case following the passing of the 1836 Act, prosecution counsel, John Adolphus predicted that ‘much of the benefit to be derived from [the Act] would depend on the conduct of those to whom the administration of justice was confided, and more especially the bar’. He was sure that the latter:

- would never be found deficient in zeal in defending prisoners; but great consideration was due, not to prisoners alone, but to prosecutors; and it would be extreme injustice to load an individual with censure or hold him up to ridicule. Counsel should take care in their cross-examinations, and in the statements they made, not to goad witnesses, otherwise a full measure of justice would be unattainable.

Importantly, what was also changing as the nineteenth century progressed was that parliamentary debates and official inquiries were being replaced by the press as the primary medium for discussion of barristers’ responsibilities. As a consequence, what Cairns described as a ‘fragile public patience with forensic licence’ turned to ‘virulent

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417 Cairns, p.35.
419 Morning Chronicle, 14 October 1836, p.4; The term ‘prosecutors’ is there used to connote those bringing the prosecution rather than counsel. Note: the Legal Observer 12 (1836) p.497 wrongly states the date to be 14th August.
condemnation’. The pivotal 1840s became ‘a difficult decade for the Bar’. Perhaps charitably, he conjectured that what may have been perceived as professional irresponsibility was, in fact, the result of sincere struggles with ‘the novel tactical and moral difficulties of full defence by counsel’ which followed from the passing of the 1836 Act. May commented that the public, ‘relatively mute in the discussions preceding the [...] Act, subsequently found its voice [and] the bar and the public engaged in a sustained debate into the morality of advocacy’.

Nine years before the Act, the radical, John Stuart Mill, had claimed that the influence of the Bar was ‘pernicious to morals, jurisprudence and government [...] Without dwelling upon the pecuniary advantages which lawyers derive from all vices of the law, sufficient reason for their constant opposition to all improvement in it is to be found in [...] professional narrowness of mind’. The Old Bailey unquestionably attracted the greatest criticism. David Bentley, for example, has confirmed that it was ‘notorious for its touting, bullying of witnesses and rudeness to the Bench, was [...] an open disgrace’. According to the Law Times, ‘An Old Bailey Practitioner [was] a by-word for disgrace and infamy.’ It should, however, be noted that the journal’s typical reader has been dismissed as a ‘disgruntled rural attorney’. In 1835 the Westminster Review questioned why prosecuting or defending at the

420 Cairns, p.127.
421 Cairns, pp.126-7.
422 May, The Bar and the Old Bailey, p.5.
Old Bailey should ‘per se be less reputable than at Norwich or York’? The following year the *Legal Observer* claimed that Old Bailey business had been conducted ‘in worse taste’ than in any other court and asserted that ‘we have here seen counsel forget not only all respect for the Bench, but all respect for themselves’ so that ‘the faults of a few practitioners throw a shade over the whole Court; we have here also seen Judges give way to petulance and ill-breeding’. It too questioned: ‘Why is the metropolis to bear the disgrace of being worse off than the provinces? Why is her great Criminal Court to be the place in which all the intestine broils of lawyers are to be settled?’ Even so, it maintained the hope that, with the opening of a new building with a new title, ‘the Central Criminal Court’ in November 1834, ‘a new school of practitioners’ would arise and ‘we shall cease to consider the persons exclusively practising in this Court as belonging to an inferior grade in the profession’.

Equally hopeful, the first edition of the *Law Times* had also anticipated that the 1836 Act itself would also improve behaviour:

> [T]he appeal to the jury is now the one great defensive weapon: juries cannot tolerate a bully, and, however uneducated themselves, they like to be talked to by an educated man and a gentleman. Perforce the Old Bailey bully has been thrust aside to give place to men who can win the attention of juries by their bearing and keep it by their eloquence, and those are necessarily the higher order of minds, and to them the business of the Central Criminal Court will ere long be confided. In such hands it must become a respectable business, and shall command the

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loftiest position by its character no less than by its talents.\textsuperscript{428}

These journals were to discover that bad habits persisted. This is not to say that there was no sign of betterment. In 1841 the \textit{Law Magazine}, for example, remarked on ‘the marked improvement that has taken place of late years in the metropolitan criminal courts’. Even so, it conceded that it remained ‘undeniable that the bullying system, which has made the Old Bailey a bye-word, is still much too frequently pursued’.\textsuperscript{429} The \textit{Westminster Review} suggested that it was often done to impress on the client that everything had been done for him and that, ‘on returning to prison, he might say: ‘what a fine fellow councillor leather sides is!’’.\textsuperscript{430}

In fact, bullying was not unique to the Old Bailey. In the same issue, the \textit{Law Magazine} continued:

\begin{quote}
The practitioners in other courts are also apt to disregard the feelings of third parties - to treat every adverse witness as a witness of untruth. [...] We might adduce such practices as that of the advocate turning his eyes away from the witness box whilst he asks the witness a question. The simple witness, doubting whether the question was addressed to him, or believing that it was addressed to someone else, hesitates, or does not answer. When the witness has evidently lost his self-
\end{quote}

\textsuperscript{428} ‘The Crown Courts Bar’, 1 Law Times (15 September 1843) 611.


possession, he is asked, in a thundering tone, why he is so reluctant to answer or if that does not promise success, he is plied with another question which leads him away from explanation, and thus an impression is probably made on the minds of the inexperienced jurymen, that the witness had been fearful of the effect of his answer, and had, for sinister purposes, withheld it.\textsuperscript{431}

The image of the bullying barrister was not unfamiliar to the reading public. Characters like the hectoring ‘Mr. Botheram’ in Bulwer-Lytton’s popular contemporary novel, 	extit{Paul Clifford}, were easily recognisable: ‘the learned counsel then proceeded, as artfully as he was able, through a series of interrogatories, calculated to injure the respectable character, of [the witness, and weaken his testimony in the eyes of the jury. He succeeded in exciting in the audience that feeling of merriment wherewith the vulgar are always so delighted to intersperse in the dull seriousness of hanging a human being’\textsuperscript{432}.

Some of the weaker judges were also intimidated and treated with open contempt. J.R Lewis’ anecdotal reminiscences of 	extit{The Victorian Bar} include that of a Mr. Sergeant Adams in the 1840s and 1850s who ‘appeared only to occupy the bench as a mark for the impertinence of barristers’. Rudeness was not confined to London. In 1848 the Recorder of Hull was reduced to tears by the constant disrespect of a particular barrister. A ‘vendetta’ between the Bar and Judge Ramshay was said to have occupied Liverpool County Court between 1850 and 1851. Of the Old Bailey it was said that:

[D]ay after day, and session after session, [the judges] are treated with indignities which no constable of the night would suffer [...] There is no irregularity so flagrant that it is not committed; no perversion of law so monstrous that it is not hazarded; no maltreatment of witnesses so outrageous that it is not persevered in, malgre their remonstrances. Their positions in law are rudely questioned; their statements of fact saucily corrected, or derided in that tone of clear susurration which impudence assumes when it simulates respect [...] The distinctive characteristic of the Old Bailey barrister is a desire to overbear the judge [...] One method is to bully the judge [...] the other method is to make the judge appear to bully the barrister."\textsuperscript{433}

Conversely, some of the judges acquired poor reputations themselves. Overtly political appointments of ‘uncouth and overly severe’ Old Bailey judges by the Corporation of the City of London between 1802 and 1833 during the currency of the Tory party’s ‘Old Corruption’ was ‘a source of public outrage’ according to Vic Gatrell who quoted a Dr Parr’s depiction of them as ‘sable bigots’ and ‘furred homicides’.\textsuperscript{434} In 1833 the \textit{Law Magazine} published extensive passages from \textit{Old Bailey Experiences}, written by a practising attorney. The point was forcibly made that criminals much preferred to be tried by a Circuit judge (‘a


real judge’) rather than by one of the biddable judges appointed by the City. Sentencing was ‘a lottery’ and ‘the evident anxiety of all the city judges to proceed with indecent and unjudicial haste with the business of this court, makes them frequently petulant at any interruption or impediment to their usual dispatch, which manifests itself in much acrimony between themselves and counsel’. The author added that the City judges were ‘vicious, inasmuch as [...] they [...] are too much within the influence of local and subordinate interests’ and it called for appointments by the state rather than the City.\textsuperscript{435} The blame for the unfavourable distinction was thus placed firmly on the nepotism of the Corporation.

If a barrister of some fifteen or twenty years’ standing finds, that by the caprice of fortune his merits have remained undiscovered by the world at large [...] his friends in the City get fonder of his company; if, as his business decreases, they who have a place of 1500L a year at their disposal, warm into admiration of his powers; if that place is a judicial one [...] and, if his friends should offer it to him, why should he not accept it? why, then, should not a worn-out barrister make a spick-and-span new judge?\textsuperscript{436}

Alcohol and tiredness from long sittings appear not to have helped, both contributing to an occasional atmosphere of lassitude and fractiousness There were twice daily meals, funded by the Sheriffs, one at three o’clock, attended by counsel and the judges and aldermen ahead of the evening sittings and a second at five o’clock for those coming off duty. Evening sittings were not abolished until 1844. Typically, steak and marrow-puddings were

\textsuperscript{435} ‘Old Bailey Experience, 10 Law Magazine, (November 1833), pp. 259-95 (p.277).
accompanied by plentiful port and sherry. Charles Ewan Law, Recorder of London between 1835 and 1850 was described as ‘dignified in manner before dinner always’. The remarks of Judge Arabin, who sat between 1830 to 1839, ‘had either the distinct whiff of alcohol about them, or signs of a more deep seated confusion’. Inebriation could sometimes infect all aspects of the proceedings:

[T]he dinners were good, the wines abundant, and the results visible at the evening sittings [...] and living men have seen a judge [...] descend the stairs, holding fast by the banister, not in wantonness of care, afterwards trying prisoners, when unable to read the depositions accurately, or to understand the witnesses answers yet getting through the work from memory and habit. The witnesses, who had been waiting all day in the Old Bailey public houses, were often very drunk.[...] Quarrels of the most discreditable order might be expected from a court so composed. It is better not to attempt a description of the rows. Those who have been present at them will remember; those who have not would disbelieve’.

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439 Lewis, pp. 22-27.
As the *Monthly Law Magazine* delicately put it in 1838: ‘There is a suspicion [...] – for everything done within the walls of the courthouse is known and discussed outside of it – that the judges and counsel have, to use a mild term, dined’. 441

Meanwhile, there were constant complaints about dubious practices in the distribution of briefs. A persistent problem with leading counsel was the acceptance of multiple briefs and brief fees when they were unlikely to be available, leaving juniors to appear in their absence. Leaders would sometimes arrive suddenly to take over cases with little idea of what had preceded their arrival. 442 Prior to the twentieth century introduction of legal aid, remuneration for a barrister was deemed to be an *honorarium* – a form of non-contractual and non-refundable reward which Coke and Blackstone had dignified by analogy with the Roman *patroni* who supposedly acted without expectation of payment. 443 According to barristerial mythology, the symbolic cloth purse which still hangs at the back of a junior’s gown is so positioned so that the barrister will be unaware of the ‘reward’ unobtrusively placed there. The non-return of the money when counsel did not appear caused obvious resentment. In 1845 *Punch’s* list of ‘What a Barrister May Do, and What He May Not Do’ included; ‘A Barrister may take a fee when he knows he cannot attend to the cause but he may not return the money, for his doing so would be very unprofessional’. 444 In 1846, *Lloyd’s Weekly Newspaper*, one of the foremost working-class Sundays, even demanded legislation: ‘A

441 ‘On the Administration of the Central Criminal Court’, p.313.
444 9 *Punch* (1845), p.113.
barrister may take his client's fee, and then absent himself from the trial of the cause; or he may advise a certain course, and then, at the last moment, abandon it, without apparent reason, and refuse to assign a reason, if asked for one. And all this he may do with the most perfect impunity, and maintaining his place as "a bright ornament of the English bar!" In 1858, a solicitor correspondent to the Solicitors' Journal unsurprisingly 'found much difficulty' in explaining to a client who wanted his cash back that 'he was an unreasonable man to expect such a thing'. In 1863 Reynolds's Weekly Newspaper, was still complaining about 'the disgraceful practice of barristers undertaking the cause of a client, pocketing heavy fees, and when the hearing comes on absenting themselves entirely'. The same year, the Solicitors Journal published extracts from a pamphlet written by the radical, George Lefevre. He made allowances for the pressures of work and uncertainties of listing but concluded that 'one such case does more injury to the reputation of the Bar than years of devotion from the great body of the Bar, and gives rise to a complaint that desire for gain rather than a sense of duty are its characteristics'.

There were other ways in which clients were disadvantaged. '[T]here was a strong suspicion that beneath the level of a few outstanding advocates [...] work was distributed to those with influence rather than ability'. An underworld of patronage flourished which caused the Law Times to claim that 'the world knows, and long has known, that “An Old Bailey practitioner” is a by-word for disgrace and infamy [...] Are there not a few agents with no pretence to the title of attorneys, who pilfer the prisoners, and select the counsel most

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447 Reynolds’s Weekly Newspaper, 4 January, 1863, p.5.
pleasing to themselves? Are not prisoners’ briefs received without attorneys? We doubt not that some members of that Bar could be found willing to give the fullest information upon the subject; men who have unwillingly followed in the stream, because they found it hopeless to resist it’. ⁴⁵⁰

From 1841 onwards, Punch Magazine was a conspicuous baiter of the contemporary Bar. The following is taken from a typical satire in which it purported to cover an ‘interesting’ paper read by a fictional ‘Professor Plodder’ to a meeting of a ‘medico-legal society’ entitled ‘The Anatomical Peculiarities of the Barrister’s Tongue’:

The extreme muscular power of the Barrister’s tongue, he said, was such as to enable it to say anything, and, in corroboration of this statement cited several falsehoods [...] which he conceived impossible for any other human being to utter [...] The Simulator and Dissimulator muscles, which enabled the barrister to feign what he did not feel, and to dissemble what he felt according to the exigencies of the case. The Suppressor Veri muscle by means of which he could insinuate a fallacy, when necessary, into the minds of Jurymen. The Minax, or bullying muscle, which served for intimidating witnesses. The Pertubator or bothering muscle so as to make them swear to what was untrue. The Patheticus Linguae used in making claptrap appeals to British juries. The Detractor

muscle, whose function was to vilify the character of an opponent’s client.\textsuperscript{451}

Notwithstanding this litany of barbed irreverence, the Bar did have some powerful apologists - notably, Sir James Fitzjames Stephens, commentator and theorist, publisher of the Saturday Review and the Pall Mall Gazette and subsequently High Court judge, who argued in 1861 that critics overlooked ‘the existence of a whole system of professional morality [enforced] not only by the authority of the judges, but by both the good and bad qualities of the bar, by professional honour and esprit de corps but by personal rivalry and even jealousy on the other’ He believed that this was effective in preventing attempts to ‘attack private character without explicit instructions that the imputations made are true [or] to attempt to confuse and bewilder a witness by brutal manner or insolent questions.’\textsuperscript{452} In reality and in the face of pressing public concern at the criminal Bar’s degeneracy and the inexactitude of its expectations of standards of professional ‘etiquette’. the governance of the Bar was ill-equipped to engage with the proprieties of barristers’ dealings with clients, solicitors and each other.

Bar Messes

The preferred, and only, internal arbiter of proper conduct was peer pressure as personified by the messes of the six regional circuits. Each of these had its own character with older members acting as the custodians of their respective traditions. Some circuits delegated discipline to their ‘wine committees’ as these necessarily met regularly. In that way

\textsuperscript{451} ‘The Anatomy of the Barrister’s Tongue’, Punch (1845) p.238.

they ‘sought to be private clubs exercising public functions’. The *Law Magazine* characterised circuit discipline as ‘a region quite unknown to the general public, and therefore disturbed by no external influences’. That, of course, was the point. For the *Law Journal* the circuits’ ‘power of punishment [was] too restricted to be of efficacy as against a perseverance in wrong-doing. The truth is that the rules of the Bar, which are admitted to be of a very fluctuating and uncertain character, are obeyed rather from spontaneous consent and general faith in their wisdom and virtue than because they can be enforced by any superior power’. In a detailed analysis of the extent and enforceability of circuit conventions in the 1860s, the famous jurist, Dicey, concluded that the rules were ‘so uncertain and indefinite […] it is almost impossible that any one should be punished for their breach’.

Many felt that one of the principal reasons for the misbehaviour of the Old Bailey Bar, in particular, was that it was not subject to even the degree of control exercised by the Circuits. The *Legal Observer*, read mainly by solicitors and attorneys, spelt out the difference with the Circuits whose messes kept ‘some sort of surveillance as to what occurs on the particular circuit to which it belongs. But in London there is no such superintendence. The Inns of Court are utterly useless for this purpose. There is no bar club now extant, and all [misdeeds] may be committed with impunity’. The *Law Magazine* agreed:

> The Old Bailey never was under the discipline of a bar mess. At it every man did what seemed good or profitable in his own eyes. Nothing short of being disbarred

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prevented his being heard, and there was no punishment for obtaining business irregularly, except professional disapprobation. In such a state of anarchy it might be expected that some dishonourable practitioners would spring up, it is much to the honour of the English bar that they were so few.\footnote{Mr Adolphus and his Contemporaries at the Old Bailey’, 4(1) n.s. Law Magazine or Quarterly Review of Jurisprudence (1846) p.54.}

In 1843 the \textit{Law Times} optimistically, but wrongly, predicted the imminent formation of a Mess:

The fact is indisputable that the name of an Old Bailey Lawyer is so unenviable, that minds of the best class are averse from incurring the \textit{possibility} of having such a title affixed to them, and they shun the tribunal where their abilities might be most worthily employed [...] I have heard that the first step towards the removal of this reproach has been taken, in the establishment of a Bar Mess, to which those only will be admitted who sternly resist whatever, in old customs of the Court and habits of its Bar [...] Their purpose it will be to improve the \textit{tone} of advocacy there; to cultivate the same gentlemanly bearing between Counsel that prevails at other Bars; and, above all, by resolute adherence to the rule that forbids the acceptance of a brief from those pests that prowl about the purlieus of the prisons, composed of lawyers
uncertificated or that have been struck off the rolls [...] nothing is required which might not be fearlessly undertaken and successfully accomplished by a few resolute men combining to resist conduct elsewhere deemed professionally discreditable,... For awhile they will perhaps be subjected to the mortification of seeing less scrupulous rivals seemingly more flourishing. But let them not lose heart in the good cause they have undertaken; having put the hand to the plough, let them not turn away, or so much as look behind. Onward, and their ultimate reward is certain.\textsuperscript{459}

The following year, the journal reported that Old Bailey and Middlesex Sessions practitioners had met and, ‘after a lengthy discussion’ appointed a committee to enquire into ‘the state of the practice in these courts’ and the desirability of a mess – ‘but some difference of opinion exists on this subject’.\textsuperscript{460} The contrary views must have prevailed as the creation of the Mess had to wait a further 47 years until 1891.\textsuperscript{461}

Meanwhile, despite hopes for change, the Old Bailey’s poor reputation persisted. As late as 1871, the \textit{Law Times} was demanding that the Inns intervene to prevent the behaviour of ‘the blackguards of the Bar’, who undercut established brief fees in order to obtain bulk work from ‘unqualified practitioners’ and ‘the lowest class of attorneys’, thus striking ‘at the very root of all legal prosperity’.\textsuperscript{462} In 1872 the \textit{Law Magazine} was still characterising the Old Bailey, ‘the Bohemia of the Bar’, as ‘the place of easy professional virtue’: ‘Had a man's

\textsuperscript{459} Original italics; ‘The Central Criminal Court’, 2 \textit{Law Times}, (1 October 1843) 46.
\textsuperscript{461} May, p.242,
\textsuperscript{462} ‘Malpractices at the Bar’, 51 \textit{Law Times}, (2 September 1871), p.327.
reputation become clouded, the Old Bailey was still open to him. Had he been expelled from a circuit mess, or had his budding professional career given such promise of ignoble fame that his fellows on circuit deemed it expedient not to allow him to join such mess, there was always believed to be one spot where no questions would be asked, and where a not too great scrupulousness of conscience was an advantage’. Readers were reminded of Trollope’s ‘Counsellor Chaffenbrass’, in *Orley Farm* and of the benefits of circuit messes:

He practises the whole of the Bailey arts, the browbeating of witnesses, the throwing the jury off the scent, the suppression of the truth, the suggestion of the false. He has no objection to putting a question to a witness which may injure him for life, which contains a suggestion that he knows to be unfounded, provided that such question or suggestion will damage the witness in the eyes of the jury.

He glows with indignation at the thought of the conspiracy which has been hatched against his client. [...] All who know the Old Bailey, know that men of the stamp described by Mr. Trollope still exist. But there is a lower class still, with which both the public and the profession are now pretty well acquainted [...] These men do not dine together. They meet together as strangers, and separate as strangers. The circuit mess, with its purely informal constitution, its voluntary organization, is yet, as every barrister knows, a powerful safeguard against the malpractices of any on circuit. Nothing corresponding to it
exists in London, nor, if it did, would it probably be of much use.\textsuperscript{463}

\textbf{Charles Phillips and R v Courvoisier}

Within four years of the passing of the 1836 Act the predictions that counsel would abuse their new speechmaking ‘licence’ appeared to be confirmed by the content of Charles Phillips’ closing speech in the trial of Francois Courvoisier for the murder of Lord Russell.\textsuperscript{464} This case, more than any other, inflamed discussion of the morality of defence advocacy and was invariably resurrected whenever the issue subsequently arose. The defendant had admitted his guilt to Phillips on the second day of the trial and the controversy principally revolved around the fact that, notwithstanding that knowledge, Phillips had not only continued to act but appeared to suggest that a prosecution witness, a female servant, Sarah Mancer, was the person responsible. Phillips was alleged to have compounded his impropriety by claiming that no one but god knew if Courvoisier was guilty or not. The intensely negative publicity around this case, and others which followed in that decade, amounted to far more than personalised criticism of the excesses of individual barristers. Many critics argued that the \textit{Courvoisier} case was merely an example, albeit extreme, of the depths to which the criminal Bar in general and Old Bailey practitioners, in particular, had descended. One conclusion of the present study is that, while the excesses of the 1840s represented a reputational nadir for the Bar, they paradoxically provided the starting point and impetus for the professional transformation which was to follow.

Phillips had been admitted to the Irish Bar in 1812. He was a rapid success in seduction and breach of promise cases to which his ‘florid oratory, fiery denunciation and


\textsuperscript{464} R v Francois Courvoisier, (unrep.), Central Criminal Court, 18-20 June 1840.
pathetic description’ were well-suited - so much so that he felt able to publish a collection of his speeches after only six years. Called to the English bar in 1821, he was not initially successful with English juries, being regarded as ‘too rich in description and imagery’ for their taste. Some of his colleagues named him ‘Councillor O’Garnish’. In particular, his extravagance did not impress the leading advocate of the day, Henry (later Lord) Brougham. When they opposed each other in 1823 in a seduction case, Brougham belittled Phillips, describing his speech as ‘horticultural’. Not someone to upset, Brougham was by then a significant figure in the legal and political world. A vocal supporter of the abolition of slavery, electoral reform and free trade, his great forensic triumph three years earlier had been his closing speech before the House of Lords defending Queen Caroline, when her husband, George IV, was seeking an annulment of the royal marriage on the grounds of her infidelities. He burnished his public reputation with a six-hour speech in the House of Commons on 28th February 1828 on ‘The Present State of the Law’. As Lord Chancellor between 1830 and 1834, he attempted significant legal improvements. His personality and his efforts to achieve reform of legal education are discussed further in Chapter Seven.

Brougham and Phillips later became friends and correspondents but it is said that, as a result of Brougham’s initial put-down, Phillips’ reputation as a civil advocate never recovered and he was forced to develop the criminal practice where his style made him highly successful. Another contemporary claimed that Phillips’ success at the Old Bailey had deprived him of ‘a decent income’ from the point when ‘that Irish blackguard, with his

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467 Cairns, p.101.
Edward Rees (Ph. D. Thesis)

plausible brogue and slimy manner, deluded people into trusting him’.\textsuperscript{468} Adolphus, his opponent in \textit{Courvoisier}, was said to have told him: ‘You remind me of three B’s – Blarney, Bully and Bluster’, to which Phillips retorted: ‘You never complained of my B’s until they began to suck your honey’.\textsuperscript{469} According to Cairns, ‘He had a grand style, explosive in pace and overflowing in superlatives, metaphor, and vivid expression, though he lacked the tact of a first-class advocate’.\textsuperscript{470} The autobiography of Serjeant Ballantine, a leading contemporary, described him as:

[S]ignally the prisoners’ counsel at the Old Bailey, the Middlesex sessions, and also upon the Oxford circuit. In this capacity he was certainly at that time unrivalled. He had great readiness, a power of repartee, earnestness when it was required; and whatever deficiency he may have shown in his earlier career, he had acquired a very sound judgment. He was never dull and the juries liked him.\textsuperscript{471}

It is important to note, however, that in the 1840s shallow popularity with some sections of the public was no guarantee of universal respect. It is true that in 1816, 24 years before the controversy over his conduct in the case of \textit{Courvoisier}, a passage in a speech that Phillips made in an adultery case on behalf of the abandoned male spouse was spontaneously applauded.\textsuperscript{472} This kind of approbation did not prevent the \textit{Law Magazine Quarterly} from

\textsuperscript{468} Serjeant Robinson, \textit{Bench and Bar}, (2\textsuperscript{nd} Ed.), (London: Hurst and Blackett, 1889), p.67.
\textsuperscript{469} William Ballantine, \textit{Some Experiences of a Barrister’s Life}, (6\textsuperscript{th} Edn.), (London: Bentley and Son, 1898), p.58.
\textsuperscript{471} Ballantine, p.87.
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quoting an anonymous article in the *Edinburgh Review* in 1830, thought to be the work of Brougham, entitled ‘Irish Eloquence’ which castigated Phillip’s style:

> Its characteristics are great force of imagination, without any regularity or restraint; great copiousness of language, with little selection or propriety; vehemence of sentiment, often out of place; warmth of feeling, generally overdone; a frequent substitution of jingling words for ideas; and such a defect in skill [...] as may be supposed to result from the intemperate love of luxuriant declamation.\(^{473}\)

It has already been noted that Phillips had opposed the Prisoners’ Counsel Act and it suited him to suggest disingenuously in his speech in *Courvoisier* that the Act had made ‘a court of criminal jurisdiction the arena of angry passions, and to place the life of a fellow-creature in peril or in safety, just in proportion to the skill and talent of his advocate’. The incident which triggered this particular complaint, made at some length by Phillips, was that Adolphus, the prosecution counsel, had appealed to ‘passion and prejudice’, by suggesting in his own speech that foreigners such as Courvoisier, a Swiss citizen, ‘always murdered when they rob’.\(^{474}\) In fairness, Phillip’s complaint was well-founded. Adolphus’ xenophobia was real. According to the *Law Magazine*, he was a devoted Tory and ‘hated all Frenchmen, all Irishmen, all papists, and all dissenters’.\(^{475}\) Adolphus was described by Ballantine as ‘nearly a great man, and but for an unfortunate temper would probably have risen to the highest

\(^{473}\) ‘Eloquence of the Irish Bar’; 3 *Law Magazine Quarterly Review*, (1830), 305.

\(^{474}\) The full text of Phillips’ speech, as reported in *The Times*, *22 June 1840*, is set out in Cairns, Appendix 3, pp.186-200.

\(^{475}\) ‘Mr Adolphus and his Contemporaries at the Old Bailey’, 4(1) n.s. *Law Magazine or Quarterly Review of Jurisprudence* (1846) p.54.
honours of the profession. This is confirmed by his obituary in The Law Magazine: ‘His uncompromising spirit and impetuous temper led him into the use of language which was too severe not to wound, and too clever to be forgotten [...]. His defect was insufficient command of temper. A little rudeness provoked him, and in the Old Bailey and its dependencies he was sure to meet with much. When attacked, he retaliated with a good will and vigour which often exceeded the bounds of propriety, but in the many altercations in which he was engaged, he was seldom, if ever, the aggressor’.  

One of the features of Courvoisier and later cases which now appears remarkable to modern sensibilities is the fact that individual barristers’ personal behaviour was laid before the public for critical judgment in the pages of leading newspapers. In the example of Phillips, his popular appeal was to disintegrate with the criticism of his defence in Courvoisier. Two years after the trial, he took an appointment as a commissioner of the bankruptcy court at Liverpool. In 1846 he returned to London as a commissioner of the insolvent debtors' court thus accepting a lower income and status.

The Courvoisier Trial

The trial lasted three days between 18th and 20th June 1840. Courvoisier, a valet, was charged with the murder of his employer, Lord William Russell. Phillips was instructed by the highly respected attorney, James Harmer, who had dominated defence work in London since 1800. Serjeant Ballantine described Harmer as ‘gifted with great shrewdness [with an] immense reputation’. A longstanding supporter of legal reform, Harmer’s evidence to the

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476 Ballantine, p.57.
477 ‘Mr Adolphus and his Contemporaries at the Old Bailey’, op.cit. p.65.
478 May, p.80.
1834 Commission was ‘unequalled’ according to Sir James Mackintosh, a supporter of the 1836 Act. In 1834 Harmer was sheriff of London and Middlesex. In the year of the trial he resigned his aldermanship when his election to the mayoralty was opposed because he was proprietor of the Weekly Dispatch, which then advocated ‘very advanced’ liberal and independent religious and political views.\(^{479}\) This biographical detail is provided here to show that Harmer was a highly experienced practitioner and, in fairness to Phillips, it can be assumed that he would have discussed Courvoisier’s confession with Harmer before continuing as he did.

The aristocratic status of the victim ensured considerable fashionable interest. Nobility attending the trial included a royal duke, five earls and the Dutch and Portuguese ambassadors. The Duke of Sussex, a friend of Adolphus, apparently cried ‘Hear! Hear!’ at one point.\(^{480}\) According to Ballantine:

> The occasion might, from the appearance the Old Bailey presented, have been thought one of the most festive character. The court was crowded with ladies dressed up to the eyes, and furnished with lorgnettes, fans and bouquets; the sheriffs and under-sheriffs, excited and perspiring, were rushing here and there, offering them what they deemed to be delicate attentions. […] The extensive [female] draperies left the Chief Justice with scarcely room to move.\(^{481}\)


\(^{481}\) Ballantine, p.61.
The allegation was that Courvoisier had stabbed Lord Russell in his sleep and that, at some point before this, he had stolen silverware. Initially, the prosecution case consisted of the evidence of a housemaid, Sarah Mancer, who discovered the body in bed before fetching Courvoisier. Following Courvoisier’s arrest, the police searched his belongings including a box and found nothing incriminating. However, on a subsequent search a few days later, bloodstained handkerchiefs were found in the box. It now seems more than likely that these had been planted by the police. May, for example, believed the evidence was ‘clearly fabricated’. A police inspector, the first officer to search, swore that he would have seen the items if they had been in the box. In his own speech Adolphus finessed the glaring discrepancy. He said that he did not rely on anything found in the box. He felt that he was speaking to ‘men who heard and read what was published to the world … he attributed no weight to it’. According to The Times, the judge went further in summing-up. Referring to one officer, he said he gave his evidence ‘in such a way that it would be dangerous in such a serious enquiry as this to give any credit to it’.

Matters took a decisive turn at the start of the second day when the prosecution suddenly informed the defence that they were to call a new witness, a Mrs Piolaine, the landlady of a lodging house. She was to say that a package which was found to contain silverware belonging to the deceased had been left with her by a man a few days before the murder. She identified Courvoisier. It was the prospect of this evidence which prompted Courvoisier’s confession to Phillips to which he supposedly added: ‘I expect you to defend me to the utmost’. There are differing accounts of what Courvoisier actually told him. All agree that, on learning of the evidence, Courvoisier sent for Phillips. According to the

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482 May, p.24.
484 The Times, 22 June, 1840, p.6.
memoirs of Serjeant Ballantine, who encountered ‘a much agitated’ Phillips that morning in the robing room, Courvoisier had ‘admitted the correctness of the statement as to the discovery [but] he did not, as was generally supposed and asserted at the time, avow that he had committed the murder, though doubtless what he did own was very stringent evidence of the fact and the communication was certainly made, not for the purpose of admitting his guilt, but merely to prepare his counsel to deal with the evidence’. 485 The implication is that the source of Ballantine’s account was Phillips himself but this seems implausible. Thomas Seccombe described Ballantine’s memoirs as ‘an uncritical farrago of newspaper and club gossip’. 486 Further, as far as the present writer can discover, Ballantine’s recollection did not appear in print until the first edition of his memoirs in 1882. Melinkoff has suggested that it was ‘based almost entirely on a jumbled interpretation of an ambiguous recollection of Mr Serjeant Ballantine almost half a century after the event, and is not consistent with allusions to the confession in the press or with other contemporary accounts’. 487 As an example, Melinkoff cites a letter from the prosecution solicitor to the Metropolitan Police Commissioners written immediately after the verdict: ‘I am well pleased to hear from Mr P’s own lips that yesterday, the Prisoner, after he had seen my female witness, Mrs Piolaine yesterday morning, confessed to Mr P & Clarkson [his junior ] that he did the murder’. 488 Finally, what appears to have been overlooked in the various commentaries on the case is that, two days after the trial, The Morning Chronicle published an almost verbatim account of the confession by Courvoisier to

485 Ballantine, p.57.
487 Melinkoff, p.131.
488 Letter: Hobler to The Commissioners of the Metropolitan Police, 20 June 1840, cited in Melinkoff, p.131.
Phillips in which he had admitted the murder in detail.\textsuperscript{489} Nine years later in 1849 \textit{The Times} published a letter from Phillips’ friend and apologist, Samuel Warren, defending Phillips’ conduct and apparently written with his concurrence (see further below). This stated that Courvoisier had plainly admitted murder.

Warren’s 1849 letter to \textit{The Times} also revealed that, prior to his speech, Phillips had sought the advice of Baron Parke, a judge who was present during the trial alongside the trial judge, Chief Justice Tindal, but took no part. Understandably, Parke was ‘much annoyed’ at having been drawn into the intimacies of Courvoisier’s case for advice.\textsuperscript{490} Ballantine’s memoirs also excoriated Phillips for involving the judge:

This conduct placed the judge in a most painful position,
and was grievously unjust to the accused [...] I happen to know that the judge said he must go on with the defence [...] If he gave any advice at all, this was the only advice he could give and ought to have been patent to the enquirer; and certainly no censure can be too severe upon the conduct of Phillips, who, when assailed for his management of the case, violated the confidence that his interview with Baron Parke demanded, and endeavoured to excuse himself by saying he had acted under that learned judge’s advice.

All of this begs further unanswered questions of how a private confession became so public that it could be reported in the press. Most inexplicably, if this was Phillips’ own doing, why did he do so? And why did he feel able to breach the legal privilege that absolutely protects

\textsuperscript{489} \textit{Morning Chronicle}, 22 June 1840, p.3.
\textsuperscript{490} Serjeant Robinson, \textit{Bench and Bar}, (3\textsuperscript{rd} Edn.), (London: Hurst and Blackett, 1891), p.61.
communications between client and counsel by revealing his instructions to Ballantine, to the prosecution solicitor, of all people, and to Baron Parke? The way in which the confession rapidly reached the press is not known. *The Times* simply stated that, following the verdict, ‘a report was circulated that the prisoner had confessed to the murder, and upon inquiry we find that the rumour was correct.’

Courvoisier confirmed his guilt of murder in two later prison confessions. The first was made to a Sheriff of the City. The second and most detailed was made to the Governor of Newgate Prison on 22nd June 1840. He admitted taking the silverware to Mrs Piolaine, intending to steal more items on another day. On the evening of the killing, Lord Russell sacked him as a result of shortcomings in his service. Courvoisier stated: ‘I thought it was the only way I could cover my faults was by murdering him. This was the first moment of any idea of the sort entering into my head’. He said he took a knife upstairs to the bedroom where he stabbed the sleeping Lord Russell. He then took and hid various items. He made marks on an outside door to simulate a forced entry. He denied placing the bloodstained handkerchiefs in the box. They were kept in a drawer and the blood probably came from a nosebleed. He exonerated Sarah Mancer.

**The Speech**

There are no records of the speech other than press reports. The version printed in *The Times* of 22nd June 1840 is said to have been preferred by Phillips himself and the victim’s family. The point which underlay all of the various criticisms of the speech was that, in the knowledge of his client’s confession of guilt, Phillips had made positive submissions to the contrary.

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491 *The Times*, 22 June, 1840, p.6
492 *Morning Herald*, 26 June, 1840, p.6.
493 Cairns, p.186.
The basic modern rule is that counsel must not knowingly or recklessly mislead the court. According to the most recent Code of Conduct, where the client has privately confessed, ‘you would not be misleading the court if, after your client had entered a plea of “not guilty”, you were to test in cross-examination the reliability of the evidence of the prosecution witnesses and then address the jury to the effect that the prosecution had not succeeded in making them sure of your client’s guilt’. This is known as ‘putting the prosecution to proof’. However, ‘you would be misleading the court [...] if you were to set up a positive case inconsistent with the confession, as for example by: (1) suggesting to prosecution witnesses, calling your client or your witnesses to show; or submitting to the jury, that your client did not commit the crime; or (2) suggesting that someone else had done so’. It would appear from some of the contemporary criticisms that a form of these principles could also have applied in the 1840s.

The first criticism of Phillips was that he had, according to The Times report, asserted that ‘[T]he omniscient God alone knew who did this crime’ whereas, in fact, Phillips himself, his junior, his solicitor and, presumably, Baron Parke all shared God’s knowledge. The best alternative record of the speech in the Morning Herald reported in similar terms: ‘The God above knows who is guilty of the terrible act of which the prisoner stands accused’. Later in The Times’ report of the speech, when inviting the jury to convict of robbery as an alternative to murder, Phillips was reported as saying, ‘even supposing him guilty of the murder, which indeed was known to Almighty God alone, and of which for the sake of his eternal soul, he (Mr Phillips) hoped he was innocent’. The Morning Herald’s version was that he said it would be far better if Courvoisier was convicted only of robbery ‘than that he

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495 Morning Herald, 20 June 1840, p.6.
should be guilty of the foul crime of murder, which, for the sake of his eternal soul, I hope he is not.’ The Courier even quoted him as saying: ‘From my soul, I believe Courvoisier innocent of the crime [...] The omniscient God alone knows who’s guilty and I cannot throw a shred of light upon the terrible deed of darkness’. An entirely different version appeared in 1850 in William Townsend Q.C.’s Modern State Trials with Essays and Notes which excused Phillips’ conduct in its entirety. Portraying Phillips as one ‘who has embellished both the Irish and English bar by his oratory’, Townsend quoted a purportedly verbatim account provided by a ‘Mr. Fortescue’, a barrister who heard the speech:

But you will say to me, if the prisoner did it not, who did it? I answer, ask the Omniscient Being above us who did it; ask not me, a poor finite creature like yourselves; ask the prosecutor who did it. It is for him to tell you who did it; it is not for me to tell you who did it; and until he shall have proved, by the clearest evidence, that it was the prisoner at the bar, beware how you embrue your hands in the blood of that young man, - violate the living temple that the Lord himself hath made, - and quench the spirit in that clay which the breath of the Lord hath kindled.

But the most telling public outrage focused upon Phillips’ treatment of the servant, Sarah Mancer, who had been with Courvoisier when the body was discovered:

Here he would beg the jury not to suppose for a moment in the course of the narrative with which he must trouble them, that he sought to cast the crime upon either of the

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496 Courier, 22 June 1840.
female servants. It was not at all necessary to his case to
do so; he wished not to asperse them. God forbid that any
breath of his should send tainted into the world persons
perhaps depending for their subsistence upon their
character. It was not his duty, nor his interest, nor his
policy, to do so.

He then went on to do exactly that. He queried why she should have been suspicious
from the outset and he dwelt on the difference between her evidence at trial that she first saw
‘a speck of blood’ and that before the coroner when she said she saw ‘his lordship murdered’.
He excoriated the police over the manner of Courvoisier’s interrogation and the finding of the
handkerchiefs which he suggested had been planted in pursuance of a conspiracy to obtain a
reward – ‘the blood money’. He attacked the character of Mrs Piolaine and the introduction
of ‘last minute’ evidence.

By All Expedient Means

‘One of the reasons why the case occupies such a significant position in the overall
narrative is that it became the principal focus of a debate around the proper application of the
expression ‘by all expedient means’. A concluding theme of the present thesis is that the
parameters of modern professional conduct were literally defined by an historical process of
‘trial and error’ which began in the 1840s and ultimately rejected ‘by all expedient means’ as
a permissible measure of propriety.

The phrase is believed to have been taken from Henry Brougham’s speech in defence
of Queen Caroline in 1820:

An advocate, by the sacred duty which he owes his client,
knows in the discharge of that office but one person in the
world, that client and none other. To save the client by all expedient means, to protect the client at all hazards and cost to all others, and among others himself, is the highest and most unquestioned of his duties. He must not regard the alarm, the suffering, the torment, the destruction which he may bring upon any other’. 498

It might be remarked that, without further illustration of what amounts to ‘all expedient means’, the term is fairly meaningless. Langbein has suggested that Brougham’s ‘self-serving prattle became window dressing for a truth-be-damned standard of defensive representation that served the economic self-interest of the Bar’. 499 Certainly, it never featured as a central component of the debates on the Prisoners Counsel Bills and, as Cairns has pointed out, an understanding of the context in which Brougham used the phrase is important to its meaning. Queen Caroline’s case obviously reflected a serious conflict between the monarch and his queen and its constitutional ramifications justified ‘majestic eloquence and defiance’. 500 Years later, Brougham explained the true political significance of the speech: It ‘was anything rather than a deliberate and well-considered opinion. [It] was a menace, and it was addressed chiefly to George IV, but also to wiser men, such as Castlereagh and Wellington’. 501 In other words, it was a veiled threat to the government of the day to embarrass George IV and challenge his legitimacy with exposure of his clandestine marriage to a catholic. Be that as it may, whatever he meant by the phrase, he appears not to have shied away from volunteering his personal opinion of the Queen’s innocence: ‘It is not the magnitude of this case that oppresses me; with that I am borne up,

498 The Times, 5 October 1820, p.4.
499 Langbein, p.309.
500 Cairns, p.139.
and cheered by the conviction of its justice which I share with all mankind [...] I, knowing
here there is no guiltiness to conceal.’

An article in the *Law Quarterly Review*, written nearly eighty years later, cited a
speech which Brougham made in 1864 as evidence that, in fact, he had held ‘wider views of
an advocate’s duty than generally obtain in the profession’. Brougham was speaking at a
dinner in Middle Temple Hall held in honour of a distinguished French advocate. He
compared him to Thomas Erskine, noting that they shared ‘that indomitable courage, which,
in the interests of their clients, quailed neither before kings, nor courts, nor judges. In both
was observed the first great quality of an advocate, to reckon everything subordinate to the
interests of his client.’ According to the *Law Times*’ report, these words were greeted with
‘Hear, hear’ but they also provoked a correction by Lord Cockburn, the Lord Chief Justice of
the day, who stated that an advocate should ‘strive to accomplish the interest of his clients
*per fas*, but not *per nefas* [sic: through right not wrong]; it is his duty, to the utmost of his
power, to seek to reconcile the interests he is bound to maintain, and the duty it is incumbent
upon him to discharge; with the eternal and immutable interests of truth and justice.’

Contemporary differences as to the limits of propriety may be more understandable
when it is remembered that, as late as 1836, there was considerable confusion in professional
circles. Propositions which would be entirely unacceptable today were not uncommon. For
example, the 1834 Second Report of the Royal Commission on Criminal Procedure
concluded that ‘[It] is the duty of the Advocate *by the most strenuous exertion of his powers,
to urge his own view of the case*, and by force of argument to compel the Jury to adopt it’.

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502 Henry Brougham, *Selections from the Speeches and Writings of Henry Lord Brougham
504 *Second Report*, p.8; Italics inserted.
The obvious flaw in this approach may be shortly stated: counsel’s private opinion of the
strength of the case is not evidence, is irrelevant and has no probative worth. Conversely, in
the 1836 Lords’ debates, three of the main reformers, Lords Lyndhurst, Abinger and
Denman, appear to have believed that, ‘in cases where the prisoner's guilt was clearly proved,
no counsel of the least discretion would think of addressing the jury to assert his
innocence’. 505 For Lyndhurst, this flatly contradicted what he had said in the 1820s when, as
Sir John Copley, Tory attorney-general, he had opposed reform. 506 He had then suggested
that, if the prisoner's counsel ‘did not speak, he would by his silence pronounce a verdict of
guilty’. Defendants and attorneys would soon avoid scrupulous counsel and instruct the less
fastidious. 507 A witness before the Commission opined that ‘[T]here would be no want of
volunteers’. 508 In fairness, one should also acknowledge that there was no uniform code of
conduct stipulating ‘how far a barrister ought to avow or conceal his opinion of his client's
cause in arguing it before judge or jury’ as the Legal Observer put it in 1837. It continued:

Many young men at first going to the bar, perceiving how
much it helps them in obtaining a favourable decision, if
they appear to be fully convinced of the justice of their
client's cause [...] have fallen into what appears to be [...] a
very grave error. They have been led to affirm in an open
court [...] that they firmly and conscientiously believe in
the justice of their client's cause: and yet all the while,
these same men, coming out of court, will say they never

505 (1836) 35 P. D. 183; (1826) 15 P. D. 624.
506 Gareth Jones, ‘Copley, John Singleton, Baron Lyndhurst’, (1772–1863’), ODNB,
507 (1824) 11 P. D. 207.
508 Evidence of Serjeant Spankie, Second Report, App. 2.
saw such a bad case as their client’s [...] These gentlemen do not see the consequences to which this conduct tends, and the world itself is generally apt to look at such deceit with a lenient eye, as being only a necessary part of the profession of a lawyer. But I am disposed severely to reprobate such conduct [...] Because it offers occasion for an unmerited and shameful opprobrium to be cast on the profession of an advocate, that he will barter right and wrong for the sake of a paltry fee.\(^{509}\)

The Press and Public Response

Some of Phillips’ most unforgiving critics believed that he should have ‘returned’ his brief immediately following the confession. Thus, one member of the public, having acknowledged Phillips’ ‘forcible and glowing appeals to the passions’, expressed puzzlement, possibly feigned, at Phillips’ conduct in a letter to the *Age*:

> How far more extensive and durable would the sympathy of the nation have been with the zealous integrity of the advocate, had he at once thrown up his brief; and with it the unhallowed fee, by which his services were engaged!\(^{510}\)

The views of the legal journals varied. At one end of the spectrum, the *Jurist* not only rejected the ‘expediency’ principle but even the practice of continuing to act where the barrister merely suspected the client’s guilt. It addressed the generally accepted rule that, in

\(^{509}\) *A Barrister's Advocacy of his Client's Cause*, *Legal Observer*, 15 (1837) 216.

\(^{510}\) *The Age*, 28 June 1840, p.3.
the circumstances, counsel are bound to say all that they may consider ‘necessary and efficient’ for the client’s protection. It continued: ‘But the important question is, how far this rule can be carried consistently with the dictates of morality and sound policy?’ The journal believed that advocacy which considered it a professional duty to ‘guide the jury and court, if possible, to the conclusion that his client is innocent, without reference to whether he is or not, and even without reference to whether he himself believes him so or not [is] a system which is not to be reconciled with sound policy or high morality’. The implication was that any counsel who was personally satisfied of the client’s guilt should refuse or return the brief. However, the article continued: ‘this is a state of things which could never happen unless the evidence against the prisoner, on his own shewing, was so strong as to afford an irresistible inference of his guilt.’\footnote{Jurist, 4 (18 July 1840), p. 593.} This appears to conflate guilt by admission with guilt by inference or, put another way, it confuses knowledge with suspicion. The stentorian conclusion was that ‘if an accused person be really guilty, he has no moral right to any defence [...] How can that [...] be a moral right, if attempted for him by another?’\footnote{Italics inserted.}

The Law Magazine, on the other hand, accepted that there was a professional dividing line between continuing to act for a client known to be guilty and consciously making submissions known to be false. Before offering a glowing estimation of Phillips’ ability and charm coupled with a soaring flight of praise for the Bar in general, the journal gave qualified acceptance of Phillips’ right to continue:

But the duty of the advocate, thus conscious of his client’s guilt, is strictly confined to the detection of defects in the evidence offered to convict him, and the suggestion of such legal difficulties as the most guilty has a right to urge [...] If, therefore, it is true that Mr. Phillips, not only urged,
as we think his duty required, that the circumstantial evidence adduced to prove his client’s guilt was consistent with the possibility of his innocence, but threw out imputations on others, we agree that it was a grievous fault, but trust, as we have been assured, it is altogether untrue.\footnote{Law Magazine, 4 (1) n.s. (1846) p.1.}

The essential problem for Phillips was not that he suspected his client, but that his instructions were that he was, in fact, guilty. That being so, the preferable view is that those parts of the speech which manifestly sought to blame the female servant while simultaneously purporting to disavow any such suggestion, were grossly improper and made all the more so by his disingenuous attempt to walk a fine line between a positive suggestion of her guilt and criticisms of her evidence which could serve no other purpose. There is a suggestion that Phillips was faced with a dilemma compounded firstly by Courvoisier’s supposed instruction to defend him ‘to the utmost’ and then by Baron Parke’s advice, to ‘use all fair arguments arising on the evidence’. As to the first, the limits of propriety are determined by counsel and not set by the client’s expectations. Secondly, while Parke’s remark may have been ambiguous, Phillips was no novice and his thinly-disguised accusation of Sarah Mancer of murder suggests that he knew full well what he was doing.

Initially, press criticism of the speech was muted. The powerful Whig daily, the \textit{Morning Chronicle} actually stated: ‘We must [...] do Mr Phillips the justice to state that with that honourable zeal which always distinguishes him for his clients, he made the best of a very bad cause; and, although surrounded by difficulties, his speech for the prisoner was most energetic and impressive’.\footnote{Morning Chronicle, 22 June 1840, p.3.} Surprisingly, the Tory \textit{Morning Herald} believed he had, in fact,
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abstained ‘from indulging in insinuations […] which he knew at the time he was addressing the jury were altogether without foundation’.\footnote{Morning Herald, 22 June 1840, p.6.}

On the other hand, according to Melinkoff, the general public were appalled.\footnote{Mellinkoff, p.141.} This included Charles Dickens who wrote two scathing letters to the \textit{Morning Chronicle} under the pseudonym, ‘Manlius’. The \textit{Chronicle} had previously employed Dickens and Albany Fonblanque, the editor of the \textit{Examiner} (see further below). In the first letter, published three days after the trial, describing himself as ‘a plain man’, Dickens challenged Phillips’ solemn and frequent appeals ‘to his God on behalf of a man whose hands he knew were reeking with venerable blood, most savagely, barbarously, and inhumanly shed’ and asked whether he was justified in ‘plainly stating that the jury, in finding him guilty, endangered their eternal salvation’.\footnote{Morning Chronicle, 23 June 1840, p.6.} Having regard to the allegation against Sarah Mancer, Dickens declared that he ‘never would stretch out my hand to arrest a murderer, with these pains and penalties before me; and, secondly, that no earthly consideration should induce me to permit my wife or daughter to give evidence at the Old Bailey, if any effort of mine could shield her from such a trial’.\footnote{Ibid.}

The letter led to an immediate and angry response to the \textit{Morning Chronicle} from ‘A Templar’.\footnote{Morning Chronicle, 25 June 1840, p.5.} Cairns has offered the ‘tentative’ speculation that the author may have been Phillips himself, noting ‘stylistic affinities’ with Phillips’ known writings, ‘especially its vivid and emphatic expression’.\footnote{Cairns, p.133, f.18.} It described Dickens’ letter as ‘well calculated to mislead
many well-meaning persons’. It is significant that, if it was the work of Phillips, it was a clear and bullish assertion of the ‘all expedient means’ principle as his principal justification:

   In my opinion, in no case whatsoever would a counsel be justified, merely on account of any knowledge that he may have acquired, or of any suspicion that he may entertain of the prisoner's guilt, in refusing to defend a prisoner, or, having undertaken that defence, in neglecting to exert, to the utmost of his power, all his talents and abilities to procure his acquittal. [...] Though a juryman may be morally certain of the guilt of a prisoner, yet, unless he is convinced that the evidence produced before him is such as not to leave any reasonable doubt of his guilt, he not only is not justified in bringing in a verdict of guilty, but, on the contrary, he would, if he did so, be acting contrary to law-he would be guilty of a violation of his oath, and (in the case of life and death) he would be guilty of the murder of a fellow creature. What is the duty of the prisoner's counsel? I hold that his first duty is to endeavour to procure, by every means in his power, the acquittal of his client; and if he cannot do that, at least to see that he is legally convicted. Though a man be guilty, that is no reason that he should be convicted contrary to law. To warrant a conviction a man must not only be guilty, but his guilt must be legally proved, If that is not done, and yet, nevertheless, the man be convicted, he is as equally murdered as if he were perfectly innocent.\textsuperscript{521}

\textsuperscript{521} \textit{Morning Chronicle}, 25 June 1840, p.5.
The letter echoed Phillips’ evidence before the House of Lords Select Committee on the Prisoner’s Defence Bill in 1835 that it would be ‘treacherous and dishonest’ not to fully pursue any possible exertion even in cases of ‘flagrant guilt’. However, the letter unleashed a storm of rebuke. In his rejoinder on 29th June, Dickens made it plain that his criticism went beyond complaining that Phillips had over-stretched his ‘bounden duty’ to defend his client. His greater concern was the criminal Bar’s behaviour in general:

In cross-examination of all kinds, but especially in the cross-examination of women, counsel do most abominably and shamefully abuse the licence they enjoy: Every man [...] knows that counsel cross-examining a female in a desperate case invariably begins with a reckless assault upon her character; and that when he has bullied her into a state of extreme confusion, and shamed her modesty into tears, he triumphantly calls upon the jury to observe her “equivocation” and embarrassment.

On the previous day, the Examiner had weighed in with a direct allegation against Phillips of conscious dishonesty. Firstly under the editorship of Albany Fonblanque and later under John Forster, the paper became Phillips’ principal scourge from then on. It suggested that, if Phillips’ conduct was consistent with ‘professional morality’, ‘the public will probably be disposed to think that the profession should change its name from the profession of the Law to the profession of the Lie. We should like to know the breadth of the distinction between an accomplice after the fact and an advocate who makes the most unscrupulous

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522 Prisoners’ Defence Bill. Minutes of Evidence taken before the Select Committee of the House of Lords (1836), Lords Papers 119, p.7.
523 Morning Chronicle, 29 June 1840, p.3.
endeavours to procure the acquittal of a man whom he knows to be an assassin’. A fortnight later the paper castigated Phillip’s conduct towards Sarah Mancer:

Our objections to Mr Phillips's defence applied to the points in which he became the assailant or accuser of witnesses whose truth he had no reason to suspect after Courvoisier's confession, and also to his solemn pretences of the murderer's innocence.

The *Morning Chronicle* published a sarcastic contribution from ‘A well-meaning person’ who had supposedly believed that adherence to truth was a professional duty,

[A]nd knew not that the evasions, subterfuges, and efforts to conceal and stifle truth, which would disgrace a gentleman, could, by the mere accident of his having received a fee, become honourable and laudable. In the counsel [...] I thought, too, that no man could be required to forfeit his self-respect but the "Templar" exacts such rigorous self-abnegation from the counsel in favour of his client, that even self-respect is to be abandoned, that he may defend him by "every means in his power.” I should not like to encounter the "Templar" in a duel, lest, should his pistol misfire, regardless of fair play, and using "every means in his power,” he should knock me down with the butt end of it.

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525 *Examiner*, 12 July 1840, p.2.
Punch magazine, which had come into being a year after the trial, weaponised its gift for parody against Phillips. It invented a speech in a fictitious adultery trial as a vehicle for an ad hominem attack on Phillips who appeared as counsel for the deserted wife. It is worth quoting at length simply for its wit:

Mr. Charles Phillips, having successfully struggled with his feelings, rose to address the court for the plaintiff. The learned gentleman said it had been his hard condition as a barrister to see a great deal of human wickedness; but the case which, most reluctantly, he approached that day made him utterly despair of the heart of man. He felt ashamed of his two legs, knowing that the defendant in this case was a biped [.. ]The lady was a native of Switzerland – yes, Switzerland. [...] that he could lead the gentleman of the jury to the Swiss cottage where that gentle Felicite (such was that lady’s name) lisped her early prayer, that he could show them the mountains that had echoed with her songs, that he could conjure up in that court the goats whose lacteal fluid was wont to yield to the pressure of her virgin fingers – the kids that gambolled and made holiday about her – the birds that whistled in her path – the streams that flowed at her feet – the avalanches, with their majestic thunder, that fell about her. Would he could subpoena such witnesses! then would the jury feel, what his poor words could never make them feel -
the loss of his injured client [...] Gentlemen of the jury [...] I leave you with a broken heart in your hands! A broken heart, gentlemen! [...] Make that heart your own, gentlemen, and say at how many pounds you value the demoniac damage. And oh may your verdict still entitle you to the blissful confidence of that divine, purpureal sex, the fairest floral specimen of which I see before me! May their unfolding fragrance make sweet your daily bread; and when you die, from the tears of conjugal love, may thyme and sweet marjoram spring and blossom above your graves.

The report of the imagined speech concluded as follows: ‘Showers of tears fell from the gallery so that there was a sudden demand for umbrellas. The learned counsel sat down, and, having wiped his eyes, ate a sandwich’.  

There was general acceptance among the legal journals that it had been proper for Phillips to continue to act but the prevailing concern was whether his subsequent conduct was acceptable. For example, the Law Magazine, lamented:

There was no occasion for insinuations against the maid-servants nor was it in good taste, to say the least of it, to attempt to work upon the timid consciences of the jurymen, by holding out the apprehension of a never-dying omnipresent feeling of remorse.

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527 *Punch* 1 [1841]: 245-6.

In a later issue, the editor allowed a degree of sympathy for a fellow-lawyer. While the journal acknowledged that the ‘by all expedient means’ justification was ‘always subject to the general obligations of morality’, it felt that Phillips ‘was placed in a very difficult and trying situation, for which great allowance is to be made’. Had matters rested there, that might have been the general conclusion. Unfortunately for Phillips, the press returned to the attack nine years later when he unwisely caused his friend, Warren, to draft a further exculpatory account (see below).

**Fitzroy Kelly and R v Tawell.**

In the meantime, in March 1845 it was the turn of Sir Fitzroy Kelly Q.C., M.P. to be the object of accusations of hypocrisy after he wept conspicuously during his defence speech for the notorious murderer John Tawell. It appears not to have damaged his career overmuch as he later became Tory Attorney General and Chief Baron of the Exchequer. However, at the time, public condemnation was swift. According to the *Law Magazine*, for example, ‘The tears washed down the defence, which it certainly would have been somewhat difficult to swallow dry’. Some publications took the opportunity provided by Kelly’s histrionics to indulge in a new and contorted basis for criticising the Bar. The assertion was that, by the exploitation of Victorian sentimentality on the part of gullible jurors, some defence counsel were vicariously complicit in the encouragement of crime. For the *Examiner*, this suited its nostrums that acquittals by sentimental juries encouraged potential murderers to emulate the

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successful murderous methods of others and that, in any event, too many of the guilty escaped the death penalty. The *Law Magazine* expressly followed the *Examiner’s* line: ‘Instances continue to abound of the violation of this mercy by juries of outrages done to the interests of the great body of society, of injury to the safeguards of life itself, from a feeling of weak-minded sentimentality towards accused persons’. Both publications congratulated the trial judge in *Tawell* on his ‘firm and penetrating’ summing-up in favour of conviction as a ‘service to humanity’. A point to note for the purposes of this thesis is that, as with Phillips, the personal attacks on a prominent barrister made publicly by a leading newspaper were vehement:

Mr. Fitzroy Kelly shed no tears for [the victim], or for her orphaned little children. The fate of the victim does not touch the heart of Mr. Fitzroy Kelly. He had no retainer for emotion, no fee for sensibility in that cause. He does not weep for the murdered, nor indeed for murderers, unless they happen to pay him for it. Tears such as brazen counsel shed appear never to fall except in some peculiarly bad case. [Those] who bring about the example of the impunity of crime are morally responsible for the crimes committed in consequence of such evil encouragement.

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533 ‘Effects of Examples of Impunity’, The *Examiner*, 29 March, 1845, p.1
The War between the Bar and the Press

In the same year as the Tawell case an astonishingly bitter spat erupted between the criminal Bar and *The Times* newspaper which soured relations with the press generally. Prior to this, younger barristers had augmented their limited incomes by reporting cases on behalf of the daily newspapers. However, irritated by what they perceived to be a bias in *The Times*’ selectivity in the naming of trial counsel in its reports, the Oxford and Western Circuit messes resolved to exclude any member who filed newspaper reports. The paper reacted by completely omitting the identities of all trial counsel from its case - including Thomas Noon Telfourd, the popular leader of the Oxford Circuit.\(^{535}\) He was then a successful Serjeant-at-Law and contributor to the *London Magazine* along with Lamb, de Quincey and, indeed, Charles Phillips.\(^{536}\) He found himself in a difficult position as he himself had been a law reporter for the paper early in his career. Moreover, he had resisted the Oxford Circuit resolution, which was passed by 24 to 16 votes, but this did not prevent *The Times* from ridiculing him as a hypocrite.

The insights provided by these events are considerable. *The Times* was the most influential newspaper of the educated middle and upper classes. Its reach was extensive as, at this point, it easily outsold all other dailies. Other newspapers weighed in with generalised criticism of the Bar. The particular significance of this rupture for this thesis is that it provides a snapshot in time of the mutual incomprehension of the Bar and the press. It simultaneously reveals both the Bar’s inward-facing *amour propre* and the violent hostility of the respectable and respected *Times*.

Taking the facts from contemporary legal journals, it appears that in *The Times’* reports ‘the names of certain counsel were either altogether omitted, or only occasionally

\(^{535}\) See the supporting correspondence: *The Times*, 2 August 1845, p.6; 9 August 1845, p.8; 22 August 1845, p.8..

\(^{536}\) Cairns, p.143.
inserted, while the names of others not so eminent were conspicuously given, and sometimes
gross perversions of the facts were plain'. The relevant barrister/reporter on the Oxford
Circuit insisted that the reports which he had submitted had been fair and correct and that
they had been subsequently altered by the newspaper. The resolution was passed. Over the
following legal term, the issue subsided and Talfourd's name quietly re-appeared in the
reports of The Times. However, at the commencement of the next term, two members of the
Oxford circuit gave formal notice that they intended to act as reporters for the newspaper –
‘impelled doubtless by what they considered due to a principle of personal independence, and
nothing daunted by the assured prospect of becoming martyrs to what they persuaded
themselves was an act of chivalry’. After attempts to dissuade them, they were expelled
from the Oxford mess. The Western Circuit then passed a similar resolution on the basis that
newspaper reporting ‘was inconsistent with the dignity and independence of the Bar’. This
brought forth a chorus of press vituperation against the Bar generally.

The Times aggressively engaged with the accusation made against it that it had
selected Talfourd alone for omission from its reports as a matter of spite - ‘the coiffed
butterfly whom we were charged with breaking singly on our wheel’ On the contrary, it
said he was not alone as there were a number of ‘legal grubs’ and ‘utter non-entities’ who
received similar treatment. It explained that it believed the Oxford Circuit resolution to be ‘an
offensive piece of arrogant impertinence directed against the Press, [and had] determined no

Journal of British and Foreign Jurisprudence, 3 (1), (August 1845), pp: 27-43; ‘Newspapers
540 The Times, 29 July 1845, p.4.
longer to concede to the parties who had been guilty of it the favour of reporting their names in our columns’ and continued:

[W]e had hoped that the Oxford Circuit would have seen the folly of its antagonism to the public press; and we had, therefore, resolved on giving the majority whose names we had hitherto excluded the benefit of such publicity as their occasional employment - in some cases bordering closely on total brieflessness - would admit of. We had therefore printed, without exception, the names of all those employed in any case of interest, thus affording the public the means of comparing the eloquence and learning of the various members of the Oxford circuit - supposing, at least, the difference between Tweedledum and Tweedledee to be a matter of interest to any one. [...] we are scarcely surprised at the Western Circuit having been attacked with the same disease as the Oxford; and both of these irritable bodies of forensic feebleness have, it seems, come to the determination that none of their members shall report for newspapers. To us it is really a matter of the smallest possible consequence.\textsuperscript{541}

The professional journals were generally enraged at \textit{The Times}‘ behaviour. The most emollient, the \textit{Law Review}, evidently regarded the whole episode as self-defeating. The Oxford circuit, ‘in endeavouring to protect itself from one injustice [had] committed a far

\textsuperscript{541} \textit{The Times}, 29 July 1845, p.4.
greater’. The journal was equally dismissive of the newspaper’s defence which it understood to be that ‘the insertion of the names of counsel was wholly a matter of grace and favour [...] and that the doing so only pandered to a morbid desire for notoriety on the part of the Bar’. Rather than exclude their members, it advised the circuits to devote their efforts to improving the character and status of the reporter which would not be achieved ‘by driving him from society’. By excluding members, the two circuits had taken up a position which was ‘altogether untenable’ and in the interests of neither the public nor the Bar. It called upon them to be sufficiently magnanimous to rescind their resolutions ‘simply because the bar can afford to give way’. In a stirring passage, it reminded the press that ‘whenever any attack has been made on it, whenever its privileges have been invaded, its most powerful and effectual defenders have been found in the bar’.  

The Law Magazine, on the other hand, was pugnacious. It claimed that the Bar was a more moral body than the press. It attacked the ‘mean and vindictive’ Times and ‘those who have subsequently ministered to its malignity’:

Its morals have [...] now reached that extreme pitch of corruption; and its conduct that degree of offensiveness, at which it has been well said, that the worst examples cease to be hurtful, whilst its malignity so far surpasses its legitimacy that the grossness, of the design is constantly betrayed by the stupidity of the execution’.  

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543 Ibid.
The journal then turned its attention to the *Examiner*, which had labelled barristers as ‘[T]he advocates of falsehood for a guinea,’ and suggested that this ‘false estimate’ resulted from excessive attention attracted by the ‘noisy obtrusiveness’ of the rare individuals who went against the ‘established’ rules of propriety – presumably mindful of Phillips’ speech in *Courvoisier*. Surprisingly, part of its argument was that defence counsel never resisted strong cases: where ‘the evidence leaves no reasonable doubt [...] no respectable advocate perseveres in the struggle’. The rules apparently required ‘the quiet surrender of bad cases’. Another controversial assertion was that it was well known that recalcitrant barristers ‘are alike under the ban of the Bench and the Bar, constantly checked and censured by the former, and held very lightly in esteem by the latter’.

The similarity in the approach of the *Law Times* illustrates the ferocity of (possibly exaggerated) feeling which this otherwise mundane *contretemps* was provoking. It castigated the ‘cowardly malignity’ of *The Times* towards Talfourd as ‘one of the most tyrannous attempts to wield the power of the press against an individual which has ever been exhibited in this country’. It then introduced two serious allegations of mendacity on the part of *The Times*. Firstly, it accused it of publishing a supportive letter which falsely purported to be the work of an ‘Editor of a Country Newspaper’. Secondly, it suggested a nepotistic ulterior motive behind the omission of Talfourd’s name - an ‘infamous design of advancing a rival of the learned serjeant who happens to be connected, by ties of relationship, with some or one of the conductors of the *Times*’.

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545 Ibid.; (See the *Examiner*, 16 August 1845, p.1).
546 Ibid.
Among the periodicals, the *Oxford and Cambridge Review* regretted the Circuits’ resolution – ‘this slight measure’ – but suggested that *The Times* had cynically manipulated the situation in order to recruit other newspapers into its perennial criticism of the Bar: ‘There is no war between the “Times” and the Bar, until the former, with more cleverness than magnanimity, endeavoured to implicate the whole Press in its own private misadventure.’ Serjeant Talfourd was ‘so amiable and estimable a man’ and ‘many of the most respectable publications in the kingdom would side heartily with the Bar [...] All the bluster and all the snarls have come as usual come from the “Times”’. It predicted that the ‘arrogant and scurrilous tone which, of late, has largely grown upon the “Times” is very likely to rouse the Bar - to deprive it of its readership’.  

*Punch* lost no opportunity to weigh in. It compared the circuits’ resolve to expel members for reporting cases to newspapers with the fact that ‘[T]hey do not expel a man for disgusting hypocrisy; for bearing false witness; for the “artful dodge”; for keeping “fraud and falsehood” out of view—they load him with honours for it’. The accompanying cartoon depicted the incident as a medieval jousting contest which the Bar was losing. That same year it had published ‘What a Barrister May Do, and What He May Not Do’ which included: ‘A Barrister may be employed in inducing Members of Parliament to vote in favour of railway bills, but he may not report for a newspaper’. ‘The illiberal resolutions of the Bar’ provoked the *Examiner* to quote extensively from the *Punch* article in a renewed attack on the perceived hypocrisy of the Bar. It added: ‘These folks of the long robe [will] turn a man

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550 9 *Punch*, (1845) p.64.
551 9 *Punch* (1845), p.113.
from their mess who reports in a paper; they’ll expel a man from their spotless society for reporting in the Times or the Morning Chronicle’.\(^{552}\)

The saga came to a grudging end when all the circuit leaders were summoned to meet with the Attorney-General. Without any prior consultation with their circuits, most, but not all, of the leaders agreed on the desirability of discontinuing the prohibition on newspaper reporting. The Oxford Circuit then rescinded its vote by a majority of 25 to 18. As members of the Western Circuit had already ‘avowedly infringed’ the original resolution it was deemed to be virtually overruled.\(^{553}\)

By way of a postscript, Talfourd was inspired to write of ‘his fervent wish’ for the merits and difficulties of advocacy to be better appreciated and for the removal of misconceptions between the Bar and ‘literature’, in which he included the press –‘for the sake of both’. His theme was that ‘no other great occupations of human energies are so nearly allied; [...] no others are so entirely lighted up from within’.\(^{554}\) Mindful of earlier controversies, he apparently believed that it was ‘sympathy’, which he grandiously called the ‘soul’ of the advocate's profession, that inspired the partisanship of the advocate: ‘A pliancy of character may thus be fostered, [...] a weakness which the advocate shares with the poet, who [...] is open to the seductions of sentiment when he would scorn those of lucre’. Echoing the Law Magazine of five years earlier, he characterised Phillips’ imputation against the maidservant in Courvoisier, although ‘a grievous fault’, as ‘a lapse, made under peculiar circumstances of great agitation’; Kelly's tears in Tawell were provoked by his abhorrence of the death penalty and his awareness that a life depended upon his advocacy.\(^{555}\) However,

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\(^{552}\) Examiner, 16 August 1845, p.1.  
\(^{553}\) ‘Events of the Quarter’ 4 n.s. (1846) Law Magazine 218 and 368;  
\(^{555}\) ‘The Practice of the Bar’, pp.283, 292.
Talfourd’s *apologia* ‘passed with little notice’ in the face of the more pragmatic arguments of the likes of Fonblanque which ‘settled the professional response to the licence of counsel controversy’.  

**Digby Seymour – R v Reid and M’Cabe**

The propriety of imputing guilt to others, contrary to instructions, arose again in the trial of *Reid and M’Cabe* in 1847. Both men were indicted for murder. It was believed that Reid had confessed to his counsel, Digby Seymour M.P., but that Seymour had nevertheless pursued a case that the co-defendant, M’Cabe, was responsible. In the event, both were convicted but only Reid was executed.

Seymour was another advocate known for his flamboyance. By way of example, he was once instructed in a compensation claim against the owner of a large number of carriage horses which had been unlawfully grazing in his client’s fields. It is said that he referred to ‘Arab steeds with flowing manes and panting flanks, careering over these fields as though they had been in the desert’. His opponent focused the jury on the more mundane principles of compensation. It is said that, out of his depth, Seymour asked his junior how best to proceed, only to be advised: ‘Don’t worry about that rot [...] just give them some more of those Arab steeds’. This he did and won massive compensation. In 1867, representing a member of the Irish Republican Brotherhood charged with murder, he described ‘Fenianism’ as a ‘blighting curse, a cancer, fastening itself to the fairest spots of an otherwise fair island,

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556 Cairns, p. 149.
557 *R v Patrick Reid and Michael M’Cabe*, (Unrep.), York Assizes, 20 December 1847.
and looking for its mischief and exerting its influence upon the most vital parts of my native country’.\textsuperscript{559}

Seymour was heavily censured for his attack on M’Cabe. He too defended himself in a letter to the press, namely, \textit{The Times}, claiming that reports of his conduct were not accurate. He accepted that, following a statement made to him by Reid before trial, he ‘had reason strongly to presume Reid's guilt’ but he insisted that Reid’s statement was not ‘irreconcilable with the supposition of M'Cabe's guilt’.\textsuperscript{560} However, he foolishly brought down censure on himself when he further insisted that, even if Reid had fully exculpated M’Cabe, it would not have been ‘morally or professionally wrong’ to have adopted a similar line of defence. His professional logic was firstly that, as the confession was not in evidence, he was duty-bound to ignore it and secondly, he could and should ‘throw the whole guilt upon M’Cabe if the evidence, by which the jury were bound to decide, warranted such a course’. He argued:

\begin{quote}
If a prisoner confesses his guilt, or makes admissions which tend to criminate him while they acquit his fellow prisoner, is his counsel to hurry into the witness-box to ruin and betray him? [...] When a veto is put upon this exercise of a counsel's discretion - when, instead of his argument being weighed and measured by the nature of the evidence, his motives and private opinions are publicly submitted to a rigid moral test - the relation of client and counsel will be deranged, and their mutual confidence interrupted; the independence of the bar will be violated,
\end{quote}

\textsuperscript{559} \textit{R v Allen, Larkin, O'Brien, Maguire and Condon} (Manchester Assizes), 1867, cited by Watson, p.110.

\textsuperscript{560} \textit{The Times}, 30 December, 1847, p.6.
The principle of advocacy will be abolished altogether’.

The Times’ believed that, on the contrary, if this latter part of his letter represented an acceptable approach, it was ‘the office of advocate [which] should be abolished.’ Once again the ‘unscrupulous’ advocacy in Courvoisier was recalled. If Seymour’s ‘miserable jesuitry [...] were, as it is not, the general feeling of the bar, no man of common honesty – not to say, no gentleman – would submit to the degradation of being enrolled in its ranks’. 561

The nature of these various examples of condemnatory journalism illustrates a number of features which are material to this study. What is immediately striking from the language used is the vehemence of the press hostility. There is also the constancy of familiar themes - not merely that of hypocrisy for financial gain but also the charge of complicity in the commission of crime as had been levelled at Fitzroy Kelly in Tawell. The Leeds Times, for example, portentously declared: ‘there is a statute which declares that any person knowingly harbouring and screening from justice the perpetrators of any murder, &c, shall himself be deemed an accessory, and punished accordingly.’ 562 The Examiner went so far as to suggest that, had M’Cabe been hanged, ‘Mr Seymour would have richly deserved to swing from the same gallows’. 563 The Law Times veered into xenophobia, asking readers to note ‘the singular coincidence that Mr. SEYMOUR, like Mr. C. PHILLIPs, whose example he has followed, is an Irishman […] It should be asserted that the principles enunciated by Mr. SEYMOUR are, as it would appear, merely importations from the other side of the Channel, and are not born and bred and domiciled on our own soil’. 564 Coincidentally, the same issue contained an article written by the editor entitled, ‘The Advocate: his Training, Practice,

561 The Times, 30 December 1847, pp.4, 6.
562 Leeds Times, 1 January 1848, p.4.
563 Examiner, 1 January 1848, p.3.
Rights, and Duties: Moral Training’ which advised the student to aspire to ‘the character of a Christian Gentleman’. The *Law Magazine*, while finding Seymour’s conduct ‘indefensible’, made a more considered and insightful contribution. It recognised the Bar’s apparent inability ‘to set itself right in this matter’ and identified the cause as structural disunity: ‘The members of each bar mess are usually too little allied to admit of their being efficient judges of the conduct of each other. There is not sufficient mutual confidence to render their sentences authoritative, and too much jealousy prevails to permit of their sanction’. That being so, it appealed to the judiciary to police counsel’s behaviour: ‘No better mode exists of checking these disgraceful practices than the prompt and unsparing chastisement of counsel who resort to them by those who preside in our criminal courts’. Secondly, it called upon ‘the inn of court to which an offending member belongs to subject him to its undoubted jurisdiction. The benchers have lately exercised this right and "screened" barristers, excluding them from hall for two years on account of offences not deserving the graver penalty of expulsion and disbarring […] The inns of court have recently awakened out of their long slumber, and appear desirous of doing something towards the mental progress of the profession. Why not extend their surveillance also to its moral amelioration?’ It finally dismissed the ‘by all expedient means’ principle, claiming to have consulted ‘leading members’ of the Bar: ‘In the strongest terms we denounce all such views of the duties of counsel as unprofessional, outrageous, and detestable’.  

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**The 1849 Postscript**

Nine years after the *Courvoisier* trial, The *Examiner* renewed its attack on Phillips. The catalyst had been the trial of a married couple, the Mannings, jointly accused of

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murdering the wife’s lover, O’Connor (‘The Bermondsey Murders’). The controversy in the Mannings case stemmed from the fact that the husband’s counsel, Serjeant Wilkins, had attempted to place sole responsibility on the wife and went so far during his speech as to address her personally as she sat in the dock: ‘You knew his mouth would never speak again; it bad been hushed for ever. You knew it, and well might you say "poor O'Connor," your lip quiver, and your cheek grow blanched’. Both were convicted and executed. Counsel for the wife, Ballantine, was outraged. He is reported as having said that he would ‘rather never appear in that court again, and seek some other but more honourable and honest toil, than have uttered such calumnies against a person who stood there on a trial for her life, and who also might shortly be led to the scaffold and ushered into the presence of her Maker’. Wilkins was generally criticised. The Spectator, for example, suggested it might be sensible to transfer the courts to the theatres ‘which would be more convenient in more ways than one; the Judge, counsel and other performers would welcome the better ventilation; and the orchestra would be on hand to accompany Mr Charles Wilkins and the other eloquent gentlemen in the chanting parts of the oratory.

In some sections of the press Wilkins’ conduct again brought comparison with that of Phillips. The Observer, for example, stated that ‘oratorical flourishes may be amusing, and even interesting, when they affect no one’s life, but when they are merely the mask for death and destruction, then they become not only disgusting but criminal. Charles Phillip’s case should have been an example to him [...] but that case was not as bad as this. The bar of

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566 R v Frederick and Marie Manning (unrep.) Central Criminal Court, 25-6 October 1849.
567 Examiner, 27 October 1849, pp.10,12; See also The Times, 27 October 1849, p.4.
Edward Rees  (Ph. D.Thesis)

England is an honourable and upright body but a few such instances of defence as that pursued by Serjeant Wilkins would soon sadly derogate from its dignity’. 569

From then on it was again Phillips, rather than Wilkins, who bore the brunt of the Examiner’s renewed ire. John Forster, a friend of Dickens, had succeeded Albany Fonblanque as editor in 1847. May has stated that Forster’s ‘sense of morality was outraged by [...] the conduct of the criminal bar. [His] attacks on Phillips were more hostile and more personal than those made by Fonblanque eight years earlier’. 570 Forster claimed that

[W]orse was Mr Phillips attempt to throw the suspicion of the murder of Lord William Russell on the innocent female servants, [...] But little was he prejudiced in the highest places of legal authority and patronage by this horrible endeavour, that he was soon after advanced to a seat of judicature, about the time that one of the unfortunate women whose characters and lives he would have placed in jeopardy was lodged in a lunatic asylum, driven mad by the terrors that had successively beset her. 571

Having been publicly silent for nine years, Phillips evidently found this fresh onslaught too hurtful to ignore and was provoked into defending his earlier conduct in a letter to The Times. He also published a pamphlet of supportive letters from those who had heard his speech. In the letter, Phillips claimed that he welcomed ‘an opportunity of annihilating a calumny which has for nine years harassed my friends far more than myself’. 572 His account was a mixture of denial of the accuracy of what had been reported coupled with denial of any impropriety. He asserted that, up until the confession on the second morning of the trial, he

569 The Observer 29 Oct 1849, p.4.
570 May, p.225-6.
571 Examiner, 3 November 1849, p.4.
572 The Times, 20 November 1849, p.5.
Edward Rees (Ph. D. Thesis)

had ‘believed firmly’ in Courvoisier’s innocence. Following the confession, he advised Courvoisier to plead guilty but was met by the response: ‘No. I expect you to defend me to the utmost’. Phillips intended to return the brief until his junior suggested he should first speak to Baron Parke. Parke advised him to continue and to ‘use all fair arguments arising on the evidence’. Phillips added: ‘I believe there is no difference of opinion now in the profession that this course was right.’ He flatly denied that he had ‘appealed to Heaven as to his belief’ in Courvoisier’s innocence, as reported in ‘this most unscrupulous of slanderers’, the Examiner, and claimed that the offending passage had been read out ‘to all’ in the City Alderman’s Room at the Old Bailey whereupon he judges, Tindal and Parke, vouched that it had not been said. Nor had he blamed the servant, Mancer. He asserted that, as a matter of principle, ‘the moment (counsel) accepts his brief, every faculty he possesses becomes his client’s property’.

In the same issue of The Times he adduced a letter from his friend Samuel Warren. A significant choice, Warren was a well-respected writer of novels and legal textbooks and the previous year had published a series of four lectures advising students and young attorneys on how to behave like gentlemen: The Moral, Social, and Professional Duties of Attorneys and Solicitors. Warren stated that Baron Parke had since told him that Phillips’ speech ‘was perfectly unexceptionable’. In an editorial in the same issue, The Times accepted Phillips explanation as ‘clear and complete’ while noting that, if he had made it earlier, ‘[he] should have silenced the slander which has so long associated his name with unscrupulous advocacy’.

The Examiner’s response was to launch its most splenetic attacks and within days it reprinted its two original articles from 1840 and accused Phillips of having ‘done his best to

573 Ibid.
Edward Rees (Ph. D. Thesis)

evade every charge specifically brought against him’. Referring to Sarah Mancer’s apparent retreat to an institution after the trail, it continued:

We should like to know the breadth of the distinction between an accomplice after the fact, and an advocate who makes the most unscrupulous endeavours to procure the acquittal of a man whom he knows to be an assassin’ [...] When the fact became known that Sarah Mancer had been lodged in a lunatic asylum, driven mad by the sufferings and terrors arising out of the Courvoisier trial, it was an illustration, not an aggravation, of Mr Phillips's defence of his client. Mr Phillips charges the Examiner with having "invented" the accusations against him which have been under notice, and introduces slanderer, coiner, libel-mint, and the like Old Bailey epithets, into his tawdry and ill-written letter. These things do not affect us in the least’ [...] Mr Phillips [...] appeals to a dictum of Lord Brougham, thrown out, as he bombastically phrases it, "even to the affronting of a King." A more detestable doctrine than this, or one that, if generally acted on, would more surely break down the whole framework of society, it is impossible to imagine.\(^{575}\)

\(^{575}\) Examiner, 24 November 1849; see also Examiner 1 December 1849, p.4; 15 December 1849 and 22 December 1849.
There followed a duel between the *Examiner* and the *Law Review* over Phillips’ reputation until an article by Warren in the *Law Review* finally exhausted the subject. Warren vigorously criticised the *Examiner*, going through a lengthy *seriatim* rebuttal of the *Examiner*’s arguments in what Brougham described as ‘wholly preposterous detail’. Phillips was ‘a gentleman of brilliant eloquence, of great experience, and characterised by a very zealous devotion to the cause of his clients’. Warren referred to ‘his powerful exertions on behalf of a client, in whom there appears no doubt that both he and his brother advocate in the cause believed, as they still declare that they did, innocent’. He claimed that ‘*The Times* was promptly followed by almost the whole metropolitan and provincial press; several journals, in a praiseworthy spirit of candour, adding an expression of regret that they had ever lent assistance in giving currency to misrepresentation’. However, this last assertion was hardly accurate as reactions to Phillip’s letter were at best mixed and, on balance, the avalanche of press criticism quoted below provides considerable evidence to the contrary. Admittedly, Tory organs like *John Bull* still described him as a ‘gentleman of splendid talents and of the highest character —though traduced for many years’. Nevertheless, one overall feature was striking. On balance, Phillips’ letter did him more harm than good because much of the press which had previously supported him now condemned him.

By the 8th December, the *Examiner* exulted in a catalogue of quotations from national and provincial newspapers and journals which it had persuaded away from their original opinions. The primary sources are deliberately quoted at a little length because of their

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evident probative worth for any assessment of the extent and force of contemporary opinion. What is highly significant is that the misconduct of individuals such as Phillips and Wilkins was perceived as part of a general malaise. Most rejected the ‘expediency’ justification.\textsuperscript{579} The \textit{Spectator} went so far as to suggest that the criminal Bar as a whole found excessive advocacy laudable. In the case of \textit{Courvoisier}, for instance, it was

\begin{quote}
[T]he part of the counsel to show in what the evidence failed; but not to suggest, to originate and create, suspicions against an innocent person. [...] Here, then, rises a second question - that of manner. In the case now discussed, much of the offence against propriety belonged to the manner - the style of rhetoric - what \textit{The Examiner} calls the "acting" of the advocate. The \textit{suggestio falsi} was enforced by an appeal to the Supreme Being - the Almighty was called on by name to back the counsel in bearing false witness against his neighbour! But this is the "eloquence" of the criminal bar - a thing which barristers applaud and attorneys pay. Hence we say that there is no real wish in those most interested to reform these abuses: barristers do not care to have their "honourable profession" cleared of the charge that it will support falsehood as readily as truth, and desecrate the most exalted subjects by using them in the service of any client who has duly retained his wigged and gowned servant.\textsuperscript{580}
\end{quote}

\textsuperscript{579} \textit{Examiner}, 8 December 1849, p.6.

\textsuperscript{580} \textit{Spectator}, 1 December 1849.
Punch was equally savage in a reference to Phillips’ judicial appointment:

CHARLES PHILLIPS, hired counsel of the murderer [...] is one in authority. We are sorry for it. He, the defender of the confessed Courvoisier and the justifier of a wrongful defence, sits in judgment upon the imprudent and the unfortunate. A word of his falls crushingly upon the improvident and the helpless. Such is his power. We say, we are sorry for it.

The Morning Post noted that Phillips’ pamphlet included testimonials from seven barristers and a solicitor who had heard the speech. It commented: ‘If the gentlemen who wrote those letters knew the use that was to be made of them, we should charge them with an outrage upon public justice. Regarding them, however, merely as private testimonials of their friendly feeling towards a brother barrister, we have only to congratulate Mr Phillips upon the consolation which private friendship must afford him amid the just public obloquy which he has brought upon himself.’

The Birmingham Journal had also changed its mind:

We believed that he had vindicated himself, and did feel that public opinion owed him a prompt recompense for the currency and countenance so long given to the slander [However] the defence is an evasion of the charges made by Mr Fontanblanque nine years ago [...] The article in the Examiner in which this is shown is the finest example of an impartial almost judicially calm and

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581 Punch, 17 (8 December 1849) p.224.
582 Morning Post, 6th December 1849, p.4.
severe, examination of a cause we have ever seen [...] Phillips has miserably deceived himself. If we sought occasion for sentimental reflection, we might cite this personal episode in the world's affairs as a proof of the immutability of truth, and the enduring punishment of an unexpiated sin against society.\textsuperscript{583}

The \textit{Leicestershire Mercury} like ‘many of our contemporaries’, will now wish that they had been even more guarded than we were in their verdict that [Phillips] had entirely cleared himself. A more thorough impalement of a self-convicted offender than this article in the \textit{Examiner}, we have never read; and we trust that the lesson may not be without, useful effect upon the Bar generally. Strong appeals to Heaven and attempts to damn the character of hostile witnesses have been too frequently resorted to in desperate cases by others besides Mr Phillips until the public were beginning to believe that every barrister would sell his conscience as well as his professional skill to any wretch whose friends could afford to raise the requisite golden inducement’.\textsuperscript{584}

The \textit{Derby Reporter and Chronicle} was ‘grieved to say that the \textit{Examiner} proves that both his defence and his friend Mr Warren's voucher, have together only the appearance of a hollow pretence artfully concocted to disguise the truth [...] To all who are anxious for the

\textsuperscript{583} \textit{Birmingham Journal}, 1 December 1849, p.5.

\textsuperscript{584} \textit{Leicestershire Mercury}, 1 December 1849, p.1.
preservation of the honour, and consequently the utility - nay, we may say even the very existence upon its present recognised footing of the English bar, we must recommend the careful, although it may be melancholy, perusal of the last leader of the Examiner.  

The *Liverpool Chronicle* also believed the *Examiner*’s rejoinder had ‘cut Mr Phillips's defence to shreds’,  

The *Bristol Mercury* found Phillips’ exculpation ‘so damaging [...] to the character of the barrister, that no one can help seeing that it was the most unfortunate thing he could have done to break his nine years silence on the subject’.  

Sections of the legal press came to identical conclusions. The *Jurist*, critical of Phillips in 1840, had recanted by 24 November 1849 after reading Phillips’ letter to *The Times*, in the belief that ‘his conduct was misrepresented’. However, by the 15th December, it changed its mind again, having decided that it had given Phillip’s letter too much credit for ‘direct impeachment of the veracity of a paper second to none in respectability’. Having belatedly read *The Times* report of the speech, it now found ‘every particular’ of the *Examiner*’s charge proved. Likewise the *Law Times*: ‘In justice to our contemporary, the *Examiner*, we are bound to say that we as well as others too hastily adopted the vindication of Mr Charles Phillips as complete [...] But upon perusal of the whole case, as stated, with all the documentary evidence, in the *Examiner* of Saturday last, it is but too certain that this apparent triumph was produced, not by answering the charge, but by evading it’.  

The *Law Magazine* was more nuanced. It defended the *Examiner* against Phillips’ charges: ‘Mr Phillips is also in error when he calls the recent reference to his conduct in the *Examiner*,

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585 *Derby Reporter and Chronicle*, (date unknown).
586 *Liverpool Chronicle*, 1 December 1849, p.5.
587 *Bristol Mercury*, 1 December 1849, p.8.
588 *Jurist* 13 (24 November 1849), p.469.
"the malignant libel of an obscure journalist." The Examiner has, in former times, evinced a very bitter spirit towards the Bar, but that does not render its notice of Mr. Phillips either libellous or malignant. [...] Nothing had been more generally taken for granted (whether rightly or wrongly) than that Mr. Phillips had sadly overstepped the due licence of counsel.’

The journal restated the general rule: ‘No advocate, having received a fee for defending a prisoner, can break his contract to do so because he finds that the prisoner is guilty [...] This right is a right in furtherance of public justice, which demands that no one shall be convicted except on legal and sufficient evidence’. It then attempted to absolve him from impropriety in respect of Sarah Mancer, given that, before the confession, and at a time when he supposedly believed in Courvoisier’s innocence, he had already implied in cross-examination that she was guilty: ‘We blame Mr. Phillips for the course he took, but, unlike his assailants, we deem it a fault entitled to lenient consideration, on account of the positive obligation he was under to pursue the defence, and the intense difficulty he necessarily laboured under in doing so’. In the judgement of this writer, this is plainly wrong. The proper course should have been to say nothing to the point in his speech rather than compound the inaccurate cross-examination by repeating the thinly-veiled suggestion. Phillips made a deliberate choice to re-visit the allegation against Mancer while disingenuously disavowing any intention to do so.

The 1840s were thus a remarkable and pivotal decade for the criminal Bar, featuring phenomena which would be unthinkable today: a ferocious falling-out between two circuits and the leading newspaper of the day, overt allegations of hypocrisy and dishonesty against individual barristers and the criminal Bar as a body - and all of this played out before the public in vituperative correspondence and leading articles in national newspapers. It is hardly surprising, therefore, that a cultural change had to come. The next chapter examines the nature of the resulting improvements in professional conduct and the reciprocal shift in public opinion.
CHAPTER 6– Improvements in Behaviour and Image

Introduction

Thus far, this Section has catalogued the criminal Bar’s self-inflicted reputational damage. This concluding chapter argues that conduct had so improved by the end of the century that the Bar was perceived as belatedly conforming to late-Victorian society’s notions of utilitarian professionalism. It argues that there was a direct causal link between improvements in behaviour and the improvement in public attitudes. The reasons for that improvement include (a) the Bar’s acceptance of the primacy of ethics over ‘expediency’, (b) greater judicial control, (c) greater unity and internal cohesion and, most importantly, (d) cultural changes in courtroom behaviour and style.

The Discussion of Professional Morality

The previous chapter related how Courvoisier and other instances of questionable conduct provoked intense interest in the moral parameters of advocacy in the public and legal press. Commentators began to concentrate practitioners’ thinking. Notable among them was William Forsyth in his 1849 work on the proper functions of the advocate, Hortensius. Beginning with a review of Greek, Roman and French history, it concluded with consideration of what he termed ‘ethics’. He noted that ‘the chief odium’ was incurred by ‘licence’ of the criminal Bar. His principal point was:

Such a licence all right-thinking men must repudiate, and it tends only to the dishonour of a noble calling to represent it as requiring and justifying the use of trickery and falsehood. [...] He may not assert what he knows to be a lie.

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He alluded to the ‘painful’ cases of Courvoisier and Reid and M’Cabe, stating that ‘the subject may be dismissed with the single observation, that the opinion of the bar was in entire accordance with that of the public, in condemning the line of defence adopted’. He concluded: ‘It behaves [counsel] to never for a moment imagine himself released from the obligations of Christian morality’.\footnote{William Forsyth, *Hortensius: or The Advocate*, (London: John Murray, 1849), pp.460-1, 466.} Cairns has detected a number of other contributions to the debate over the next two decades. He noted, for example, that a paper on forensic morality was read to the Juridical Society in 1857, that Samuel Warren, Phillips’ apologist, included a chapter on it in his successful *A Popular and Practical Introduction to Law Studies* in 1863, that the *Cornhill Magazine* published articles by Fitzjames Stephen and Francis Parker in 1861 and 1865, and that Stephen made it a central feature of his *A General View of the Criminal Law* in 1863. It was obvious that ‘the existence of moral limits on adversarialism could no longer be questioned’.\footnote{Cairns p.152.} As an earlier commentator observed that even ‘the timely irony’ of Punch’s relentless characterisations of the Bar’s moral shortcomings, by ‘holding up to the laughter of the public a theatrical and utterly wholesome state of things […] joined to the sound sense of the profession, brought about a great and beneficial change in the style of advocacy in our courts’.\footnote{Bernard Kelly, *Famous Advocates and their Speeches*, (London: Sweet and Maxwell, 1921), p.26.}

**Judicial Control**

As early as 1844 the *Law Magazine* was arguing that ‘no better mode exists of checking these disgraceful practices than the prompt and unsparing chastisement of counsel who resort to them … Learned judges cannot better uphold the dignity and purity of public
justice, than by branding such advocates with public reprobation’. It later transpired over
the second half of the century that judges were able to exert greater influence over the
proceedings and the parties’ behaviour through more effective case management skills.

By the 1850s a greater judicial readiness to curtail misconduct was making
itself felt. The coverage of the legal journals played an increasingly influential role in shaping
behavioural expectations for the profession at large. For example, also in 1844 the Jurist
reported how a judge rebuked counsel for concealing an authority of which, unlike his
opponent, he was aware. The journal applauded the denunciation of the principle that
‘counsel have no duty but to their clients [and] no object but to gain the particular cause in
which they are engaged’. A more famous example was the admonition of Serjeant Shee by
Lord Chief Justice Campbell in the trial of the poisoner, William Palmer, in 1856. Shee said
in his speech: ‘I say in all sincerity, with an entire conviction of his innocence I believe that
never was a truer word pronounced than the words “Not Guilty to the Charge”’. Sir
Alexander Cockburn, who, as Attorney-General, was entitled to address the jury after the
defence, then submitted that Shee’s conduct was ‘unprecedented’. Shee interjected 'not
unprecedented'. It has been suggested that Lord Campbell was reluctant to interfere at that
point because he was mindful that he himself had said something similar when defending
Lord Melbourne against an allegation of adultery in 1836: ‘I declare to my God - I make the
declaration in the most solemn manner - that this circumstance alone bears to my mind the
most convincing proof of her innocence.’ A subsequent commentator has pointed out that
‘it is not a little significant’ that this did not appear in the 1842 edition of Campbell's

596 R v Palmer: Verbatim Report. Transcribed by Mr. Angelo Bennett of Rolls Chambers,
597 The Times, June 23, 1836, p.4.
'Speeches' prepared by himself for publication.\textsuperscript{598} Be that as it may, Campbell directed the jury: ‘It is my duty to tell you that opinion should not be any ingredient of your verdict [...] It is the duty of the advocate to press his argument on the jury, but not his opinion’.\textsuperscript{599} Of itself, that was obviously not a novel proposition. In the trial of Tom Paine in 1792 for seditious libel arising from the publication of \textit{The Rights of Man}, Erskine had said to the jury: ‘I will now lay aside the role of the advocate and address you as a man’. The judicial riposte was: ‘You will do nothing of the sort. The only right and licence you have to appear in this court is as an advocate’.\textsuperscript{600} Nevertheless, an admonition from such a figure as Campbell in a high-profile trial in the 1850s would be highly authoritative and difficult to ignore thereafter. Shee was not a serial offender and would later become the first Catholic to be appointed to the Bench. Ballantine’s opinion was that Shee, moved by a sincere personal belief, meant merely that Palmer should be acquitted because the prosecution could not prove the use of strychnine as opposed to antimony.\textsuperscript{601}

The functional judicial skills and the pragmatic management of court business which later developed as a result of the Judicature Acts 1873 to 1875 were inevitably carried over into the criminal jurisdiction. The Acts replaced twelve disparate civil jurisdictions with a new Supreme Court consisting of the High Court, divided into five divisions, and the Court of Appeal. In 1880 a further rationalisation resulted in three High Court jurisdictions: Chancery, Queens Bench, and Divorce, Probate and Admiralty.\textsuperscript{602} The greater

\textsuperscript{599} \textit{R v Palmer: Verbatim Report}, cited by Watson, p.87.
\textsuperscript{600} \textit{R v Paine} (1792) 22 How.St.Tr.358.
\textsuperscript{601} Ballantine, \textit{Some Experiences}, pp.131-2.
professionalism of the judiciary inexorably spread itself throughout the legal system generally. As more confident arbiters of forensic conduct with greater control of the courtroom, this breed of judges fashioned a more respectful reciprocal relationship with senior advocates, followed inevitably by the junior Bar. The flowery advocacy of the likes of Charles Phillips had become largely anachronistic and unappealing to a more professional judiciary.

Looking back from the 1920s, Bernard Kelly remarked with apparent regret that, ‘nothing has been more fatal to the eloquence at the Bar than the operation of the Judicature Acts [...] the prosaic way looking at things seems, by most accounts to be invading even the jury box, and hence cynical yawns, and not the higher emotions, more often than not greet the most pathetic efforts of counsel to create a sentimental leaning towards their clients at the expense of actual fact.’ 603 An anonymous author writing in 1911 lamented how the introduction of non-jury cases after the Judicature Acts had debased ‘the style of modern advocacy’:

Judges sitting without juries, official referees, and professional arbitrators, have curbed the fancy and emasculated the eloquence of the ambitious advocate; and many a mute, inglorious Erskine has doubtless pined in obscurity, or withered speechless at the portals of the Commercial Court [...] Thus to find the ideal advocate one would look for a chartered accountant, accustomed to read the lessons in his parish church.’ 604

More approvingly, it has been said that ‘the movement in the later nineteenth century towards courtesy in courts may to some extent have resulted from the steadily growing dignity of the bench, especially since the Judicature Acts’. A rise in judges’ standing ‘has been seen as responsible for increased judicial control over legal proceedings and for a greater acceptance of that control by the Bar than earlier in the century’.  

**The Inns**

A major explanation for the poor governance of the Bar lies in the diffidence of the Inns of Court towards the exercise of effective central oversight and control. They were, however, increasingly fearful of the possibility of external interference if matters did not have, at least, the promise of systematic formalisation. Accordingly, one finds that in 1861 the Inner Temple Benchers had commissioned a committee report ‘as to the expediency of establishing some authority to which all questions connected with the practice of the Bar may be referred’. In 1863 the Treasurer of Lincoln’s Inn, having been requested by the Benchers to search the books of the society for precedents that could be used to resist a court challenge to a proposed disbarment, reported back that there had only been one instance of punishment by disbarment and that had been twenty years earlier.

The likelihood is that this belated interest in housekeeping was a response to a number of well-publicised controversies which occurred between 1859 and 1863. Wesley Pue has characterised this as a period of ‘moral panic’ and ‘profound crisis about the English Bar’ which ‘riveted public attention’ and heightened external scrutiny. The events which caused the ‘panic’ did not themselves arise in criminal cases but this was nevertheless a turning point in an historical process, the effect of which ‘was to transform the Bar from a relatively open,  

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606 Inner Temple, *Bench Table Orders*; April 16 1861  
unregulated status group into something akin to a rule-bound disciplinary regime’. The conventions of practice were starting to move away from uncertain subjective expectations of behaviour with regional variations according to idiosyncrasies of circuit messes towards uniform rules which were less obviously self-serving and more easily determinable both by the public and by the profession itself. However, the secrecy surrounding governance by the Inns was feeding a contrary perception that they were proving to be an unacceptable model for professional associations. The Solicitors’ Journal, for example, made obvious criticisms:

[I]t is by no means impossible for members of the Bar to pursue for many years an unimpeached and successful course of practice, while it is matter of common notoriety that they have rendered themselves obnoxious to imputations which, so long as they remain unexplained, ought to be sufficient to place them outside the pale of respectable society. Yet so strangely inert are the governing bodies of the higher branch of the profession that nothing short of the greatest public scandal appears to have the least effect in putting them in motion against wrong-doers. This is no doubt partly owing to the jealousy in favour of personal independence which exists among all bodies of Englishmen; but in the case of the Bar it is to be attributed much more to the exceptional and inefficient character of the self-constituted tribunals for the determination of questions affecting the honour of its

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members, and also to the mysterious secrecy with which such proceedings are conducted.\(^{609}\)

In reality, the Inns did not make any proactive changes in governance but the appearance of disciplining practitioners suggested that they had. To that extent, therefore, these instances are important to the underlying narrative of this thesis in that they eased public suspicion of the Bar’s internal mechanisms and engendered greater respect, albeit misguided, for the Bar’s ancient institutions.

The first of these arose from highly publicised litigation in 1859 concerning a challenge to the validity of the will of an elderly testator, Samuel Swinfen, under which a substantial estate in Staffordshire had been bequeathed, not to his heir-at-law, Frederick Swinfen, but to Patience Swinfen, latterly the wife of his deceased son. In Patience’s absence, her counsel, Frederick Thesiger, went against her express written wishes by compromising the action having had ‘a few minutes conversation’ with the trial judge, Sir Cresswell Creswell.\(^{610}\) Patience refused to give up and confronted the claimant, Frederick Swinfen, with a shotgun when he arrived to claim possession.\(^{611}\) A re-trial was ordered. In the meantime, she had instructed Charles Rann Kennedy who became not only Patience’s legal adviser but also her lover. It is said that she had capitalised on his unhappy marriage to a wife who ‘suffered from something too dreadful to mention’.\(^{612}\) The order was set aside and the estate passed back to Patience. Kennedy then took it upon himself to proceed against Thesiger, now Lord Chelmsford and a Tory Lord Chancellor, for malpractice.\(^{613}\)


\(^{610}\) The Times, 7 July, 1859, p.8.

\(^{611}\) Lewis, p.97.

\(^{612}\) Lewis, p.98.

Chelmsford’s previous opponent in the original action, Sir Alexander Cockburn, was now Lord Chief Justice. Chelmsford’s defence was that counsel had absolute control over a client’s case irrespective of his instructions and that professional discretion should not be fettered by fear of the consequences. All this inevitably attracted the press. The public were treated to the sensational sight of the now senior judges who had earlier been involved in the original case giving evidence in their robes, including the Lord Chief Justice who testified from the bench in full regalia. The damage done by this extraordinary spectacle was exacerbated by the fact that Kennedy alleged that Chelmsford had improperly settled the case to allow him to appear in another case elsewhere. However, the trial judge, the Chief Baron, determined that the claim outraged "public decorum and decency [...] by putting on the records of the court such a charge’. The jury found for Chelmsford and the barristers who crowded the courtroom greeted the jury verdict ‘with loud applause’. The applause was not echoed in the press and the true significance of the case for the current study lies not in the fact of the verdict but in the response of newspapers with large circulations such as the Daily News and The Times which evidently assumed that ‘double-briefing’ would now cease.

Until the authority of the client has been granted, no gentleman at the Bar will now venture to enter into a compromise or to abandon a case. [...] However absurd or perverse a client may be, it is now conclusively settled that the authority of counsel does

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614 The Times, 5 July 1859, p.11; Daily News, 5 July 1859, p. 6; Morning Star, 5 July 1859, p.6; The Times, July 6, 1859, p.11; Daily News, 6 July 1859, pp.6-7; Morning Star, 6 July 1859, p.6.

not extend to ignoring the client's wishes and binding him to stipulations against his will.\textsuperscript{616}

The \textit{Times} was less inclined to find bad faith on Thesiger's part but did believe he had ‘over-stepped the bounds of sound judgment, nor can we think such compromises are within the just authority of any body of men, ever learned or honourable’. It nevertheless acknowledged the wider significance of the case:

\begin{displayquote}
[W]e, as representing the public, may be allowed to revert to the real question which interests us all. Are counsel supreme and irresponsible in dealing with the interests of their clients, and when we bring a cause into court do we abnegate all control over it? The Swinfen cause has established that this is not law.\textsuperscript{617}
\end{displayquote}

There was an unfortunate postscript when Patience and Kennedy fell out badly and his fees of £20,000, which he had directly negotiated without the involvement of an instructing solicitor, went unpaid. He sued but lost, falling foul of the rule that counsel cannot sue for their fees.\textsuperscript{618} The revelation of his adulterous relationship with Patience as part of his case also brought down heavy judicial criticism. According to Pue, the final favourable outcome for the judges which had revealed ‘the warts of Queen's Counsel and judges [was] testimony to the resilience of the bar leadership, to their political influence [and] their opportunism’.\textsuperscript{619} However, events such as this had multiple significances. Over and above the damaging exposure of the self-

\textsuperscript{616} \textit{Daily News}, 7 July, 1859, p.4.

\textsuperscript{617} \textit{The Times}, 7 July, 1859, p.8.


\textsuperscript{619} Pue, 'Moral Panic', p.75.
interestedness of the senior Bar, behind the scenes and shielded from public view, the
Inns were now forced to contemplate improvements in governance. For example, in
1860 Gray's Inn had already resolved ‘that the attention of the three other Societies be
invited to the expediency of appointing a Committee of the four Inns of Court for the
purpose of inquiry into and reporting upon instances of improper professional conduct
on the part of Members of the Bar’. 620

More damage to public confidence in the processes of the Bar came two years later
when Edwin James Q.C., M.P., and prospective Liberal attorney-general, suddenly and
mysteriously renounced all his public offices and even his club memberships. 621 Inner
Temple set up a disciplinary committee, the result of which was that James became the first
Queen’s Counsel to be disbarred. This novelty was all the more acute as there was no existing
formal process of disbarment, nor of publicising the outcome and reasons for disciplinary
decisions. The rumoured reasons for the disbarment, questionable commercial transactions
and borrowings, were widely known in London circles but there was no public explanation
from the benchers for a further nine months. 622 There were instead suggestions that the true
reasons for his punishment had more to do with his ungentlemanly presentation and habits
than his indebtedness. The Spectator, for example, believed that ‘he was impeded in his rise
by all those aristocratic influences that are an obstacle to mere talent at the bar’. 623 James
epitomized a new type of ‘flashy’ advocate. ‘A shallow lawyer, he had long been suspected
of gaining publicity by unscrupulous use of the press’. 624 Moreover, his practice, although

620 Gray’s Inn, 12 Book of Orders, 1855-1861, 6 June 1860, p.540.
621 See ‘The Fall of Mr. Edwin James, Saturday Review, 13 April 1861, pp.358-59.
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623 Spectator, 23 November 1861, p.1283.
624 Polden, p. 1082.
highly successful, had not been prestigious. The *Spectator* once described him as a ‘leader in all actions [...] which involved the reputation of an actress or a horse’.\(^\text{625}\) The *Solicitors’ Journal* ‘urged’ the Benchers to publish a fuller account of their decision. Moved by widespread suspicion of their motives, an explanation, probably written by a Bencher, was published in the *Law Magazine* from which it appeared that James was in serious debt and had been instrumental in a number of dubious financial dealings. He had, for example, persuaded a young Lord Worsley, the son of Lord Yarborough, to assume co-responsibility for over £30,000 of his debts, causing Yarborough to begin an inquiry into James’s financial status generally. James’ evidence to the committee was said to have been ‘a tissue of suppressions, falsehoods, and perversions of fact [...] his accounts of the pecuniary transactions no more resembled the parol and documentary evidence than the moon resembles the sun’.\(^\text{626}\)

According to Pue, the underlying reality behind both the Kennedy and James sagas ‘represented proactive professional policing of the worst kind’.\(^\text{627}\) Both had been liberal outliers. Kennedy had dared to allege corruption on the part of the senior judiciary and, in James’ case, it was believed that his radical politics, including his early support for Garibaldi and vocal opposition to Napoleon III, had alienated the conservative professional elite.\(^\text{628}\)

Conveniently, prurient interest in the deviations of the likes of Kennedy and James distracted public attention from the blatantly monopolistic etiquette against which they had offended. Paradoxically, these events ultimately contributed to the improvement in the image


\(^{626}\) Quoted in ‘The Disbarment of Mr. Edwin James, Q.C.’, *Solicitors’ Journal* 6 (15 February, 1862), p.275.

\(^{627}\) Pue, ‘Moral Panic’, p.82

\(^{628}\) See, for example, ‘The Fall of Mr. Edwin James’, *Saturday Review*, 13 April 1861, 358-59; 15 February 1862), 184.
of the Bar as a body because the sternness of their treatment allowed the Inns to present themselves misleadingly as vigorous enforcers of internal discipline which certainly did not require external interference.

**Internal Unity and Cohesion**

One thing the 1836 Prisoners’ Counsel Act had not done was to provide the newly empowered criminal speechmakers with a code of behaviour with which to deploy their statutory right. Cocks has suggested that the nineteenth-century criminal Bar simply conducted itself with ‘a vague but strong form of individualism’ which harped back to the ‘Great Man’ idealisations of the previous century personified by Erskine. Criminal barristers saw their profession as the scene for individual adventure, and unexciting matters like the creation of an efficient disciplinary procedure were of little interest.₆₂⁹ Cairns confirmed that professional morality was ‘a matter for the subtle pressures of professional opinion and the advocate's conscience’ rather than rules.₆₃⁰ This may offer some explanation of the apparent resistance of Old Bailey practitioners to the formation of a Bar Mess until the last decade of the century.₆₃¹

Similarly, a national representative body, the General Council of the Bar (‘The Bar Council’) was not incorporated until 1895.₆₃² However, support among the rank and file for effective representation had been growing since the 1870s, principally as a reaction to what the junior common law Bar perceived as limitations on potential sources of work as a consequence of the Judicature Acts and to the absence of any formal mechanism for organised

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₆₃⁰ Cairns, p.150.
₆₃¹ May, p.242.
protest. The precursor of the Bar Council was the Bar Committee. According to Daniel Duman, the Bar had drifted into the 1880s ‘devoid of real leadership and desperately trying to shore up archaic governing institutions that were incapable of fulfilling the demands placed on them.’ In 1883, following a number of ad hoc meetings of juniors to discuss matters of common interest, the Attorney-General was presented with a requisition asking for a meeting of the Bar to set up a Bar Committee. Over a thousand barristers attended the subsequent meeting, out of which was formed a committee consisting of equal numbers of QC’s, juniors of more than ten years’ call and juniors of less than ten years’ call. Although the Committee achieved some success in resisting minor changes to proposed procedural rules, it ‘lacked the authority needed for the full usefulness of its work’ and, in particular, for clarifications of ‘etiquette’. It, therefore, attempted to bolster its standing with the inclusion of representatives of the Inns and by including ‘the enforcement of professional discipline and custom’ as one of its express objectives.

However, there was a further ten years of inertia until the profession was ‘suddenly’ infused with a new life by the creation of the General Council of the Bar in April 1894. By October 1895, after prolonged negotiation, the Inns agreed to support the Bar Council but typically insisted that it should not ‘claim any right to exercise any of the jurisdiction, powers or privileges of the Inns of Court’. In practice, however, the Council had by now acquired

633 Polden, p.1088.
637 Abel-Smith, p. 219.
Edward Rees (Ph. D.Thesis)

‘strong moral authority’ over professional conduct. In fact, this amounted to ‘a conservative victory’ because the authority of the Inns was confirmed and the absolute autonomy of the bar was preserved. The circumstances of this episode nevertheless support the conclusion that the common law Bar was now sufficiently unified to be desirous of a collective voice and enforceable, universal standards of conduct. Faced with the reluctance of the Inns to relinquish their claim to oversight of the profession, the Bar was prepared to self-organise resulting in ‘a stronger internal sense of cohesion and self-confidence’. The badge of a common identity and the setting of behavioural norms by the Bar Committee and Council advertised a new professionalism to the outside world. As a pertinent example, the Bar Council was later able to express opinions, taken as binding, upon matters such as the circumstances in which counsel may properly seek an acquittal after a defendant had privately confessed guilt.

Improved Courtroom Behaviour and Style

According to J.R. Lewis, the early years of the Victorian Bar had been ‘peopled with personalities of a kind that were to disappear as the century progressed [...] They were relics of an earlier age, unmarked by the strict moral rectitude of their successors, less fearful of scandal, more profligate of money – and members of a school of advocacy that was to die out in the 1880s’. John Witt, a long-serving silk, wrote in 1906: ‘No one who has seen three

638 Ibid.
639 Duman, The English and Colonial Bars, p.69.
640 Polden, p.1088.
decade of the law can fail to have observed enormous improvement in the demeanour of counsel towards each other ... Side by side with the change in manners of counsel, one to another, there has also been an advance in courtesy towards the suitors and witnesses’. Witt put the improvement down to ‘the general tendency in the minds of people at large towards pity for rather than condemnation of wrongdoers’. Whatever the actual reason, the fact remains that he had noticed a change. Also remarking upon the improvement from an early twentieth century perspective. Edmund Purcell wrote of ‘the bludgeon being too often the weapon of the advocate. The judge was denounced and insulted; the witnesses, especially the police, were accused of willful perjury; the address to the jury was clamour and vituperation. It was only gradually that subtlety and plausibility took the place they now occupy in the armoury of the advocate’. He singled out one ‘loud-voiced advocate’, who was a terror to one judge whom he managed to somehow compare to Nebuchadnezzar and to a ‘coiled-up boa-constrictor, who was about to spring on the unhappy prisoner’. Of another barrister, he wrote: ‘His strength was not so much in winning acquittals as in giving his clients, as it used to be described, a “glorious funeral” [...] His powers of vituperation, often quite original, relieved his speeches from the monotony of mere abuse’. By the 1880s, the predominant style of criminal advocacy had deliberately metamorphosed away from the ‘melodramatic, declamatory and lachrymose’ model of the mid-century which had seen students attend courses on theatrical declamation. In its place came a more conversational engagement

645 Purcell, pp.48-9.
with the jury.

Pausing there, any estimation of the qualities of the leading advocates of the turn of the century must be cautious insofar as it relies on their frequently hagiographical biographies. It should be mindful of Virginia Woolf’s observation that towards the end of the century, biographers had become preoccupied with ‘the idea of goodness … [n]oble, upright, chaste, severe; it is thus that the Victorian worthies are presented’. 647

Nevertheless, there is sufficient primary evidence from news reports and from contemporaries to conclude that styles of advocacy had in fact changed for the better - becoming quieter and, with some exceptions, less inclined to violent and florid appeals to emotion. In the Bar’s tradition of copying the styles of the successful leaders of the day, the junior Bar followed its leaders. To take a further contemporary opinion, the barrister George King writing in 1896 described the change in habits as follows:

The average barrister of today though less addicted to florid declamation, to lavish imagery, is doubtless a more effective speaker than the average of fifty years ago. The object of much of the fine talking of days gone was to plunge the jury into a turbulent sea of irrelevancies, to confuse rather than to convince the minds of twelve good men and true. What the present leaders of the Bar chiefly aim at is a keen cross-examination of the witnesses and an effective arrangement of the facts. 648

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The Leading Advocates

It is not a coincidence that the leading advocates of the turn of the century nearly all employed moderate and unsensational methods. Nevertheless, a review of the styles of the most successful counsel of the period must accommodate the anomaly of its most famous individual, Sir Edward Marshall Hall. Hall’s flamboyance was arguably anachronistic but his inclusion in this study goes to the general point that, by this time, the leaders of the profession were esteemed and lauded by the public as they never had been in the mid-century.

He was called in 1883 and took silk at the early age of 39 in 1898. Biron describes him as ‘[a] handsome man with a commanding presence, he always appealed to the lay client, as solicitors were not slow to appreciate, and he had an instinct for making the most of his qualities’.

Most of his well-known cases occurred in the Edwardian period but he spectacularly made his name in 1894 defending Marie Hermann, a 43-year-old prostitute, charged with the murder of an elderly client. The evidence was overwhelming but at the close of his speech Hall pleaded with the male jury to remember that ‘these women are what men made them. And do not forget, even she at one time was a beautiful and innocent child [...] Look at her, gentlemen of the jury, look at her. God never gave her a chance, won’t you?’

The verdict was manslaughter. Norman Birkett, the great advocate of a later generation, had been a member of Hall’s chambers when he was at the peak of his fame. He remembered that when Hall entered court, ‘There was a subtle change in the atmosphere, a tightening of

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the tension, an air of expectation, due in some measure to the extraordinary power of reputation, but mainly to his physical presence’. After Hall’s death in 1927, Edward Marjoribank’s famous hagiography ran to eleven reprints and sold 30,000 copies in the United Kingdom and America in its first three years. His modern biographer, Sally Smith, describes him as, ‘Showman, opportunist, crusader, genius, Marshall Hall was all of these things, frequently all at the same time […] He did not perform in front of juries, he aligned himself with them’. He was not a bully save that he ‘baited judges, teasing harassing, badgering, cutting down to size, to the fury of the Bench and the delight of juries.’ The conventional view of Hall is that he was ‘the last of the dramatic criminal advocates’. Thus Watson has suggested that Hall’s style ‘could be said to be almost [the] final deep gasp’ of the tradition of nineteenth-century histrionic advocacy. However, in a more nuanced appraisal, Smith believed that:

His advocacy was not the barnstorming of the previous generation of barristers as it is sometimes now reported; it was unclassifiably his own […] A misconception commonly held latterly is that Marshall’s technique was a throwback to that of the advocates of a generation before, a style which emulated the Victorian stage, ludicrously

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654 Smith, Preface Xiii, p.40.


656 Watson, p.171.
melodramatic, embarrassingly mannered [...] Admittedly histrionic by today’s understated standards, nonetheless he was learning the new styles adopted on the stage by Irving and others in which artifice was abandoned in favour of the application of technique to real emotion born of personal experience and memory. 657

The last part was a reference to his first unhappy marriage which ended in legal separation in 1889. The next year his wife became pregnant by another and died of a botched abortion which was followed by a very public prosecution of the lover and the abortionist for murder. 658 Hall himself compared advocacy to acting: ‘out of the vivid, living dream of somebody else’s life I have to create an atmosphere; for that is advocacy’. 659 He was not above trickery, including allowing tears to run down his face or, at difficult moments in an opponent’s speech, endearing himself to juries by blowing his nose, inflating a rubber cushion supposedly needed to ease his haemorrhoids, or tipping his glass of water. 660 Notwithstanding the rule that an advocate should not express a belief in innocence, he realised that ‘if an advocate for the defence can legitimately in his advocacy convey to the jury the impression of his belief in his client’s case, he has gone a long way towards securing their verdict’. 661 The defences which sealed his reputation included Herbert Bennett (‘The Yarmouth Beach Case’, 1901), Robert Wood (‘The Camden Town Murder’, 1907), Edward

657 Smith, Preface p.Xiii, Xv, pp.40, 45.
660 Watson, p.163.
Lawrence, in which he physically mimicked the scales of ‘justice’ and spoke of ‘the invisible weight of that invisible substance’, the presumption of innocence (1909), Frederick Seddon, the poisoner (1912), George Joseph Smith, ‘The Brides in the Bath Murders, (1915), Ronald Light, (‘The Green Bicycle Case’ (1919), Harold Greenwood, in which he recited the death scene from Othello, (1920), and ‘Madame Fahmy’ (1923). He returned the brief to defend Dr. Crippen in 1910 as he felt uncomfortable with his instructions. He twice served as a Unionist M.P. – 1900 to 1906 and 1910 to 1916.

This chapter now moves to a descriptive selection of three other leaders more readily associated with the new gravitas: Sir Edward Clarke (1841-1931), Sir Charles Russell, (later Lord Russell of Killowen) (1832–1900) and Hardinge Giffard (later Lord Halsbury) (1823–1921). Watson traces the emergence of this more restrained style as early as the first half of the century in the person of James Scarlett, later Lord Abinger (1769-1844):

‘Scarlett’s highly winning method of addressing juries did not involve rhetorical expedients but choosing the very best argument on his client’s behalf and putting it with all his ability in a well modulated musical voice, paying strict attention to facts and good diction. His manner was relaxed and his tone conversational’. Contemporaries apparently joked that he ‘had developed a machine which made judges nod their assent at his arguments’.662

Of the later advocates, it is Edward Clarke (1841-1933) who stands out as the most admired in the pantheon of the last two decades of the century. Tellingly, an 1897 profile in the popular Sunday, Lloyd’s Weekly Newspaper, assumed its largely working-class readership to be familiar with his reputation: ‘it has been accepted that the Bar furnishes no more capable advocate in criminal cases [...] He stands alone among the members of the Bar, without a rival in the leadership’.663 He appeared in a number of highly celebrated cases in

662 Watson, p.121.
663 Lloyd’s Weekly Newspaper, 28 February 1897, p.7.
which there had been intense public interest. In 1886, opposed by Sir Charles Russell and, it
appears, the trial judge, he secured the acquittal of Adelaide Bartlett charged with the murder
of her husband with chloroform. The *Pall Mall Gazette* gathered together other newspapers’
appreciations of his skills on her behalf. 664 The *Daily News* had claimed that, ‘no greater
triangle of advocacy has been witnessed in our time. From the position of grave peril in
which, ever since the coroner's inquest, she has undoubtedly stood, she was rescued by the
skill and eloquence of her counsel. Mr. Clarke's speech was not only an effective rhetorical
performance, but a masterpiece of tact and judgment’. 665 The *Standard* believed that ‘the
verdict of the jury was quite in accordance with expectation. Although Mr. Justice Wills
unquestionably summed up for a conviction [...] in our judgment the jury were absolutely
right, and could not have found the prisoner guilty without the risk of committing a terrible
error, which it is impossible to contemplate without a shudder’. 666 According to the *Daily
Telegram*, ‘a result which is partly due to the doubt which has surrounded the case from the
first, and partly also to the exceptionally skilful and impressive manner in which the
prisoner's advocate, Mr. Edward Clarke, conducted her defence’. 667 For the *Morning Post,*
‘the defence was one of the ablest of the many able specimens of advocacy which Mr. Clarke
has given’. 668 In the opinion of the *Morning Advertiser*, ‘to obtain a verdict of 'not guilty' in
face of such difficulties as Mr. Clarke had to face must be classed among the chief triumphs
of a distinguished career, and confirms the claim of the eminent pleader and politician to a
foremost place in the front rank of contemporary advocates’. 669 In ‘The Baccarat Case’ of

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664 *Pall Mall Gazette*, 19 April 1886 p.11.
666 *Evening Standard*, 19 April, 1886., p.5.
667 *Daily Telegraph*, 19 April, 1886, p.2.
668 *Morning Post*, 19 April, 1886, p.8.
669 *Pall Mall Gazette*, 19 April 1886 p.11.
1891 he appeared for a previously respectable Scots Guards colonel, Sir William Gordon-Cumming, who unsuccessfully sued for slander following an accusation of cheating at cards at a house party attended by the Prince of Wales who was required to give evidence. *John Bull* described Clarke’s speech as ‘one of the finest pieces of oratory that have been heard for many a long day’. In 1895 he represented Oscar Wilde in his failed libel action against the Marquess of Queensbury and defended Wilde when he was subsequently prosecuted.

One of his biographers, Derek Walker-Smith, gives an insightful explanation of Clarke’s wider appeal to late-Victorian England which confirms the conclusions of the present thesis. The essential point is that an advocate of Clarke’s qualities was highly esteemed because he personified contemporary Victorians’ sense of self. Walker-Smith wrote:

> The designation, “a typical Victorian”, is used by some people as a term of pity and even contempt. However that may be, they will find in Edward Clarke many of the characteristics that arouse in them those feelings. He was earnest, and deficient in lightness of touch. His view of life was serious, and incompatible with that gay cynicism so fashionable in the twentieth century. He accepted the standards of his time, and strove to satisfy them, and was neither introspective nor iconoclastic. He believed in the Victorian ideas of progress, religious observance, family life, enlightenment by education, the triumph of reason, and material success. He believed it better to be moral than amusing and good-hearted than either.... He

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670 *John Bull*, 13 June 1891, p.3.
devoted himself to the service of his generation and from it received
the stamp of approval. 671

J.R. Lewis made the point that ‘he had inherited few of the declamatory, lachrymose,
resonant talents of the early Victorian Bar’ and offered a similar explanation both of Clarke
and of his era:

In many ways the values of the times were bound up and
epitomized in the short, stocky, full-whiskered person of Sir
Edward Clarke. He was a true Victorian, a product and symbol
of his time. He displayed a certain naivete and unworldliness
that marked him out from other men at the Bar; he showed
none of the arrogance and haughtiness that prowess at the Bar
tended to leave as a mark on the leaders; he was endowed with
a simple piety that was the ideal hallmark of the period. 672

A comparison which illustrates a change in public attitudes to leaders as the century
progressed may be made between the adulation of Clarke in the 1880s and the less glowing
appreciations afforded to Charles Phillips in the 1840s, notwithstanding that Phillips was also
the foremost criminal advocate of his day. Admittedly, Phillips was spontaneously applauded
in court for a passage in a speech that he made in an 1816 adultery case, Guthrie v Sterne, on
behalf of the abandoned male spouse (see Chapter Five). 673 Even so, there is a telling contrast
between that and the sustained approbation which followed Clarke’s speech on behalf of
Adelaide Bartlett as described in Lloyd’s Weekly Newspaper:

671 Derek Walker-Smith and Edward Clarke, The Life of Sir Edward Clarke, (London:

672 Lewis, The Victorian Bar, p. 142.

673 Jan-Melissa, Schramm. ‘The Anatomy of a Barrister’s Tongue”: Rhetoric, Satire and the
Even before the foreman of the jury had completed his statement, loud and prolonged cheering was heard from the large concourse that had assembled in the Old Bailey. Directly the verdict of "Acquittal" was formally returned, rapturous plaudits broke out in court, which were continued in defiance of the official efforts to subdue this unwonted demonstration of approval. Sheriff Evans rose on the bench, and raising his hands deprecatingly, cried "Silence, silence" and the ushers repeated the demand in stentorian tones, but all to no purpose. The shouts of applause were several times renewed, being sustained by spectators not only in the gallery and the body of the court, but by some of the more privileged at the extreme end of the bench, where hats were waved excitedly. As soon as silence was restored, His Lordship said: “This conduct is an outrage. A court of justice is not to be turned into a theatre”. Addressing the jury the learned judge continued: “I hope you shall not be insulted again by an exhibition like we witnessed just now, and which was of a most disgraceful kind occurring as it did on the most solemn occasion on which men can be called together to perform a public duty”. [...] On leaving in his carriage Mr. E. Clarke was loudly cheered by a large number of persons remaining within the outer yard of Newgate, and also by the crowd in the Old Bailey.  

In Clarke’s case it continued as a crowd escorted the carriage to his home in Russell Square. That evening when he and his wife went to watch Ellen Terry and Henry Irving at the

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674 *Lloyd’s Weekly Newspaper*, 18 April 1886, p.7.
Lyceum Theatre ‘the whole house rose and cheered their entry’.\(^{675}\) It is said that Clarke himself cried at the verdict.\(^{676}\)

Clarke’s frequent opponent, Sir Charles Russell, was called to the Bar in 1859 and rapidly became established in the North of England. A contemporary, Mathew, portrayed him as one who was not regarded as a pleasant antagonist: ‘Despite a quick temper and a tendency to allow matters to become personal between himself and opposing counsel he was popular on circuit and said to treat witnesses fairly’.\(^{677}\) However, Mathew agreed with Andrew Watson that having been intemperate at the beginning of his career, as he became more experienced, he became less aggressive.\(^{678}\) This change in courtroom behaviour over time is significant insofar as it again provides evidence that major figures like Russell were astutely adopting more refined styles than an earlier generation. His most famous cases include the successful defence of the Irish Nationalist leader, Charles Stewart Parnell, before the Parnell Commission in 1888, and the defence of Florence Maybrick in 1889 who was convicted of murdering her husband by poisoning with arsenic. In 1880 after several unsuccessful attempts, he was eventually elected as an independent Liberal M.P. for Dundalk, County Louth. In 1885 he was returned for South Hackney where a street was subsequently named after him. He was Attorney General in the Liberal Governments of 1885 and 1892 and was appointed Lord Chief Justice in 1894, the first Catholic to do so.

Russell’s great skill was said to lie ‘not so much through oratorical brilliance as his

\(^{675}\) Walker-Smith, p.186.

\(^{676}\) Lewis, *The Victorian Bar*, p. 142.


\(^{678}\) *ODNB*; Watson, p..117.
Another contemporary and biographer wrote of him: ‘It was a fine sight to see him rise to cross-examine. His very appearance must have been a shock to the witness, – the manly, defiant bearing, the noble brow, the haughty look, the remorseless mouth, those deep set eyes, widely opened, and that searching glance which pierces the very soul’. It was said he ‘produced the same effect on a witness that a cobra produced on a rabbit’. A contemporary claimed that ‘as a great personality and an “elemental force”, Russell was more than pre-eminent – he was overwhelming.’ One younger barrister recollected ‘the atmosphere which the man created. Whoever was the judge, from the moment Russell got going he dominated the court’. According to another contemporary, Edward Abinger, he was ‘the greatest lawyer I have ever met. He electrified the jury, the Judge, and everybody else with whom he came into contact. His handsome face, his fine figure, his sonorous and clear voice, all helped to contribute to his wonderful power of capturing the judgment of any jury he appeared before’.

The overall reputation of the last subject, the ‘uncompromising’ Tory, Hardinge Giffard (Lord Halsbury) is ultimately tarnished by his political preferences when Lord Chancellor. Having been first appointed to the woolsack in 1885, he held the office for

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681 Ibid.
684 Edward Abinger, Forty Years at the Bar, (London: Hutchinson, Date Unknown), p.74.
seventeen years. It is said that there were two major deficiencies in his tenure of office. Firstly, the trend of his appointments to the High Court, in particular, revealed that service to the Conservative Party rather than the possession of outstanding legal skills was the dominant criterion for preferment. Secondly, as a judge, he manipulated proceedings, notably Trades Union cases, in order to achieve his desired outcomes.\textsuperscript{685} Earlier in the century, like others, he was not above theatricality. In 1867, two years after he took silk, he was instructed to halt the prosecution of Edward Eyre, the former governor of Jamaica, for murder arising from his bloody suppression of the Morant Bay uprising by black Jamaicans. He made a six hour speech before lay magistrates. At one stage, he broke down in tears and called on God before targeting the biases of rural magistrates. Eyre was not committed.\textsuperscript{686} Giffard is included here, however, for his later style and his influence on others. According to Watson, he was respected ‘for his judgement, power of expression, freedom from speaking nonsense, not talking for talking’s sake and for his ability to grasp all the facts of complicated cases.’\textsuperscript{687} In two slightly backhanded compliments, his courtroom demeanour has been described as ‘often understated, even stilted; his forte was his outstanding memory and his mastery of the facts of cases whose briefs he was quite likely not to have read.’\textsuperscript{688} Writing in 1916, Edward Clarke believed that Giffard’s influence on him had been transformative: ‘It is now fifty years since I made his acquaintance at the Old Bailey where he had a most lucrative practice. It was then a rough place and some of the older men had habits of cruel and offensive cross–examination and


\textsuperscript{687} Watson, p.115; *ODNB*.

violent and unscrupulous advocacy, which Giffard’s influence and example did much to banish from our criminal courts. He was not a great defender of prisoners [...] To listen carefully to the whole of a case when Giffard prosecuted [...] was the best lesson a young barrister intending to practice in the criminal courts could possibly have.689

In conclusion, this part of the present study argues that the transition to more principled styles of advocacy is best understood as a positive reaction to critical exposures and evaluation by the press. The criminal Bar cannot have been unaware of its intrinsic vulnerability arising from the unsatisfactory contradiction between the status which it hoped to preserve and the tawdry reputation which its own behaviour had generated. The intense press negativity, characteristic of the period between the 1840s and 1860s, faded with reconciliation of the contradiction and the conscious replacement of men like Charles Phillips with models of Victorian professionalism like Clarke and his leading contemporaries.

689 Cited by Watson, p.115.
SECTION D : EDUCATION AND QUALIFICATION

**Introduction**

This Section and Section C are complementary. Each traces simultaneous historical processes which culminated in the enhanced standing of the criminal Bar by the end of the century. This Section charts the process of transformation from the manifest deficiencies in barristers’ education and qualification and the press characterisation of the situation as a public scandal to the Inns’ ultimate, but diffident, acceptance of the necessity for systematic reform. The reputation of criminal practitioners, perennially depicted as ignorant and unprofessional, benefited most from the increased public confidence which came with the introduction of quality control in the form of compulsory examinations. Taken together, the two Sections found the thesis that the improvements in ethical standards and the development of professional education combined to produce an enriched public identity.

What follows in this Section is a chronological narrative. Chapter 7 starts with a survey of the paucity of legal education which prevailed until the last quarter of the nineteenth century. It examines the resulting tensions between the resistance to improvement on the part of the Inns of Court and their concomitant and persistent denunciation in both the popular and specialist legal press. The chapter sets out the efforts of reformers which led to the damning but ineffective conclusions of the 1846 Parliamentary Select Committee and the 1855 Royal Commission on Legal Education. The historical account continues with a description of the continuing inertia and the intensification of public and press criticism. The Section concludes in Chapter 8 with the improvements resulting from the Inns’ reluctant acceptance of the irresistibility of systematic education and, finally, of quality control by compulsory examination. This latter innovation brought the Bar more into line with other Victorian professions and, as a result, a major cause of public concern was effectively satisfied.
CHAPTER 7 - Early History and Attempts at Reform

From the sixteenth century onwards, aspiring barristers had lodged and trained at the Inns of Court, once known as the ‘third university of England’ after Oxford and Cambridge. According to Sir John Fortescue, an Elizabethan Lord Chief Justice, there were once times when Inns were nurseries of virtue as well as schools of law, where ‘everything that is good and virtuous is to be learned, and all vice discouraged and banished’. By the beginning of the eighteenth century only the vestiges of their educational function remained. For example, lecturers or ‘readers’ were still appointed by the Inns but no longer gave readings. Without effective judicial supervision, the Inns had become ‘little more than residential clubs for lawyers’. In 1762 new rules for admission were intended to attract ‘gentlemen from the universities’, thereby ensuring the exclusion of most attorneys and solicitors. By 1820, admission to an Inn required no educational qualifications - merely a statement of respectability signed by two persons and a deposit of £100. The requirements for call to the Bar were membership of an Inn for five years, or three for university graduates, and the keeping of twelve dining terms which meant attendance in hall for three evenings each term. Normally, those intending to practise paid a fee of 100 guineas to become the pupil of a special pleader (a non-practising barrister who drafted

694 Polden, pp.1175-6.
documents), equity draftsman or conveyancer. Pupils were expected to learn by copying pleadings, observation and attendance at court. The pupil master was under no formal obligation to teach although some, such as Joseph Chitty, who had more than 20 pupils, gave lectures which were subsequently published as treatises. In 1833 the Satirist commented: ‘I am assured that in and out of the Law List, there are thirty thousand lawyers! And every term others admitted without limitation. Good Heavens, to what shall we come at last’. The Bar’s hostility to systemised standards is best explained by a combination of its deeply-felt suspicion of external control and its self-regard: ‘Emphatically law was the lawyers’ business.’ The unselconscious result was that the nineteenth-century Bar was ‘content with its everyday life’ - partly from the fact that they ‘were engaged in the common pursuit of wealth’ and ‘able to function without an overwhelming amount of internal dissent and without very much concern for public opinion’.

Solicitors and Attorneys

In its 1855 report the Royal Commission on Legal Education highlighted the uniqueness of the Bar’s position:

The Clergyman, the Physician, the Surgeon, the Apothecary, as well as the Attorney or Solicitor, are all required to pass an Examination before they are permitted to practise. In the Navy and Army, a like Examination of

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695 Payment of a discretionary ‘pupillage fee’ only ceased in the 1970s.

696 Joseph Chitty, Prospectus of a Course of Lectures on the Commercial Law, to be Delivered Immediately after the Michaelmas Term 1810, (London: Harding and Wright, 1810).

697 The Satirist or Censor of the Times, 9 June 1833, p.3.


699 Cocks, p.25
officers is required before they are entitled to their first commission, and also before a Lieutenancy in the one or a Captaincy in the other is attained. In every other country in Europe an educational test is applied to Advocates, either by requiring a Degree in Law at a University, or else by a distinct Professional Examination. In Scotland, the Faculty of Advocates have so recently as in the last year required a Test both of general and Professional knowledge.  

For our purposes, it may suffice to take two contemporary comparables, namely that of attorneys and solicitors and that of medical practitioners, to illustrate the deficiencies of the Bar’s professional training. W.J. Reader provided the insight that, unlike the Bar, the lower branches of both law and medicine ‘needed something in the way of formal qualifications, impartially assessed, uniformly recognised, ubiquitously enforced, and their essentially practical view of education, no doubt made them the readier to take to the idea of specialized studies and examinations. Moreover, they wanted status’. Barristers, on the other hand, buttressed by their historical standing and the perceived benefits of a gentlemanly university education, had no reason to aspire to what they already possessed.

The nearest reference point is obviously the training of ‘the junior branch’ of the legal profession. While this was certainly not without its imperfections, a comprehensive and largely effective system, supported and self-administered by an incorporated body of

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700 Report of the Commissioners Appointed to Enquire into the Arrangements in the Inns of Court and Inns of Chancery for Promoting the Study of Law and Jurisprudence’, HCPP (1855), p.15.
practitioners had evolved many years before the institutions of the Bar would even contemplate anything similar - a distinction which was not lost on the press and public. Attorneys are believed to have emerged in the thirteenth century with responsibility for preparing cases in the common law courts. Solicitors first appeared in the fifteenth and sixteenth centuries principally to manage business in the Lord Chancellor’s Court of Chancery, which determined matters outside common law rules by applying principles of ‘equity’. They subsequently expanded into multi-jurisdictional work so that, by the beginning of the nineteenth century, practices included personal, business and corporate affairs, conveyancing, general legal advice, and, increasingly, the investigation and management of criminal proceedings, including the instruction of counsel. As a result, solicitors had subsumed the older profession of attorney.

As ‘officers of the court’ attorneys and solicitors were subject to judicial supervision. As such, they were controlled for centuries by ‘detailed regulation of innumerable Acts of Parliament [which had] only partially freed them from the dominance of the judges’. In 1729 the Solicitors and Attorneys Act formalised training with a requirement of five years’ apprenticeship as ‘articled clerks’ (reduced to three years for graduates in 1821) to be followed by judicial interview. The important point to note is that, unlike the Bar, they were thus governed by a formal, codified practice, enshrined in legislation, which provided them with ‘a professional consciousness’ as early as the first third of the eighteenth

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704 Solicitors and Attornies Act 1729 (2 Geo. II c. 23).
century. Some contemporary commentators complained that the quality of training was frequently perfunctory and depended on the extent of the ‘master’s’ commitments. To that extent, in practice, the learning offered to an articed clerk was not very different from that experienced by the aspiring barrister.

In 1739 the ‘Society of Gentleman Practisers in the Courts of Law and Equity’ was formed to represent common interests and to exclude unqualified individuals from practice. In other words, self-incorporation and quality control had started a century and a half before the Bar. In 1825, the precursor of the Law Society, pointedly named as the ‘Society of Attorneys, Solicitors, Proctors and others not being Barristers, practising in the Courts of Law and Equity in the United Kingdom’, came into being. It was renamed as the Law Society in 1831. Unlike the Inns, it was evidently proactive. By 1833 it was providing lectures by barristers in its Chancery Lane hall. Subjects included common law, conveyancing, equity, bankruptcy, and criminal law. By 1836 the Society had persuaded the Queen’s Bench and Nisi Prius judges to make rules for a compulsory written examination for admission as an attorney, with the examiners drawn internally from membership of the Law Society. The following year the Master of the Rolls made similar provision for solicitors. The two sets of examinations were amalgamated in 1853. Again, the Bar lagged behind by forty years until it made its own examinations compulsory in 1872. In 1843 the Law Society was authorised to keep a register of solicitors and by 1845 was recognised by Royal

705 Carr-Saunders pp.44-7.


707 Carr-Saunders, p.45.

708 Abel-Smith, p.74.
Charter for the declared purpose of promoting ‘professional improvement and [...] the acquisition of professional knowledge’.\textsuperscript{709}

Despite some concern that articled clerks had insufficient time to attend lectures, the 1846 Parliamentary Select Committee on Legal Education (see below) made a tentative suggestion that they attend some joint lectures with Bar students but, in essence, broadly approved of the existing system of articles:

\begin{quote}
The articled clerk not only learns what he is to do, but is gradually found doing it as he advances, and thus enters, in this particular usually well prepared, on the career of the Solicitor.\textsuperscript{710}
\end{quote}

By the 1830s and 1840s some legal periodicals, such as the \textit{Law Times}, were increasingly supporting the training of the expanding attorney/solicitor market by reprinting Law Society lectures.\textsuperscript{711} Even so, being unable to attend London lectures in person, provincial clerks frequently set up their own local societies in the larger towns, some with the financial support of the Law Society itself. Cities such as Manchester and Birmingham arranged their own lectures but attendances were poor.\textsuperscript{712} As a result of dissatisfaction with the Law Society’s performance in ‘turf wars’ with the junior Bar over rights of audience following the 1846 County Courts Act, a number of these local societies came together to form the Metropolitan and Provincial Law Association.\textsuperscript{713} The 1860 Solicitors’ Act was the result of lobbying by the Association which had hoped to improve the social composition of legal practitioners.

\textsuperscript{709} Carr-Saunders p.47.
\textsuperscript{710} Report from the Select Committee on Legal Education’, HCPP; 25 August 1846, Lii.
\textsuperscript{711} Polden, p.1179.
\textsuperscript{712} Wesley Pue, ‘Guild Training vs. Professional Education: The Committee on Legal Education and the Law Department of Queen's College, Birmingham in the 1850s’, \textit{American Journal of Legal History}, 33 (3) (July 1989), 241-287, (p.251); Polden, p. 1201.
\textsuperscript{713} Abel-Smith, p.54.
the profession by introducing a sound general education with preliminary examinations in Latin, French, English, History, Geography, and Arithmetic. The Act had also allowed for discrete local qualifications, some of which were proving unduly easy to attain. An intermediate examination was also introduced in 1860 to ensure that articled clerks acquired some substantive legal knowledge. By the time the Law Society took control of the final examination in 1877, the emphasis was leaning towards professional practice rather than theory. However, the lectures provided by the Society were not highly regarded and many students resorted to more purposeful ‘crammers’ aimed squarely at gaining examination passes. Recognising the competition, the Society abandoned lectures in favour of a correspondence course with minimal tutorial input. In another turnaround, faced with protests from articled clerks, it reinstated its lectures. It took until 1903 before the creation of a ‘College of Law’ offered the level of preparation the examinees wished for.

The Medical Profession

The structure of the medical profession was considerably more complex. It notionally consisted of three hierarchical, medieval ‘orders’ of physicians, surgeons and apothecaries, The first two groups were governed by their own Royal Colleges; the latter by the guild-like Society of Apothecaries. In practice, their respective functions became blurred as the nineteenth century progressed until the emergence of the modern categories of ‘Consultant’, ‘General Practitioner’ and ‘Chemist’. One consequence was that the century was punctuated by ferocious jurisdictional battles which ultimately maintained formal demarcation between

714 (23 &24 Vict.) c. 127.
715 Polden, p.1198.
716 Polden, p.1199.
their permitted competencies and which continued to determine the nature of their training and status.

Physicians, who came for most part from ‘better middle-class families with a sprinkling from the upper classes’, occupied the primary position.\(^{718}\) In common with the Bar, the original ideal had been that of ‘a cultured and highly educated gentleman with, quite secondarily, an adequate knowledge of medicine.’ Surgeons, on the other hand, treated ‘by operation of their hands’ and were permitted to apply salves, plasters, liniments and lotions externally. The paradigm before the widespread use of anaesthetics was the ‘general anatomist’ - a ‘sound operator’ able to act with speed and dexterity.\(^{719}\) According to M. Paterson, men of high social rank avoided the profession because they feared the loss of social standing involved.\(^{720}\)

Historically, the lowest level of medical professional was the apothecary who had been permitted to prescribe and dispense medication since 1704. These generally came from lower-middle-class groups, such as shopkeepers, together with the higher class ‘of what might be called the depressed middle-class, the younger sons, the sons of curates, or of village schoolteachers’.\(^{721}\)

With time the theoretical differences between the three orders were becoming unsustainable. Firstly, physicians’ and surgeons’ practices had been trespassing on each other’s territory since the end of the eighteenth century. In 1834, Sir Anthony Carlisle, an eminent hospital surgeon, claimed that ‘the distinctions between what ought to belong

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\(^{719}\) Newman, pp.17-19.


\(^{721}\) Newman, pp.21-22.
to a physician, and what belongs to a surgeon, are quite undefinable [...] The most eminent surgeons in London do not confine their practice to surgery: they practise also as physicians and physicians do not scruple to take fees in surgical cases'.

Of wider significance at the other end of the professional spectrum was the fact that, by the early part of the nineteenth century, a mixed breed of unregulated ‘surgeon-apothecaries’ had grown up who combined surgery with the prescription and supply of medicines. Their concern over damaging competition from ‘uneducated’ individuals led to the 1815 Apothecaries’ Act. However, the Act did not achieve its objectives. It had failed to clearly define an apothecary’s functions and duties with the result that it was difficult to bring proceedings against the unqualified. Moreover, anyone simply wishing to engage legally in a general practice was obliged to become a licentiate of the ancient Society of Apothecaries which required a five-year apprenticeship and passing the Society’s examinations. Historians have differed considerably in their estimations of the implications of the Act for the future shape of the medical profession. Newman, for example, argued that the benefit of the Act for apothecaries was that it entrusted the examination of and responsibility for ‘the great majority of medical practitioners’ to their Society which, in his judgement, meant that the two Royal Colleges ‘and especially the College of Physicians were completely sidestepped’. Perhaps more astutely, Holloway asserted that, by the time of its final form, the Act ‘tended to degrade rather than elevate the rank and file of the profession’ because the physicians had insisted that the legislation comply with the principles and language of the Company of Apothecaries’ Charter of 1617. This intentionally stifled any pretensions apothecaries might have about becoming members of a learned profession as

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723 (55 Geo. 3) c.194.
opposed to a trade guild. ‘The ancient theory of “orders” was re-asserted at the very moment this theory was crumbling in the face of the new social structure’. While the consulting physician and surgeon could claim to be members of Royal Colleges, the general practitioner was associated by law with a London trading company and, therefore, occupied the lowest status in the medical profession. Remarking upon the hostility between within the professions, Irvine Loudon found Holloway’s analysis ‘wholly convincing’ and now ‘largely accepted’. ‘The general practitioners [...] ended up with an Act designed by the medical colleges for their suppression, [they] saw themselves increasingly as professional men with a growing sense of a collective identity, a determination to reform, and a new pride in their position in medicine and in society as a whole’. To that extent, these general practitioners of medicine bear comparison with the general practitioners of the law, that is, attorneys and solicitors. Unlike barristers and physicians who, confident in their own standing, saw no reason to adjust their own processes, the desire of the junior branches for systematic education and quality control was internally driven. In addition, the doctors faced the persistent refusal of the Royal Colleges to make provision for the type of education which was suited to general practice.  


726 Holloway, Pt.2. pp.222-3.


Even so, Newman and Holloway accepted that the medical profession’s achievements between 1825 and 1850, when clinical teaching assumed ‘its present predominant place’, were ‘creditable in the highest degree’ and ‘a decisive turning point in the development of medical education in England’.\textsuperscript{729} Pausing there, the arguable point may be made that, while legal principles of the time remained broadly static, advances in medical science were progressive and dynamic and thus more requiring of a specialist educational structure. University education for general practice was provided for the first time in England with the foundation of University College London in 1826. After 1830, a recognition by hospital Boards of Governors of their teaching responsibilities led to the general establishment of hospital medical schools on a regular basis.\textsuperscript{730} By 1858 there were dedicated medical schools in twelve London hospitals with additional institutions in other major cities. The old-established local licensing authorities began to issue detailed syllabuses for effective qualifying examinations. It has been suggested, however, that teaching in the London hospitals, controlled by the medical corporations, ‘was to the teachers, the means of making a good deal and giving very little’.\textsuperscript{731}

A parallel development was the 1832 formation of the Provincial Medical and Surgical Association, established by some fifty practitioners at Worcester Infirmary, the precursor of the doctors’ modern ‘trade union’, the British Medical Association. It was originally intended to provide a ‘friendly and scientific’ forum that would allow provincial practitioners to advance and exchange medical knowledge. However, its avoidance of confrontation with the professional elites caused Thomas Wakely, the acerbic editor of the

\textsuperscript{729} Newman, pp.96, 103-4; Holloway, ‘Medical Education in England’, p.299.
\textsuperscript{731} Newman, p.121.
campaigning *Lancet*, to describe it as ‘a most disgraceful abortion’. Over time, Wakely became reconciled and joined the Association which became the BMA in 1855. Its membership grew and it took over the weekly journal, the *Provincial Medical and Surgical Journal*, which became the *British Medical Journal* from 1857. An indication of the attitudes of sections of the contemporary medical profession to what they themselves perceived to be deficiencies in legal education comes from a speaker at the first meeting of the Northern Branch of the BMA in 1865: ‘if the coroner were always a medical man and more of an inquirer and less of a judge [this would] attract the best-educated and most scientific members of the profession’. 

By now the unsuitability of the apprenticeship system as a means of teaching had become increasingly apparent. ‘Haphazard and unsystematic’, much depended on the abilities of the master with ‘obsolescent ideas and practices of an earlier age [...] passed on to the new generation. In an era of innovation and change in medical knowledge, apprenticeship was seen as a reactionary institution’. 

By 1850 the modern division between consultants and general practitioners was becoming settled. Consultants were resorted to in rare, difficult, and dangerous cases, but continued to serve as generalists for those who could afford them. However, the majority of people were treated by general practitioners who prescribed medicine, performed minor operations, drew teeth, dressed wounds, and attended in child birth. There was no legally required qualification and they included unqualified individuals

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733 Bartrip, p.72-3.
735 Holloway, ‘Medical Education in England’, p.322.
who had, for example, been apprentices who had set up in practice without obtaining a specific qualification.\textsuperscript{736}

The passing of the 1858 Medical Act was a watershed which clearly differentiated the progress of medical training from that of the Bar. The Act created the General Council for Medical Education and Registration (GMC) with the task of supervising and co-ordinating medical education throughout the United Kingdom. Its members were elected by the profession itself. Of the GMC's 24 founder members, eight were BMA members. A register of all qualified practitioners was compiled and all whose names appeared in it were accorded the same legal status.\textsuperscript{737} Apprenticeships ceased to be a significant feature of medical education. Again, over time scholarly opinion has varied as to whether the Act in fact improved the status of general practitioners. In 1957, Newman, for example, characterised the Act as a great landmark and a ‘relief to moderate-minded persons who were utterly tired of the long-protracted tussle’ between the Royal corporations and general practitioners.\textsuperscript{738} However, Loudon, writing thirty years’ later, argued that the principal goal of the reformers, led by Wakely, for one single, universal portal of entry by examination was missed because none of the corporations would surrender their privileges. The suggestion that the Act was responsible for introducing modern medical education is rejected as ‘so wide of the mark that it needs only to be mentioned to be dismissed’.\textsuperscript{739} His analysis was as follows: ‘when the Act was receding into history and the anger it had aroused had faded, a chorus of praise elevated it almost into a national monument’; subsequently, it became ‘more usual to describe it as a prime example of professional consolidation and monopolisation based on motives of self-interest’ on the part of the Royal Colleges. The continued exclusion of

\textsuperscript{736} Holloway, p.314.
\textsuperscript{737} Holloway, p.299.
\textsuperscript{738} Newman, pp.187-193.
\textsuperscript{739} Loudon, p.297.
general practitioners from most hospitals, together with ‘the peculiarly British’ principle of subservient referral, mirrored in the solicitor/barrister relationship, ‘are the keys to understanding the medical profession in Britain’. The prospect of social and professional mobility which had been a source of optimism and vitality for general practitioners was disappearing, ‘To this extent, they were disappointed people who had challenged the medical corporations and lost’.  

In ‘Gentlemen and Medical Men: The Problem of Professional Recruitment’, M. Peterson found that comparisons with other professions have resulted in a ‘clear picture’, namely that, despite the elite character of the Royal Colleges, ‘the general medical practitioner stands below every other group surveyed in its ability to recruit the sons of the gentry and professional classes’. Some feared a loss of social standing and Peterson queries whether the physical nature of medical practice itself, involving diseased flesh, horrific surgery and the tradesmanlike duties of drug compounding and dispensing all may have seemed ungentlemanly. He found a better ‘solution’ in the meaning of gentlemanly status itself in that medical practitioners lacked power in two respects. Firstly, they lacked independence and, secondly, they lacked influence and authority over others. By contradistinction, both qualities defined the Bar. The Bar could thus be confident that its social composition contrasted ‘favourably’ with that of the generality of the medical profession.

On any reading, the evolution of medical training in the nineteenth century was contentious and territorial. The Royal Colleges were, in their way, as conservative and inward-looking as the Inns of Court, However, the most pertinent conclusion for the present thesis is that, for all its discriminatory elements, a national, systematic structure for teaching

740 Loudon, pp.297-300.
and quality control was in place, at the latest, by the time of the 1858 Act – in other words, decades ahead of the Bar.

The Legal Reformers: Brougham, Bethell and the Law Amendment Society

The setting up of the 1846 Parliamentary Committee was the first organised attempt at revitalising the lassitude of the previous half-century. Its conclusions were well-supported by evidence. Nevertheless, most of its proposals were not implemented until years later, and some not at all. This was despite unrelenting demands for reform in the popular and specialist press. An understanding of the reasons for this perennial failure of reform is, therefore, important to the conclusions of this study. The principal obstacles were and continued to be the defensive conservatism of the benchers of the Inns and an apparent lack of interest on the part of a complacent rank and file Bar underpinned by the perennial laissez-faire diffidence of successive governments towards interference in the internal affairs of the Bar. In the absence of a grassroots groundswell in favour of reform comparable to that which characterised the various medical professions, the efforts of Whig reformers such as Henry Brougham and Richard Bethell M.P., (later Lord Westbury), the criticisms of the growing number of (mainly conservative) legal journals and the increasing vocal concerns of the public press were all resisted for decades longer.

The 1846 Parliamentary Committee was nominally the initiative of the Law Amendment Society (LAS) which was, in turn, the creature of Brougham. Formed two years earlier, the Society was a non-party group intended to meet regularly for the purpose of stimulating inquiry and investigation and providing a vehicle for generating reforming legislation. It appointed its own specialist committees whose reports were often publicised in

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Report from the Select Committee on Legal Education’, HCPP; 25 Aug 1846, 686;
the legal press and passed on to sympathetic sponsors for introduction in Parliament. Its broad objective was stated to be ‘To assist all useful reforms in the Law’.\textsuperscript{743}

Brougham has already featured in this study as a prominent legal and political figure.\textsuperscript{744} Nevertheless, according to a modern biographer, he ‘defied easy political characterization [ and ] never fully won the trust of the traditional landed aristocratic Whig leadership’.\textsuperscript{745} It appears that his personal weaknesses may be as much a reason for the failure of law reform as his inspirational strengths were part of its impetus. Lobban has characterised his relationship with the LAS as ‘that of a quasi-Lord Chancellor with his quasi-ministry of justice’\textsuperscript{746} Charles Greville, clerk to the Privy Council for 35 years, believed that Brougham’s ‘genius and eloquence’ was marred by ‘unprincipled and execrable judgement’.\textsuperscript{747} Lobban, too, concedes that Brougham’s character was ‘vain and petulant […], that he constantly sought attention by meddling where other, wiser, heads might have kept quiet, [and that he ]used law reform for self-promotion and to keep his political career alive’. Nevertheless, in Lobban’s judgement, this should not detract from his central importance to that movement, and his commitment to its success. That he was more than a mere spokesman for the LAS is shown by the fact, as he himself grew older, the organisation became less effective and more divided.\textsuperscript{748} By the mid-1850s, the LAS had become ‘weakened by both thinly attended meetings and internal dissension’.\textsuperscript{749} On this evidence, it is arguable that

\begin{itemize}
\item \textsuperscript{743} ‘The History of the Law Amendment Society from its Institution in 1844 ,Till the Present Day’, 18 \textit{Law Review} (August 1853), 307.
\item \textsuperscript{744} See Chapter Five.
\item \textsuperscript{746} Lobban, p.1191.
\item \textsuperscript{748} Lobban, p.1193.
\item \textsuperscript{749} Lobban, p.1191.
\end{itemize}
Brougham’s personal unsuitability for the leadership of a sustained reform campaign explains the Committee’s ultimate lack of impact.

Neither the Inns nor the universities took any effective interest in the systematic teaching of law or practice. The Benchers took their responsibilities ‘little more seriously in the sixty years that followed the Napoleonic Wars than in the sixty years that followed the Civil War.’\textsuperscript{750} For its part, Oxford had founded the Vinerian Chair of Common Law in 1758 following a bequest of £12,000 by Charles Viner, compiler of the twenty-three volume \textit{General Abridgment of Law and Equity}.\textsuperscript{751} Blackstone was the first professor appointed in 1759. Downing College, Cambridge had inaugurated a Chair in 1800 but ‘the law school was generally recognised to be a refuge for those who were averse to intellectual effort’.\textsuperscript{752} Three years after London University’s foundation in 1826, professors Amos and Austin began lecturing in law. Amos was popular, reaching audiences of between 50 and 150, whereas Austin’s more philosophical approach ‘would form the core of the most influential of nineteenth-century English works on jurisprudence’.\textsuperscript{753} By the 1830s some private lectures, such as those at Lyon’s Inn hall in 1828 by Charles Petersdorff and in 1829 by J. B. Byles were being offered to aspirant barristers.\textsuperscript{754} In 1833 even Inner Temple provided a venue for courses by run by Starkie and Austin. Nevertheless, by 1834, following the departure of Amos and Austin, the London university chairs had declined into sinecures.

\textsuperscript{750} Abel-Smith, p.63.
\textsuperscript{752} D.A. Winstanley, \textit{Early Victorian Cambridge}, (Cambridge: Cambridge University Press, 1940), p.3.
\textsuperscript{753} Polden, p. 1179.
\textsuperscript{754} Polden, p. 1179.
‘Aspiring barristers had little appetite for abstract learning in the lecture hall, which gave no professional advantages, and the Inner Temple's initiative itself soon stalled.’

The next decade witnessed a revival in interest prompted by the example of the Law Institute in Dublin. Thomas Wyse MP presented a petition to Parliament from Tristram Kennedy, founder of the Institute, initially calling for further improvements in Ireland but which was then extended to England. At the same time, legal periodicals such as the Law Times and Legal Observer were increasingly publishing articles critical of the lack of improvement in England. At the other extreme, since its inception in 1841, Punch had been featuring regular tales and caricatures of a bumbling, ignorant barrister in its ‘Ballads of the Briefless’. Judging from the frequency with which he appeared over the next twenty years, the character was a resonant trope for its readership.

The 1846 Parliamentary Committee

According to Abel-Smith and Stevens, the initiative for the Parliamentary Committee came from Bethell who wrote to the Master of the Rolls, Lord Langdate, pointing out that "Two of the Inns had just spent vast sums on superb buildings but neither of them had spent “one shilling on the legal education or the moral encouragement of its students”.

Brougham and Bethell wanted a legal university to be established by the Inns providing systematic education for all those in practice or preparing

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755 Polden, p.1180.
756 Polden, p.1180.
757 See, for example, Punch 2 (1842) pp.31, 106; 4 (1843) p.31.
for it, whether as barristers, attorneys, advocates, or proctors. Writing in 1844, Brougham sarcastically observed that ‘we bestow upon the process of making lawyers a very great and a very unjust compliment, by talking of any such provision, how scanty soever, as having an existence among us. There is no kind of provision whatever made for ascertaining that a person entering into the legal profession has received any education whatever to fit him for those professions, or indeed any education at all’. He dismissed both the ‘practical and mechanical’ experience of sitting in a pleader’s office and the recently introduced discretionary examinations with scorn. For the examination, ‘the candidate approaches the benchers’ dining table, while their worships are waiting till the interval elapses that separates their wine from their meal, begins to read a sentence of law, put into his hand by the servants of the Inn, and as soon as he has read three words, the bencher, irritated to leave his wine, dismisses him, being satisfied with this "reading of law"’. Brougham’s own thinking was surprisingly holistic, contemplating not only the ‘scientific’ teaching of law and legal principle but also instruction in the classics, in general science and especially in ‘the moral sciences’. This was intended to lead to a rewarding professional life of public service forged:

Of labour, of discipline, of reading, of writing, of early rising, of abstraction from pleasure, even from relaxation, of tedious hours and copying in the office, of tiresome attendance in court, of patient following of the circuit briefless, of the sessions all but briefless, of seeing others with less merit preferred by favour or by chance, of endless hope ever deferred. [...] We have only to set off

759 Polden, p. 1181.

against these drawbacks the mighty things to which such exertions lead [...] above all, the glorious privilege of protecting the oppressed, avenging the injured, prostrating the guilty, and the brightest and purest fame that mortals can enjoy, reaped from such employment of such talents such as alone can give men to rise in the renowned profession of the Law.\textsuperscript{761}

As early as 1843, Bethell had been urging his own Inn, Middle Temple, to institute lectures and compulsory examinations and the legal periodicals reported assiduously on the progress of his proposals.\textsuperscript{762} His radicalism tended to vary according to the subject matter so that, for example, while he advocated the abolition of religious tests for Oxbridge, he also defended primogeniture. He was not, however, some peripheral, radical outlier in the law as he was, in fact, the busiest leader at the chancery Bar.\textsuperscript{763} Unfortunately, his ‘reputation for acerbic observations and complete ruthlessness in verbal dispute’ worked against him. On one occasion in 1847, this led to a bloody nose inflicted by another Q.C. in open court.\textsuperscript{764} He was passed over for an appointment as Lord Chancellor until 1861.

Nevertheless, by the start of 1846, he had managed to persuade Middle Temple Parliament to resolve that it was ‘expedient that steps be taken for promoting the legal education of the students of this House’ and that a committee should be set up to report on ‘the best mode’ of carrying the resolution into effect. The Inn’s committee recommended that

\textsuperscript{761} Brougham, ‘Legal Education’ (1844) 1 Law Review and Quarterly Journal of British and Foreign Jurisprudence, 144–57.

\textsuperscript{762} See, for example, Legal Observer (24\textsuperscript{th} January 1846), 31 (1845/6) 264; Law Magazine ‘Events of the Quarter’, n.s. 4(1) (1846) 218.


\textsuperscript{764} The Times, 27 July 1847, p.5.
these steps ‘should be such as are best adapted for the commencement of a sound and comprehensive legal education; for they have reason to hope that the plan, thus rightly begun, will be followed out and completed by the proceedings of the other Societies.’ The Parliament ordered the appointment of a lecturer to be paid £300 by the Inn plus one guinea per term from each student, ‘for the purpose of courses in Jurisprudence and Civil Law’, in order to ‘afford the students collectively a complete course of legal instruction’. An examination and two exhibitions of 100 guineas were to be open to students from the other Inns. Each course should consist of three terms of twenty lectures each. Ultimately, call to the Bar would depend on attendance at one of the two courses but not ‘until some general system shall have been adopted in connection with the other societies’. Later that year, committees from all four Inns combined to agree not to call anyone who failed to attend at least two courses.\footnote{Lincoln’s Inn Black Books, v, 9.}

However, the fact that there was no firm commitment to any actual improvement was not missed by the daily press. The encouragement to engage with public opinion proffered to Middle Temple by \textit{The Times}, for example, was predictably sardonic:

\begin{quote}
We are certainly inclined to congratulate the gentleman of the bar in this first step they have taken in the right direction, None, we believe, are more deeply impressed than themselves with the necessity of adopting measures to regain their lost ground in public opinion. The difficulty, of course, is in this, as in every other case, to make a beginning. This difficulty has been overcome. The game is now in their hands, and if they do not win
\end{quote}
it, they will prove that the obloquy so generally cast
upon them is not undeserved.766

Later that year the Globe added:

We know how many persons eat their way to their call for
no other purpose but to qualify themselves for some office
which good connection and patronage may procure. Such
men have perhaps never read a single book in the law, or
been for hour in the chambers of a pleader; and the present
system of calling to the bar enables them to become
Judges, Queen’s Advocates, Commissioners, Registrars,
with large salaries, both at home and in the colonies. A
good examination, previous to call, would at least provide
some security against the undue distribution of patronage
in the legal profession. [...] a certificate of having attended
lectures proves nothing more than that the party has sat for
a certain time in the lecture room; what instruction he has
derived from sitting there has still to be proven.767

This theme of the unmerited success ‘of men with connections but without
knowledge’ was reiterated in the Law Magazine as ‘one of the many strong reasons why an
examination or other mode of testing and publishing merit and competency is desirable.768
Notwithstanding national and professional press interest such as this, there are no
indications that, apart from the likes of Brougham, Bethell and their acolytes, there was

766 The Times, 24 Jan 1846, p.5.
767 The Globe, 16 April 1846, p.2.
768 Law Magazine (1847) 6 (2) n.s. p.175.
much concern on the part of the Bar itself. Moreover, when the judges might have been expected to have an interest in ruling otherwise, they eschewed their power as Visitors to the Inns to improve the admissions criteria.\footnote{R v. Benchers of Lincoln’s Inn, (1825) 4 Barnewall and Cresswell’s Reports 853.}

**The Committee’s Recommendations**

The Committee’s terms of appointment were ‘to inquire into the present State of Legal Education in England and Ireland, and the Means for its further Improvement and Extension’, \footnote{Report from the Select Committee on Legal Education’, HCPP; 25 August 1846, H of C 686.} This broad mandate applied not only to the education of barristers and solicitors but generally to that of ‘the diplomatist, the legislator, the magistrate, the country gentleman, and the citizen’.

The Committee reported in August 1846 beginning with a detailed review of the state of education at the universities, at ‘other public collegiate institutions’ and at the Inns. The two Oxford Chairs of Civil Law and Common Law were excoriated. The duty of the Civil Law professor had ‘dwindled down to a mere sinecure, [the chair] is usually neglected, the attendants few, or none, the lectures, from want of hearers, even where the professor is zealous, so rare, that they have been finally discontinued; the other, though the more efficient, and better frequented, is still inadequate’. The department of Common Law was ‘more efficiently managed’ but being ‘neither of long duration, nor consecutive, nor extending beyond the instruction of one professor, and uninvigorated by examinations or honours, embracing a very small proportion of the students of the University, whatever may be the
efforts or merits of the individual instructor, can scarcely lay greater claim to the character of efficient legal instruction than the course of Civil Law’. 771

Cambridge fared little better. It also had two Chairs: the Downing Professorship of Law and the Regius Professorship of Civil Law. Civil Law in this sense was derived from the *jus civile* of Roman Law and its degrees tended to be limited to clergymen and those intending in practise in Doctors’ Commons, the society for ecclesiastical and admiralty practitioners. There were some lectures but no examinations. The founder’s charter for the Downing Professorship, on the other hand, anticipated the teaching of ‘the whole range of the Law of England’ through optional lectures. The incumbent Downing Professor, Starkie, told the Committee that, despite his best endeavours, within two years of his appointment twenty three years before, no students had attended his lectures, This, he felt, was largely attributable to the fact that ‘proficiency in law’ conferred ‘no immediate advantage’ in terms of qualification. The Committee concluded that the Downing Chair was ‘an almost entire failure’ while the few lectures offered in Civil Law represented ‘the whole amount of legal education at present given within that University’. 772

The Committee at least preferred the organisation of the ‘University of London’ whose Faculty of Jurisprudence awarded annual Bachelor and Doctor of Law Degrees. A candidate for the former needed a certificate of two years’ attendance at one of the institutions connected to the university and to have passed a written examination on certain academic texts. An examination for honours in Jurisprudence was also available which entitled a successful candidate to a university scholarship for three years at fifty pounds per year. Efforts had been made at University College, London and ‘for a time’ they proved successful

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772 Select Committee on Legal Education, p.v.
but, as the Committee found, ‘there is thus no course, sufficiently extensive, available or accessible, for the general student, still less for the professional.’ Amos, the Professor of Law at University College, appears to have stood out over his four or five years teaching. He gave a daily one-hour lecture, predominately aimed at solicitors. After lectures, ‘he held a conversation with his class, going round among his pupils, and asking questions and conversing on all points of nicety which had occurred in the course of the lecture, in order to collect their ideas and to rectify them’. Daily tests were augmented by monthly, quarterly, and annual examinations with occasional prizes. Attendance at lectures ranged between 50 and 150. ‘But the most efficient part of his instruction was, perhaps that given in private in his own chambers, for a fee of 100 guineas each’. The Committee then looked at the two year law course at the East India Company’s Haileybury College, a training ground for administrators and magistrates bound for the Indian sub-continent. ‘Generally speaking, however, the East India Company is stated not to attach much importance to acquaintance with law; and [...] we need not be surprised at the [...] insufficiency of this institution for the purposes for which it was intended.’

The Committee finally turned to the Inns. The only requirements for call to the Bar were a ‘fair character’, the keeping of dining terms and to have performed the ‘exercises’ described by Brougham above. Attendance at a Special Pleader’s or Conveyancer’s office was not ‘a substitute for that systematic and comprehensive information, and philosophic spirit, which are the highest qualities of the Lawyer’.

In his evidence, Brougham asserted that the state of Legal Education in England ‘is at as low an ebb as it is possible for education to be in any country’. The international

773 Select Committee on Legal Education, p.vii.
774 Select Committee on Legal Education, pp. vi, vii
775 Select Committee on Legal Education, p. x.
776 Select Committee on Legal Education, pp. xi.
comparison was reinforced by Lord Campbell, the ex-Lord Chancellor: ‘England is the only civilized country in the world where there is not a regular course of discipline required from those who are to practise the profession of an Advocate, and to administer the Law as Judges, where they may be regularly instructed in the different branches of the profession, and may be examined to see what proficiency they have made.’\textsuperscript{777} Having received detailed evidence of the provision of legal education elsewhere, the Committee was evidently struck by the fact the English situation ‘exhibits a striking contrast and inferiority to such education, provided as it is with ample means and a judicious system for their application, at present in operation in all the more civilised States of Europe and America’\textsuperscript{778}.

The Committee addressed the prevalent ‘impression’ that ‘as the English and Irish Bar have already produced men of high eminence in all departments, [...] it is difficult to expect better results from any change in the present system’. The report concluded instead ‘that eminent men might have been far more eminent, their excellencies enhanced, their errors and deficiencies abated, under a better system; but what is of higher and wider influence, that the great body of the Profession might have been rescued from many of those crying evils, injurious to themselves, injurious to the public, under which [...] they at present labour’. These ‘evils’ featured particularly in the ‘high places of the Profession’ not least on the Bench where ‘the want of an early well-directed and well-digested philosophical system of study may for a long period, in the more technical pursuits of the Profession, be felt but partially’. \textsuperscript{779}

The report acknowledged that, as a result of Bethell’s efforts, the Inns were now prepared to fund their own courses with one professor representing each Inn plus a fifth professor approved by all. No one should be called who had not attended one or two courses.

\textsuperscript{777} Select Committee on Legal Education, Lord Campbell, evid. Para 3819.  
\textsuperscript{778} Select Committee on Legal Education, p. xxix  
\textsuperscript{779} Select Committee on Legal Education, p. xxx.
unless he had been a member of an Inn for five years. However, none of the Inns would support compulsory examinations. The inevitable conclusion was that the ‘total absence of all provision for legal education in the Inns of Court, and the meagre amount [...] provided in the Universities’ essentially left matters to chance.  

With considerable prescience the Committee’s recommendations anticipated what was to become the structure of modern legal education: a bi-partite division between the academic study of law and the teaching of professional skills. It was for the universities ‘to teach the philosophy of the science, and to secure instruction in those branches for which it might be apprehended the more technical character of the special institution (a professional school) would inadequately provide’. Professional qualifications should require certificates of attendance at lectures with periodical examinations at the end of each course followed by a ‘rigorous’ compulsory examination. The Inns were invited to co-operate by voluntarily creating a College of Law or ‘Law University’. 

Significantly, the Committee declined to suggest a joint system for solicitors and barristers not least because there would be opposition from the Bar. Ironically, ‘the “lower branch”, which had been the driving force behind much of the movement to revive legal education in the 1830s, was hence to be excluded from an academic education.’ No doubt, this was considered essential if the social cohesion of the Bar was not to be diluted. Although clerks might be allowed to attend some lectures at the Inns, the Committee suggested that the Law Society could offer lectures more suitable to their profession and they should still be trained through articles.

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780 Select Committee on Legal Education, p. xi.
781 Select Committee on Legal Education, p. xxiv.
782 Polden, p.1183.
1846 to 1855.

The campaigning of the next nine years was frustrated by indifference to the Committee’s findings. Even some advocates of reform had not been entirely uncritical. The *Law Review*, for example, while agreeing that its conclusions were ‘useful’, felt that ‘the whole is prefaced by a very long and not a very clear report, occupying sixty pages, and concluding with thirty-four resolutions, so remarkable for want of method and prolixity’. The *Review* took this as another opportunity to make its own vitriolic attack on the system. The privileges of the Inns which it ‘reluctantly’ labelled ‘board-and-lodging-house-keepers’ allowed the benchers to ‘fare sumptuously every day, dine off all the delicacies of each successive season, drink without any stint the very choicest and dearest wines, sit down after dining to a dessert, often with ices, quaff coffee and liqueurs at the close of their learned potations’. More pointedly, the article was another eloquent assertion of the primacy of the public interest over the interests of the Inns:

> It is in vain for them to reject all interference [...] Their affairs are those of the community, unless they choose to renounce all claims to a monopoly of admitting barristers. Let them no longer possess the sole power of calling to the bar, or of disbarring or expelling from the profession, and they may let their chambers and eat and provide their dinners as they please. [...] As long as they alone can call and disbar, surely we have a right to ask what use is made of their funds, and to require that teaching, as well as eating, shall be cared for [...] To describe

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as education, or anything approaching to it, what is done by
[the Inns], would be a gross abuse of terms.\textsuperscript{784}

The following quotation from an 1847 editorial in the \textit{Law Magazine}, although
lengthy, provides an insider’s vivid insights into the ‘the nullity of the present system of
preparation for the Bar’ and, once again, the consequences for the public.\textsuperscript{785} The plaintive
detail is convincing:

\begin{quote}
[T]he opposition to anything like an effective remedy for
the vast evils arising from defective legal education never
was more formidable or inveterate than at this time. [...] The parents of students are usually incompetent to direct
their course, and equally so to correct their deficiencies.
The utmost that is ever done is to send them to a special
pleader or conveyancer, who, if he be a man of any
eminence, and has business of his own, is far too much
engaged to instruct his pupils. They are made to draw
conveyances or pleadings, and, with the exception of
occasional dicta, usually unexplained, they are left to
grope their way as best they can, without any instruction
worthy of the name. [...] Nothing tends more to the
degeneracy of lawyers than this vile habit of squaring
every case to some foregone case, which was probably
merely an echo, in servile adherence, to some other case
\end{quote}

\textsuperscript{784} Ibid.

\textsuperscript{785} \textit{Law Magazine}, (1847) 6 (2) n.s. 175; see also \textit{Law Magazine} (1847), 7 (1) n.s. 31.
before it. [...] Some even of the judges pander to this
abuse, they fancy it saves them trouble to decide by
precedent rather than by principle.

At this point, the writer identifies the direct link between poor education
and low standards in the administration of justice – the aspect of greatest
concern to the public:

[...] Is not this defective education the direct cause of
defective justice? [...] This is certainly a consideration less
important to the profession than to the public, but the
profession is bound to regard the interest of the public.
The low standard which a defective education establishes
affects even the bench, and men are chosen for promotion
who would not be thought of were it not for the prevalent
mediocrity at the Bar [...] Men who are deficient in
knowledge of law strive to make up for it by dint of noise,
effrontery and chicanery. Every species of low tactic is
resorted to. Grimace and invective, buffoonery and insult,
supply the place of argument and the science of advocacy
[...] The absence of any educational requirement lets into
the profession numbers of men who have no right to rank
in it, and it is vain to expect them to exhibit qualifications
which they were not required to possess on their
admission to the Bar [...] The immoralities of the Bar
result, therefore, greatly from the inferiority of legal education.\textsuperscript{786}

The journal acknowledged differences of opinion as to whether final examinations should be compulsory and offered to ‘open our columns to discussion’. Discussion there certainly was and it was not confined to the pages of the legal journals. Examples from very different social and geographical sources – respectively from the London \textit{Evening Mail}, from the sophisticated metropolitan satirical magazine, \textit{Punch} and two others from provincial daily newspapers, the \textit{Leeds Intelligencer} and the \textit{Liverpool Mercury} reveal considerable strength of feeling. The \textit{Evening Mail} demanded that ‘public interest requires some guarantee of qualification’ [but added that] ‘there seems to be literally nothing gained by the resolutions agreed to by the three Inns for the improvement of legal education’.\textsuperscript{787} \textit{Punch} pretended to publish a one-line report from ‘the Commissioners (sic) appointed to report on Legal Education in England’ which baldly stated: ‘There is no legal education in England’.\textsuperscript{788} A letter from ‘a solicitor’ to the \textit{Leeds Intelligencer} in 1847 drew on a number of themes with which its readers can be assumed to have been familiar. The principal of these was the lack of any requirement for qualification by examination and the consequent lack of protection of the public from poor professional standards:

\begin{quote}
No means is taken to test the professional attainments of the candidates, and unless there is something notoriously and flagrantly objectionable to the character, \textit{practically every person is admitted who}
\end{quote}

\textsuperscript{786} Ibid.

\textsuperscript{787} The \textit{Evening Mail}, 2 September 1846, p.4.

\textsuperscript{788} \textit{Punch}, 13 (1847) p.92.
With the exception of the few who obtain practice and distinguish themselves, the great mass are very inferior men. Among the herd of briefless barristers living in obscurity are to be found the connections and hangers-on of members of Parliament who, having eaten the requisite number of dinners in the proper place to secure admission to the bar. [...] What possible guarantee can there be to the public that a man who has been seven years member of a profession to which he is admitted without any test of his knowledge, morality or status, is a proper person to hold respectable offices where both ability and character are required.

Referring to the three Inns which had contemplated reform, the letter continued: ‘For some reason, however, best known to themselves they have declared that they do not think any test by way of examination is necessary’. In 1851 the *Liverpool Mercury* went so far as to argue that no reform was ‘more necessary or of greater importance to the community than that which will effect a change in the mode of conveying the requisite amount of jurisprudential knowledge to those who intend making the law a profession [...] At the present moment not one shilling of the vast revenues of [the Inns] is expended on legal education of any sort or description. [...] The judges of the superior courts are the appointed visitors; but even they have neglected their charge, so prevalent is the existing apathy’.

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790 *Liverpool Mercury*, 14 October 1851, p.4.
This evident intensity of concern straddled political divides. The requirement to keep dining terms was an obvious common target. The liberal *Examiner*, for example, questioned whether ‘the monstrous absurdity’ should continue ‘by which four learned societies send out annually an indefinite number of barristers without having assured themselves of their proficiency in any other science but gastronomy’? Even *John Bull*, the literal standard bearer for reactionary politics, weighed in against the Inns: ‘They have been rigid about eating, but careless about learning ... if the degree of barrister is meant to convey no notion of legal requirement and implies no standard of professional fitness, it is a mere absurdity’.  

One should acknowledge that the Inns did not entirely abandon Bethell’s initiatives. Lecturers or ‘Readers’ were appointed by each Inn in 1847. The Gray’s Inn Reader, W.D. Lewis, set voluntary examinations for honours but attendance at lectures was purely voluntary and systematic examinations were not introduced. The government chose not to interfere, preferring to rely on the Inns’ palliatives as a justification of for its own inaction. As the *Law Review* ruefully noted in 1847: ‘The House is eminently an inquiring body, and almost as remarkable for doing little or nothing after the investigation is concluded. "Look at everything, and touch nothing," seems with the Commons as with the gardeners, the motto on all occasions’. Two years after publication of the Committee’s report, George Hamilton MP, one of its members, used a parliamentary question to ask the Whig Attorney-General, Sir John Jarvis, whether any steps had been taken by the Government or the Inns of Court to implement the recommendations. The response was a telling exercise in the shifting of responsibility which overtly deferred to the Inns. The Attorney-General claimed that

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791 *Examiner*, 1 May, 1852, p.3.
792 *John Bull*, 20 September 1851, p.10.
793 Polden, p.1183; Royal Commission on the Inns of Court, 149–51.
Government had no authority to interfere in the matter. It rested in a great degree with the inns of court; but many of the recommendations of the Committee would require to be effected by legislation. Before or during the inquiry before the Committee, some of the inns of court here had established lectureships at a considerable expense, and there had been conferences of the different inns with the view of arranging some uniform system of education and admission to the bar. 795

The popular press remained unimpressed by these anodyne placations. Significantly, they even formed an occasional alliance of sorts with the legal periodicals. To take an example from 1849, The Morning Chronicle augmented an undated issue of The Law Review which had chastised the Inns for disregarding the public interest:

These are not the times when public trust can be neglected or perverted with impunity; and unless the benchers can be induced to rouse themselves in good earnest before the next session of Parliament, we would not grant them a year’s purchase for their privileges. 796

Later that year the Chronicle turned to heavy sarcasm:

Imagine yourself attacked by some inquisitive foreigner with [...]a string of questions...] and try to give each of

796 Morning Chronicle, 10 May 1849, p.6.
them a satisfactory reply. The practice of the English law, you answer, is picked up by lounging for a year or two in the chambers of pleaders and conveyancers, by poring over a few very indifferent text-books, and wading through a vast accumulation of reported cases, which have never been sifted by competent authority since the days of the PLANTAGENETS; [...] For the gentleman in the wig, there can be no doubt that he is a sound and accomplished lawyer— for he possesses, besides the capillary ornament in question, a gown, a clerk, and a blue bag, and he has been called to the Bar by the Society of Lincoln's Inn. The Honourable Society of Lincoln's Inn, your interrogator rejoins, is doubtless some department of the State, or else some great corporation to which the State has delegated a portion of its powers! [...] A moment's consideration, however, obliges you to confess that the Society is, after all, nothing more than a voluntary association, which, with certain other associations of a similar kind, has obtained, nobody knows how, a sort of monopoly of the civil forum [...] that it imposes no preliminary conditions on applicants for a passport to the Bar, except that they should have partaken of a certain number of legs of mutton in its salle à manger.797

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797 Morning Chronicle, 16 November 1849, p.4.
By the 1850s the Oxbridge universities were also attempting faltering improvements. Oxford set up a school of jurisprudence and history in 1850; Cambridge set up a new board of studies in law in 1854 leading to an honours LLB degree. There had been some hope that a law degree might become part of the general education of the gentleman as well as a professional qualification – but this would require some commitment on the part of the practising Bar. It was not forthcoming. Barristers still regarded the universities as unrelated to their professional activities and, since a law degree was not required for admission to an Inn, there was no enthusiasm to acquire one. Nor was the teaching of law at London University thriving. Amos’ successors at University College were minor figures, while Austin's chair was only intermittently filled. In 1849 King's College was obliged to appoint a committee to investigate why the law course was such a failure.

Meanwhile, the LAS tried a slightly different approach. At a meeting chaired by Bethell on the 25th March 1850, it resolved to campaign for a general law school offering lectures but now to be augmented with classes by barristers, pleaders, and conveyancers in their chambers for a fee of twenty five guineas. The Society proposed to ‘watch over’ this scheme and to aid it either by engaging chambers for the use of the tutors ‘or in any other way that may seem advisable’.

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799 Polden, p.1185.

800 Polden, p.1186.


802 *Morning Chronicle*, 26 March 1850, p.4.
Charles Rann Kennedy

At this point in the narrative one needs to accommodate Charles Rann Kennedy’s attempts in 1849 to develop a form of college-based legal education at Queen’s College, Birmingham which touched deeply on the relationship between the Bar and solicitors. His original intention had been to synthesise the notions of regularised education, gentlemanly virtues and practical competence as advocated by the 1846 Committee but to combine them in one establishment catering for both branches of the legal profession. The programme ‘failed miserably’ and only nine students attended his lectures during his first term as professor. In part this failure can be attributed to idiosyncratic features relating to Kennedy’s personality and, in particular, to a history of antagonism between him and certain leading Birmingham attorneys.\(^{803}\) For example, he had claimed that ‘attorney-advocacy’ had a tendency ‘to corrupt all law and destroy all justice’.\(^{804}\) However, this should not be overemphasised as it appears that he was able to create a reasonable income for himself from legal practice in Birmingham and, in any event, it had become apparent that his scheme was not flourishing before the open conflict between Kennedy and the leadership of the Birmingham Law Society became apparent in 1852. According to Pue, it would seem more likely that the scheme failed because of the intrinsic form of the programme itself.\(^{805}\) This makes sense. Kennedy’s personal commitment to a common vocational education was perceived as more of an affront to the dignity of the Bar rather than a disruptive issue for local solicitors ‘and there is some evidence that the Midlands bar reacted strongly against

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Edward Rees (Ph. D. Thesis)

these institutional arrangements quite apart from their attitudes to the particular Professor’. 806
Kennedy had already been excluded from the Midland Circuit Bar mess by 1850. This
actually meant that he was ‘freed from the constraints of professional opinion for the next
decade’ and his response was deliberately confrontational. In 1852 he advertised the ‘Mutual
Law Association’, the purpose of which was to provide members with legal services for five
shillings per annum. According to an early advertisement, ‘[o]ne important feature of the
system is, that members may have personal access to Counsel for advice’ who would work on
‘Wills, Leases, Agreements, all kinds of Conveyancing, besides Court business [and settle]
disputes by Arbitration, at small expense’. 807 Much of this plainly breached barristerial
etiquette and there was widespread condemnation. 808 The Association did not survive but
Kennedy persisted with work in the county courts taking direct instructions from his clients
for negotiated fees for the rest of his life. 809

The Council of Legal Education

Meanwhile, by 1851 Bethell, now Solicitor-General, succeeded in persuading Middle
Temple to take an interest in a joint scheme of education and a committee of the four Inns
was set up which reported back in February 1852. It proposed a ‘Council of Legal
Education (CLE) which he was to lead with two benchers from each Inn and five

806 W. Wesley Pue, ‘Exorcising Professional Demons: Charles Rann Kennedy and the
Transition to the Modern Bar’, Law and History Review, 5 (1) (Spring, 1987), 135-174,
(p.145).
807 Pue, ‘Exorcising Professional Demons’, pp.146, 149; W.Wesley Pue, ‘Rebels at the Bar:
English Barristers and the County Courts in the1850s’. Anglo-American Law Review, 16(4),
808 See, for example, ‘The Attack on the Attorneys’, 20 Law Times, (9 Oct 1852), p.25;
809 Pue, ‘Rebels at the Bar’, p.346.
‘readerships’ to teach Constitutional Law and Legal History. The stated purpose was ‘the maintenance of a uniform system for the legal education of students before admission to the Bar.’ 810 Henceforth, call to the Bar was to be conditional on attending the lectures of two of the Readers for a full year, or passing a voluntary examination. However, strong resistance to compulsory examination persisted. Nor was the new scheme particularly systematic.

There were, for example, no rules prescribing the order in which students were to take up the different subjects. Sir Henry Maine, Reader in jurisprudence and common law, blamed this for the students’ lack of application: ‘They look upon these new arrangements as so many onerous conditions imposed on the Call to the Bar [...] they give themselves the minimum of time for satisfying them, and thus, when they do come into contact with the system, they are too late to avail themselves of its full advantages’. 811

The 1855 Royal Commission

Two months after the proposal for the CLE, the Attorney-General was again asked in the Commons, ‘whether any further proceedings had taken place, on the part of the Inns of Court, in promotion of the question of legal education?’ 812 The purpose of the answer was evidently to assuage what the government obviously knew was public concern. As reported in Hansard, he stated his gratitude for the opportunity of stating:

\[for the information of the public, a few facts upon a matter\]

\[810\] Minutes of Evidence taken by the Royal Commissioners appointed to consider the Draft Charter for the proposed Gresham University in London, (1894), HMSO. C.7425, Q. 12,858, cited in Abel-Smith, p.66 f.1.

\[811\] Report of the Commissioners Appointed to Enquire into the Arrangements in the Inns of Court and Inns of Chancery for Promoting the Study of Law and Jurisprudence’, HCPP (1855), q. 1107.

\[812\] Parl. Deb., vol. CXX, cc. 1111–1112, 26 Apr 1852 (HC).
of certainly much interest […] He hoped that [the Inns’ plan] would convince ‘the public that the benchers of the Inns of Court were evincing a laudable desire to promote legal education, and that for the future some test of proficiency would be required as the condition of being called to the Bar.  

The issue was resurrected in the Lords later that year when the Tory ex-Lord Chancellor, Lyndhurst, asked the Lord Chief Justice, Lord Campbell, whether he was ‘satisfied with the scheme of legal education which had been adopted by the Benchers of the different Inns’? Campbell claimed that ‘the Benchers had at last been taking a step in the right direction and that he had been labouring for the last twenty years to induce them to do so. He had always thought that the state of legal education in this country was disgracefully bad; he was very eager to see it amended, and he rejoiced that something had at last been done which might lead to amendment’. Once again, however, executive diffidence inhibited his eagerness: ‘He thought more might be done; but he thought it highly satisfactory that the Benchers had at last done so much. He did not feel that the Judges would be at all justified in interfering, when so good a disposition had been shown on the part of the Benchers of the Inns of Court in the commencement of this good work’. The only other speaker, Lord Brougham, continued his plea for compulsory examinations.

Mainstream newspapers continued to follow the stuttering processes of reform. For example, in June 1853 the Globe reported on the fact that a committee of the four Inns had proposed that non-graduate applicants for membership should have to pass examinations in

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813 Ibid. Italics inserted.
815 Ibid.
816 Ibid.
English, Latin and English history. All candidates for call should need to pass examinations in a variety of legal subjects.\textsuperscript{817} The \textit{Daily News'} readership was even provided with considerable detail of the CLE’s examination rules, the syllabus and set books and the annual scholarship of fifty guineas per year.\textsuperscript{818}

The focus of Parliamentary campaigning now turned to the appointment of a Royal Commission. In 1854 an Irish M.P., J.Napier, moved successfully for a commission of ‘enlightened men’ in the hope that ‘if such a Commission would place themselves in communication with the Universities and the Inns of Court, they might carry out a harmonious plan [...] from which the greatest advantages might be derived’.\textsuperscript{819} In the debate, Richard Bethell, now Liberal solicitor general, supported the motion and repeated his contention that ‘the great essential of compulsory education [...] was necessary for the perfection of the system’.\textsuperscript{820} To that extent, he resisted his own Attorney-General’s temporising counter-proposal that the enquiry should be left in the hands of the Inns.\textsuperscript{821} E.H. Crauford M.P. claimed that ‘no corporations in the kingdom had committed grosser breaches of trust than those same Inns’ whose income he estimated at £100,000 per year with only £3,000 dedicated to education.\textsuperscript{822} The motion and speeches were extensively reported not only in the national mainstream press but also in provincial organs.\textsuperscript{823}

The Commissioners included not only Bethell and Napier but also Mr.Justice Coleridge with the Liberal Vice-Chancellor, William Page Wood, - once described by

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\textsuperscript{817} \textit{Globe}, 17 June, 1853, p.3. \\
\textsuperscript{818} \textit{Daily News}, 31 December, 1853, p.6. \\
\textsuperscript{819} \textit{Parl. Deb.}, Vol. CXXXI, c. 158, 1 March 1854, (HC) . \\
\textsuperscript{820} Ibid. c.165. \\
\textsuperscript{821} Ibid,c,168. \\
\textsuperscript{822} Ibid. c.168. \\
\textsuperscript{823} See, for example, \textit{Morning Post}, 4 March 1854, p.2; \textit{Derbyshire Courier}, 4 March, 1854, p.2; \textit{Kentish Independent}, 4 March 1854, p.2; \textit{Farmer’s Friend}, 4 March 1854, p.1. 
\end{flushleft}
Bethell as ‘a mere bundle of virtues without a redeeming vice’ – as chairman. They were mandated to enquire into ‘the Means most likely to [...] provide satisfactory Tests of Fitness for Admission to the Bar’. The two objectives which underpinned its subsequent recommendations were that students should obtain some advantage from the payment of fees and that the public were entitled to a guarantee of personal and professional qualification. The core conclusion was that there was a need for ‘a better recognised and definite and permanent combination of the Inns of Court’ than that embodied by the CLE – namely, a law university conferring degrees in law. Examination for call to the Bar should be compulsory. The Inns would retain their property and internal arrangements.

The responses in evidence to the Commission differed on the pivotal issue of compulsory examinations. Some argued that they ‘might discourage men of retired or reserved habits’ and would ‘deter country gentlemen and others who wished to be called to the Bar, with a view merely to acquire such status and so much professional knowledge as would be useful to them as Magistrates, Politicians, Legislators, and Statesmen’. The Commissioners did not ‘share such apprehensions’ but, as it was a further eighteen years before examinations became compulsory, these protests appear to have carried the day.

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825 1855 Report, pp.6,13,17.
826 1855 Report, p.12
1855 to 1860

One consequence of the Commission report was that it provided sections of the press with an excuse for further sarcasm at the expense of the Inns. The Whig weekly, *The Cambridge Independent Press*, for example, suggested that an examination in spelling (‘orthography’) might be a useful addition to the Commission’s recommendations.\(^{828}\)

The Inns’ immediate responses to the Commission’s proposals were not encouraging. Lincoln’s Inn, in particular, remained defiantly obstructive. In 1856, the CLE accepted that a compulsory examination should be instituted, but this was rejected by the Inn’s benchers.\(^{829}\) Three years later, a committee appointed by the four inns recommended a compulsory examination.\(^{830}\) The unanimous agreement of all four Inns was required and Lincoln’s and Gray’s narrowly opposed the plans. In May 1857, Bethell, now Attorney-General, used a Parliamentary answer to threaten that ‘if that state of things should continue’, the government would introduce a Bill but the subject having been under the consideration of the societies, and the Government believing that they were actuated by good intentions, it was not intended to bring any measure ‘in that Session’.\(^{831}\) This threat led to introduction of a nominal entrance examination but still no final examination was required for call to the Bar.\(^{832}\) Even Conservative publications, such as the Peelite *Saturday Review*, felt the need to remind its readership that this limited measure:

> was not affirmed without a strenuous opposition on the part of a very powerful minority; and as the details of the scheme

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\(^{828}\) *Cambridge Independent Press*, 5 January 1856 p.5.

\(^{829}\) *Lincoln’s Inn Black Books*, v, p. 61.

\(^{830}\) Ibid., pp.79,83.


\(^{832}\) Abel-Smith, p.68.
are not yet settled, it is both possible and probable that it may be entirely defeated unless public attention is directed to the question and to the nature of the influences which may be brought to bear upon its final decision [...] In every other learned profession, and in the lower branch of the legal profession, the proposition has long been recognised and acted on. No human being ever thought of abolishing test-examinations of candidates for orders or for the medical profession, and no ingenuity has ever been able to suggest the shadow of a reason for making any distinction in the case of barristers.

The Review was even prepared to contemplate dissolution:

If the Inns of Court do not educate people for the Bar, what is the use of them? They are notoriously and monstrously inefficient as a council of discipline.... They are either educational bodies or they are mere clubs for the Benchers, and clubs not of the most agreeable or distinguished kind. If they are disposed to take up in good faith, and with proper zeal, the task which they have for so long neglected, no one will quarrel with them for being very anomalous bodies; but, if they are both anomalous and useless, and glory in being so, they have, in this age of the of the world, a very fair chance of ceasing to be at all.\footnote{\textit{Saturday Review}, 12 March 1859 Vol 7, Iss. 176, pp.301-2.}
In a similar vein, that same year the *Solicitors Journal* denounced the benchers of Lincoln’s Inn in a vehement and heartfelt plea for Parliamentary intervention to protect the public from the duplicitous self-interest of the Inn and from nepotism and political patronage. It began by stating that ‘the question of an examination for the bar has now reached a position in which it will be necessary for the public to interfere’. On publication of the Commission’s report, it had ‘naturally concluded, that advice so weighty would be followed forthwith’.

When this expectation was disappointed, Parliament still waited on, partly out of respect to the ancient government of the Inns of Court, partly in belief that moderate and well-timed argument would overcome the antiquated prejudices of the obstructive party among the benchers [...] The public have a great interest at stake in this matter. The wisdom of Parliament has created a large number of offices tenable only by barristers of a certain number of years’ standing; and many are every year called to the bar avowedly for the purpose of obtaining through family or political interest, one of these places. Even judicial appointments are not free from this pest of nominal lawyers, as more than one recordership can testify; and a whole swarm of unread barristers have taken possession of registrarships and such like offices, to the injury of the public service, and ousting deserving men from the reward they had industriously earned. On this point, at any rate, the Legislature is bound to interfere, and to see that the qualification it has imposed is made worth something. The injury

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to the bar itself, caused by an indiscriminate admission, is very
great, and has already sensibly lowered its social position and
weight. [...] We are of opinion that the time has now arrived when
more conciliatory measures must be deemed to be exhausted, and
when an appeal should be made once more to Parliament for
some enactment to alter the present system in the Inns of
Court.\textsuperscript{835}

The decade, therefore, came to an end with what must have been an awareness on the
part of the Inns that legislative interference in the governance of the profession was a growing
prospect.

\textsuperscript{835} Ibid.
Chapter 8 - Improvement

Introduction

This chapter follows the trajectories of the reformers’ objectives in last quarter of the century. These were threefold: firstly, the creation of a single general school or university of law which, secondly, would cater for both branches of the profession and which, thirdly, would determine qualification for practice through compulsory examinations. The last of these was achieved but the first two were not. As in previous decades, the enthusiasm of the reformers continued to be confronted with conservatism and obstruction by the profession’s corporations. However, the indefensible absence of any systematic teaching of legal principle was denounced with increasing force in the popular and professional press. The public interest simply could not be reconciled with the Inns’ visible disregard for a structured professional education. Late Victorian notions of utilitarianism were offended by the fact that men drawn exclusively from a pool of individuals with Oxbridge degrees but little knowledge of legal principle were destined to become the judges of the future, and, moreover, to populate the class who were destined to administer the expanding Empire. Thus, faced with ever-increasing reputational damage and the real possibility of legislative coercion, the Inns reluctantly decided upon containment by means of compromise and concession. As a result, the Inns’ acceptance in the early 1870s of compulsory examination as a necessity for qualification defused the principal cause of public concern and, to some extent, pressure for further reform. The comparative reduction in the volume and intensity of criticism of the Bar coupled with improved standards of forensic conduct contributed to an acceptable professional identity within which the British regard for tradition could also be accommodated. This study argues that the Inns had thus ‘bought off’ the threat of a school of law open to both branches thereby ensuring the continuance of the Bar’s existential singularity. Accordingly, the developments analysed in this chapter address the principal
research question. On the evidence, one of the main explanations for the shift in public perceptions of the Bar in the second half of the nineteenth century was that it was a response to the reform, albeit limited, of legal education.

The 1860s and 70s

Over these two pivotal decades the education of barristers assumed the shape which it broadly maintained until the end of the century and beyond. During the early 1860’s another generation of reformers had begun to exert an influence. Sir George Bowyer M.P., constitutional lawyer, ‘enthusiastic supporter’ of Brougham and a Reader in Law Middle Temple, sponsored parliamentary Bills to reform the regulation of the Bar and the governance of the Inns. All were defeated. However, the most ambitious proposals in these years not only pursued the creation of an independent school or university of law with compulsory examinations but continued with demands for a common qualifying pathway for both professional branches within that same institution. By the end of the decade, the first element had achieved some limited success whereas the concept of a fused qualification failed to materialise.

The case for a combined university had been developed in a paper written by a Liverpool solicitor, W.A. Jevons. It is apparent from a speech which he later gave in 1868 to a conference of Provincial Law Societies that Jevons’ advocacy of educational fusion was partly informed by his general belief in the unfairness and irrationality of forcing the two

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836 Michael Lobban, ‘Bowyer, Sir George (1811-1883)’, ODNB, <https://doi.org/10.1093/ref:odnb/3090> [Accessed 7 July 1021]; See, for example, A Bill to Enable the Benchers of the Inns of Court to appoint Judicial Committees in certain cases, and to give the necessary powers to such Committees, Hansard (HC) Vol. XXXII, 11 April 1866, Col. 1092.

837 Abel-Smith, p.72; Cocks, Foundations, p.113.
branches into ‘artificial grooves’ as much as it was by educational principles. It is noteworthy that even events such as these were reported in full in daily newspapers such as the *Morning Post*. Jevons compared ‘the exclusion of able attorneys from practising at the bar and from so large a class of offices for which they were so eminently qualified [with] the employment in public offices of a large number of imperfectly qualified persons, who claimed the degree of barrister without any adequate legal qualifications or business habits’. Jevons’ solution was a single teaching institution which could award three types of degree: ‘Attorney, or Bachelor of Laws’, which would be a condition for practice as an attorney, ‘Barrister, or Master of Laws’, a condition for practice as an advocate in the superior courts, and ‘Serjeant or Doctor of Laws, ‘the essential condition of eligibility as judge of any of the superior courts’. \(^{838}\)

In the light of the sluggish progress of reform thereafter, it is noteworthy that Jevons’ scheme did, in fact, attract considerable support among both branches of the legal profession at the time. Both solicitors’ organisations, namely the Metropolitan and Provincial Law Association and the Law Society, came to back the scheme officially although the latter’s council had been unfavourable until the membership forced its hand. \(^{839}\) Importantly, Jevons was able to recruit the treasurer of Lincoln’s Inn and Chancery leader, Sir Roundell Palmer, later Lord Selborne. Palmer had been appointed Attorney-General in Palmerston’s second government in 1863 and became treasurer of Lincoln’s Inn the following year. A lifelong advocate of legal reform, he was later made Lord Chancellor under Gladstone in 1872. \(^{840}\)

\(^{838}\) *Morning Post*, 29 Sept 1868, p.3.


1867 a meeting of solicitors and barristers was held at Lincoln’s Inn Hall chaired by Palmer at which the Association for the Improvement of Legal Education was incorporated. Palmer gained the support of the then Lord Chancellor, Lord Hatherley, who had chaired the 1855 Royal Commission, and a petition was signed by four hundred barristers, including eighteen Q.C.’s. Criticism of the Inns remained extensive. That same year the Law Journal again pointed to the direct contrast between the exclusiveness of the Bar and the interests of the public: ‘[It] has, or ought to have, for its object the protection, not of itself, but of society at large. Just so far as it attempts to protect itself it deserves to fail, and in the main does fail so to do’.

The overall situation at the beginning of the 1870s was summed up by the Pall Mall Gazette, at this time a Conservative newspaper. It noted that there had been ‘no public interest sufficient to sustain further action’ following the 1855 Commission because ‘the question seemed very indirectly to concern the public, who were slow to believe that these antiquated institutions called Inns of Court had any capacity for the higher existence to which the Commissioners would have called them [or] could have produced anything very different from the somewhat torpid system of Readerships and examinations now existing under the auspices of the Council of Legal Education’. As a sign of the imperial times, it now identified increasing public ‘attention’ to the ‘want of an organized system of legal education’ which included ‘our colonies, which are beginning to discover that the credentials furnished by a call to the Bar at home are worthless as a guarantee for either legal knowledge or competence for business’. The paper wrote approvingly of the plans of the Law Reform Association for a law university open to both branches and suggested, perhaps with a hint of

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843 Pall Mall Gazette, 25 April 1870 p.6
menace, that the support of the Inns was ‘of vital importance not so much to the public as to
themselves’. 844

Other organs were more barbed. For example, the Examiner stated: ‘One of the most amusing of legal fictions is that everybody knows the law. Nothing, as a matter of fact, could be less true, for it would be hard to find a lawyer who could conscientiously affirm the fiction of himself [...] The standard of general. education required by the Inns of Court is simply absurd [...] To attend and hear lectures is thought to be a heavy enough penance. and candidates are mercifully spared the torture of an examination on what they have heard’. 845 In a later edition, a supposed correspondent returned to the perennial sore of dining-terms and queried whether the Inns ‘with their immense wealth, should be content to let into their ranks men whose training consists in their well-demonstrated capacity for eating and drinking?’. This journal too raised the needs of empire: ‘Such men are [...] sent out to the colonies entirely ignorant of the most "elementary distinctions between actions"’. 846

Under this sort of pressure, the four Inns combined to meet a deputation from the Association and appointed a committee to consider their proposals. This resulted in two opposing responses, each of which played a part in determining the shape of legal education from then on. Firstly, after some opposition from the benchers of Gray’s and Middle Temple, the Inns finally agreed ‘by a small majority’ to establish compulsory examinations for call to the Bar, to be administered by an improved and more authoritative CLE. However, they also resolved that the education of bar students and articled clerks together was not ‘desirable’. 847

Undeterred and having secured a petition signed by four hundred barristers, including eighteen Q.C.s and 6,000 out of a body of 10,000 practising solicitors, Palmer pushed on with

844 Pall Mall Gazette, 25 April 1870 p.6.
845 Examiner, 19 November 1870 p.2.
846 Examiner, 26 November 1870 p.4.
847 Polden, p.1189.
a motion before the House of Commons on 11th July 1871 calling for a statutory requirement that no one should be permitted to practise in any branch of law without ‘a certificate of proficiency in the study of Law’ granted after compulsory examination by a ‘General School of Law’. This would deliver education upon a ‘broad and liberal’ plan to match what was offered in Germany and other continental nations. Palmer listed the familiar criticisms and prayed in aid ‘unanimous’ public opinion. He too enlarged on the theme which was becoming more obvious as the century progressed, namely, that the reputation and responsibilities of empire necessarily depended upon competent administrators:

We must remember that we are the centre from which radiates law to other great regions of the earth. In the colonies and in the East Indies we undertake the administration of the law, and we send out a continual supply of Judges and barristers to carry on the traditions, the knowledge, and practice of our law in those remote possessions. Is it not of the greatest importance that we should do our best to ensure the proper qualification of those whom we send?

Palmer then moved to another resonant feature of the imperial interest. He quoted a letter from Mr. Justice Markby, a Calcutta High Court judge, which stated that England had her ‘strongest hold on India’ through the administration of the law and which continued:

I look with the greatest satisfaction at the prospect, that this link will be still further strengthened by the

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848 Parl. Deb., (HC), 11 July 1871, Col. 1483.
849 Ibid. Col. 1486.
growing habit of Hindoos and Mahometans to resort to England for the purpose of studying law at the Inns of Court. Surely they ought to find a thorough and complete system of education. If this is desirable for ourselves, much more is it desirable for a Native of India. A Native of India requires, even more than an Englishman, some systematic instruction, before he attempts to acquire the art to practise. Indeed, I do not hesitate to say, that the most conspicuous failures of Native lawyers in India have arisen entirely from the want of this preliminary instruction [...] It seems to me, therefore, not too much to say that the question which has been mooted is one of Imperial concern.  

The debate was adjourned inconclusively but there was then another meeting of the reformers, now in the shape of the Legal Education Association (LEA), in the following December, this time at Middle Temple. Attendees included ten QC’s and the Vice-Chancellor, head of the Court of Chancery. The prevailing mood of optimism is evident in the coverage in the Law Times: ‘the frequent applause accorded to Sir Roundell Palmer and the formidable array of eminent lawyers by whom he was supported afford sufficient evidence that the movement now inaugurated is one which cannot be opposed. And that next year will not come to an end without legislative sanction having been given to the scheme of the Legal Education Association’.  

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850 Ibid, Col. 1487.
The Association’s optimism was not entirely groundless. It was reported that Oxford University had set up a committee to consider improvements and, according to the *Law Times*, it was prepared to include ‘a complete reconstruction of its machinery for teaching and examining in law, with the object, amongst others, of having it ready to fit; in with any comprehensive organisation of legal education which may be established, either by the Inns of Court or any body external to them’. 852 Cambridge had appointed a syndicate to confer with the Association. London University cavilled at the concept of a degree-awarding ‘university’, ‘while it nevertheless regarded many of the suggestions ‘as deserving of the maturest consideration’. 853

In March 1872, Palmer again moved in the House of Commons for a ‘General School of Law’ with joint education for both branches. 854 In this major debate, the government’s Law Officers once again temporised. Palmer cited correspondence from the Empire, this time from members of the Indian Civil Service, who argued that educational opportunities ‘would be of the greatest possible value and importance, with a view to the administration of the various systems of law with which they have to deal in India, and with a view also to the qualification of natives who assist in the administration of justice in the Indian Courts’. 855 The Attorney-General conceded that the Inns, ‘having very large funds at their disposal, and possessing a prestige which has come down to them from many centuries, ought to do, and, if necessary, should be compelled to do a great deal more in the work of legal education and the advancement of our profession than they have hitherto done. They have the power, the means, and the machinery ready to their hands for the creation of a school for the teaching of English law’. However, with shameless sophistry, he argued that, for the very reason that our

852 Ibid.
853 Ibid., p.76.
854 *Hansard*, (HC), Vol.CCIX, 1 March 1872, Col.1222.
855 Ibid, Col.1230
Uncodified law was ‘unscientific’, ‘a knowledge of English law can only be obtained by practice’ rather than from a school. He then simply finessed the motion for the joint education of solicitors and barristers, claiming that that he should like to see more being done:

to fuse, or rather to bring together, the two branches of the legal profession, which [...] the question is whether the existing system is better on the whole or worse on the whole than the systems we find prevailing in other countries. I am not myself prepared to say that it is on the whole either better or worse than the system prevailing, for example, in such a country as America. [...] The Resolutions proposed by my hon. and learned Friend take it for granted, or, at all events, assert, that it is the duty of the State to undertake the teaching of the law. Now, that is a proposition to which I, for one, am not prepared to assent.

For his part, the Solicitor-General claimed that ‘the Government desired to throw no impediment in the way’ but the motions were ‘so crude, so vague and so indefinite that [they] did not form a sufficient guide for immediate and present legislation’. He claimed that professional and public opinion was uncertain. As soon as there was general assent, ‘legislation would follow.’ The motions were narrowly lost by 116 to 103.

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856 Ibid, Col. 1242.
857 Ibid. Col. 1245.
858 Ibid. Col.1282.
The first AGM of the LES following Palmer’s elevation to Lord Chancellor as Lord Selborne was held at Lincoln’s Inn in December 1872. Richard Amphlett, Q.C, M.P. succeeded Palmer as president. He reported that earlier in the year the four Inns had appointed a joint committee to report on legal education. While this committee had rejected the concept of a general school of law, its recommendation for compulsory examinations was confirmed by the Inns. However, as it turned out, relatively few students were obliged to sit the CLE examination as it was limited to non-graduates, ‘and the high failure rate at first attempt suggests that some had not taken it seriously’ Towards the end of 1872 the CLE drew up a new scheme. A committee of eight was appointed to ‘superintend and direct the education and examination of students’. Systematic instruction in various legal subjects was to be provided in lectures and private classes by four professors and other lecturers. A requirement to pass some of the subjects could be waived if the candidate held a law degree from a British university. Another indication of a nod towards imperial interests was that, as from January 1873, a further professorship was to be added to lecture on ‘Hindoo and Mohammedan law and the laws in force in British India’. Despite all this, Amphlett told the LES meeting that he hoped that the Association would never consider any scheme satisfactory that did not fulfil the demand for a law university and they voted to reject the Inns’ scheme as ‘wholly inadequate’. They were encouraged, however, that Palmer’s resolutions had been defeated by only 13 in a house of 219 members.

The all-encompassing title of the first edition of the new series of the Law Magazine in 1872 described it as being ‘for Both Branches of the Legal Profession at Home and Abroad’ although it was, in fact, principally aimed at solicitors. It welcomed compulsory

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859 Morning Post, 1 Jan 1873 p.6.
860 Polden, p. 1196.
861 Morning Post, 17 Dec 1872, p.6.
862 Morning Post, 1 Jan 1873 p.6.
examinations for all but what is significant for our purposes is that it identified ‘the force of
public opinion’ as ‘the preponderating consideration which presented itself, and which, no
doubt, brought about the result which has taken place’. It cautioned, however, that ‘ancient
and solid bodies like the Inns of Court are not to be shuffled as a pack of cards, or tossed
about like a child's playthings. The wisest course is to take them as they are, and to make the
best of them’.

After Palmer was appointed Lord Chancellor by Gladstone in October 1872, he was
too preoccupied with the Judicature Bills and the massive task of reforming the structure of
the courts’ system to renew the attempt to reform legal education. In December 1873, he met
privately with a deputation of the LEA to tell them so while promising that this would be
forthcoming in due course.

By the time Selborne felt able to return his attention to reform in 1874, Disraeli had
secured his second election success and Lord Cairns had become Lord Chancellor. According
to David Steele, Cairns’ ‘reputation as a partisan Tory lightly concealed a modernizing
Conservative. Like the Gladstonian and high-church Palmer, and often in conjunction with
him, he was a determined law reformer’. Writing to Palmer as he then was, in the early
1870s, he said he was ready to take on the Inns of Court and 'roll them all into a legal
university'. Yet, despite such sentiments and the fact that, between them, Selborne and
Cairns occupied the woolsack for over thirteen years between 1872 and 1885, it never
happened. The political reality was that Cairns was not prepared to pursue legislation going

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864 Morning Post, 13 Dec 1873, p.6.
865 Cairns to Selborne, 11 Oct 1872, Palmer, 1.50), cited in David Steele, ‘Cairns, Hugh
McCalmont, first Earl Cairns, (1819–1885’), ODNB,
Edward Rees (Ph. D. Thesis)

beyond the creation of a strong examining body for the Bar. Selborne himself returned to the presidency of the LEA following Amphlett’s appointment as a judge. The Association had received nearly £400 in donations in the previous month. 866

The CLE’s compulsory examination rules were thought to be of sufficient public interest to be published in the *Morning Post*. 867 Out of office, Selborne, assisted by the ‘vigorous support of solicitors’, continued to present Bills to incorporate the Inns, to provide for the election of benchers and to spend surplus funds on legal education. In July 1874, he persisted with a Bill for a general school of law. 868 After its second reading, Inner Temple and Lincoln’s petitioned the House of Lords objecting to the Bill entering the committee stage. They now argued that the Bill was ‘obviously calculated to destroy [the Inns] altogether’. With unselfconscious logic, they recognised that ‘inasmuch as it would be said, after it came into operation, that the very object of their existence had ceased, and that they had become mere instruments of call to the Bar’. Cairns’ own delaying tactic was to maintain that occupying the legislature with the Bill could prove to be ‘antagonistic’ to another of Selborne’s Bills for the Regulation of the Inns of Court which was simultaneously passing through Parliament. He suggested that further progress should await the outcome of the latter Bill and, if necessary, the School of Law Bill could be re-introduced in the next session. Selborne reluctantly agreed. 869 By the time of a second reading of an amended School of Law Bill the following year, the protagonists had also shifted their positions. Selborne was now calling simply for ‘an examining, but not a teaching, body.’ Cairns’ governmental stance had now hardened in favour of the Inns: the Bill was ‘open to serious objection. If any such

866 *South Wales Daily News*, 9th July 1874, p. 3.
867 *Morning Post*, 22 February, 1875, p. 3.
868 *Hansard*, (HL), CCXX, 10 July 1874, Col. 1458; Ibid., Vol. CCXXIV, 4 May 1875, Col. 7.
869 *Hansard*, (HL) Vol. CCXXIV, 15 June, 1875, Col. 1891.
school succeeded it could only do so by diminishing the influence and the action of the Inns of Court. The modified Bill moved to and remained at the committee stage.  

There is no obvious explanation why successive Liberal and Conservative governments did not encourage their Lord Chancellors to pursue reformation of legal education more actively. Perhaps, the more focused question is to ask why no legislation was proposed by government itself. In this writer’s judgement, the short answer is that, while the Inns might be prepared to change voluntarily under pressure, they could not tolerate the loss of potency and control implicit in legislative interference. As Abel-Smith and Stevens have pointed out, ‘although the campaign to impose reform on the benchers by legislative action was to continue far into the next century, no Act was ever passed which laid any duty on the Inns of Court or regulated in any way the qualification or educational requirements of barristers.’

Notwithstanding the relentless censure of the legal and popular press and the considerable support within the LEA, external legislative interference in the administration of the ancient Inns was also a step too far for the senior lawyers in Parliament. One might add a more mundane consideration – why should a gentleman who considered himself sufficiently prepared for professional life through his classical education and the absorption of tolerable forensic habits within chambers, additionally wish to submit himself, against his will, to the unpleasantness of examinations? And, furthermore, why be compelled by others to be taught alongside socially-inferior articled clerks as he did so?

By the late 1870s, Selborne sensed that the movement for reform of legal education excited no more than ‘a languid interest in the press and general public.’ As the major cause for public concern had been addressed with the introduction of compulsory examinations, it may be that subsidiary debates around the form and governance of a general

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870 Hansard, (HL) Vol. CCXXVIII, 1 May 1876 , Col. 1893.
871 Abel-Smith, p.74.
872 Palmer,Part II, Vol.1, p.50
school of law did not further capture the public imagination. Moreover, the support of the Bar itself in both Houses of Parliament, particularly the Lords was falling away. Selborne personally attributed the failure to three causes. There was the usual ‘suspicious conservatism’ of the benchers who were opposed to the loss of any powers, not least to an external institution. Perhaps surprisingly, Selborne ranked this behind the hostility of London University and its law teaching colleges to a ‘monster establishment’, which threatened to eclipse their own limited efforts. ³⁷³ Lastly, there was the problem of the perennial and deep-rooted objection to a socially unacceptable combination of older ‘varsity men’ with articled clerks which was regarded as a potential stalking horse for fusion and, with it, the unpicking of the Bar’s monopolies. Conversely, once the Law Society itself had gained control of its own examinations, articled clerks themselves were less incentivised and less supportive of a joint project. ³⁷⁴

Over the next few years, Bills for the creation of a school of law all floundered – they either ran out of time or were simply dropped without explanation. ³⁷⁵ Lacking government backing and with barrister supporters defecting, Selborne eventually abandoned the project. The LEA was wound up and its remaining funds given to the Law Society. ³⁷⁶

³⁷⁴ Royal Commission on Gresham University, Evidence, R. R. Pennington, q. 15,862.
The 1880s and 1890s

The last two decades of the century continued to be dominated by proposals for an independent law school or university – each to be frustrated by the usual resistance of the Inns. According to Abel-Smith and Stevens, the Inns’ own examining body, the CLE was ‘still a feeble organ and there is little evidence that any who went on to distinguished careers at the Bar had made use of its services’. 877 The situation was not entirely lost on the Inns. The ‘black books’ of Lincoln’s Inn noted that ‘the system of Education has gradually been undergoing alteration for the worse, until it has been brought into a condition which is deplorable, and we feel bound to add is unworthy of the Inns of Court’. 878 One consistent complaint was that the CLE offered no instruction in important areas of law. Three of the four lectureships ‘delivered the bare minimum of lectures’, The fourth was split between two lecturers. One solely taught Roman Law while the other had to cover Public and Private International Law, Constitutional Law, Legal History, and Jurisprudence in the same allotted 18 hours. 879 Most students resorted to cramers, like articled clerks before them, who imparted ‘for a small fee, as nearly as may be, the exact amount of information which is required for a pass, and neither more nor less’. 880

Heavy criticism in the 1880s ‘roused [the CLE] from lethargy’. 881 Prompted by Lord Justice Lindley and Mr Justice Mathew, a joint committee set up by the Inns proposed that membership of the Council should be widened to include a small number of eminent outsiders. Perennially resistant to even the slightest measure of outside interference, the proposal was vetoed by the benchers of Middle Temple so that the CLE continued to consist

877 Abel-Smith, p.169.
879 Polden, p.1195.
881 See, for example, Law Quarterly Review, 6 (April 1890) p.228; Polden, p.1195.
entirely of members of the Inns. One may judge the level of commitment to quality in legal education from the fact that the individual Inns were even disposed to put petty rivalry towards each other ahead of progress. On one occasion when one of the Inns had offered an attractive room for lectures at nominal cost, the offer was declined because “it was supposed that it would give an unfair advantage to this Inn and people going to this beautiful place would be attracted to that Inn”.

Meanwhile, in the outside academic world legal education was being taken more seriously. In 1885 Frederick Pollock, Professor of Jurisprudence at Oxford, founded the significant *Law Quarterly Review*, the intention of which was to establish law as a worthy subject for study in itself. ‘This was not a case mainly of practitioners writing for practitioners, but rather of top-flight academics writing for the entire legal profession, both practitioner and academic’.

The first edition included articles by Dicey and Anson. According to Pollock himself, it was ‘aiming at the promotion of legal science without neglect of practice’. It showed no reluctance to criticise the CLE’s methods: ‘There is no provision for any graduated course of instruction to be followed by a student for any definite time, nor for any separation of elementary from advanced teaching [...] Every professor lectures, in practice, on such parts of his own subject as he happens to be most familiar with or most interested in, and so far as we know the Committee makes no attempt to

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guide the choice of subjects or maintain any relation whatever between the four simultaneous
courses’.  

By 1891 Lindley had managed to secure the enlargement of the CLE from two men
serving for two years from each Inn to twenty members, with a high-powered board of
studies in support, consisting of two judges, six Q.C.’s and three members of the teaching
staff. The range of teaching was enlarged. Professors were replaced with six ‘readers’ and six
assistants.  Nevertheless, Pollock’s Review scathingly dismissed the re-structuring and
likelihood of an increase in student barristers’ enthusiasm: ‘On paper it is certainly better than
the old one, and if it be worked with zeal and intelligence the Inns of Court may possibly,
within a few years, be not much inferior as a centre of legal instruction to an average second-
rate American law school. So far as we are aware, the bulk of the legal profession in England
remains in its usual and deplorable state of profound indifference and ignorance on the whole
matter’. Nor, in the opinion of the Review, did the examination process provide any
assurance of quality. It claimed that all a candidate needed to do was to memorize answers to
a limited number of questions and that it was possible for a hard working student with no
legal knowledge to qualify in three months.

By then, various other independent initiatives had come and gone along with the
‘protracted wrangles’ over the re-organisation of the University of London, then essentially
an external examining body for its component teaching bodies, into a full-time teaching
institution. However, it was recognised that, to be credible, a law faculty within such an
important university would need the active participation of the Law Society and the Inns.

‘As a result, plans for the future of legal education in London became interwoven with the

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886 Abel-Smith, p.171.
888 Polden, p.1192.
continuous attempts to change or divide up London University’. The first such scheme, promoted in 1884 by the newly-formed ‘Association for Promoting a Teaching University for London’ involved a campaign for a charter for a federation which was to include the Inns and the Law Society – ‘the Albert Charter’. Neither was prepared to participate.

Seven years later, Kings and University College applied again for a charter for a large, independent teaching university, ‘the ‘Gresham Charter’ taking its name from a 300 year old City of London charitable teaching trust. This time the Law Society agreed whereas the Inns simply ignored an invitation from a Privy Council committee to discuss matters. There was also strong Parliamentary opposition. In the event the notion of a new university was displaced in favour of a comprehensive review of the structures of the existing one in the shape of the 1894 Royal Commission on the Gresham University Report. The perceived threat to the Inns posed by the review triggered another rearguard defensive response. The CLE examinations were re-ordered into two parts. The second of these appears to have been more relevant to professional practice as it included, inter alia, papers in evidence and civil procedure and a general paper. In acknowledgement of the needs of empire, Hindu and Mohammedan Law or Roman-Dutch Law might be taken instead of the general paper. The former had been discontinued in 1874 but was revived in 1892.

The reformers had hoped that the Inns might be induced to accept the degree or certificate of the university as a test of ‘theoretical knowledge’ in the ‘more general branches of law’ required for the Bar, provided that they were given a ‘leading position’ on the body

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889 Abel-Smith, p.172.
890 Abel-Smith, p.172.
891 Gresham Commission, Minutes of Evidence, Q.12,950.
892 Abel-Smith, p.172.
893 Polden, p.1197.
which designed syllabuses and set examinations. They were wrong. For once the Inns did speak with one voice, and rejected the proposals out of hand. And they were able to do so with impunity, for the Commissioners' threat that “other steps” might be necessary to secure their co-operation carried no real menace while [...] Halsbury was on the Woolsack and the bar so strongly represented in Parliament. This may not have been unexpected of Halsbury, the deeply Conservative and politically-partial Lord Chancellor. However, the wider point for our purposes is that barrister Parliamentarians were sufficiently confident in themselves and in their processes to support the Inns’ resistance to external interference regardless. Like earlier schemes, this project to create a general school of law had once again foundered upon the same obstacle that had frustrated earlier proposals - the refusal of the Inns of Court to cooperate.

These were not merely esoteric debates of interest to none but the legal profession. In 1895 the Morning Post provided its readers with a full account of a hard-hitting speech delivered by Lord Russell, the Liberal Lord Chief Justice, which supported joint education for both branches. He declared that the Inns ‘have in great measure been stationary, while society in its progression has been giving birth to fresh needs [...] One thing is clear, that again and again earnest men in the profession of the law lamented the deficiencies of the Inns of Court as legal seminaries.’ Nor did he absolve the CLE: ‘students have complained to me that the lectures, whether in the lecture-room or in the class room, are sometimes essays merely, and frequently above their heads. They say that when the lecturer is speaking of legal

895 Polden, p.1192.
897 Abel-Smith, p.174.
898 ‘The Lord Chief Justice and Legal Education, Morning Post, 29 October 1895, p.3.
documents, examples of the actual things are not put before them, and they fail to realise them. They say the classes are not sufficiently catechetical, and that when the lecturer has delivered himself he disappears and is not available for advice and assistance from day to day in moments of doubt and difficulty.’ His own solution for legal education was the creation of an ‘Inns of Court School of Law’ open to all.

A final chance of a general school of law arose when extensive funds became available from the sale of the ancient, but now otiose, Inns of Chancery historically associated with solicitors - Clement’s Inn, Barnard’s Inn and New Inn. The Law Society litigated for shares of what they claimed were charitable trusts and in 1903 managed to obtain a ruling that £55,000 from the sale of New Inn should be reserved for legal education. Following an initiative by Sir Robert Finlay, Attorney-General and Treasurer of Middle Temple, the Inns were persuaded to set up a committee to consider yet another proposal for a general School of Law. Fearful as always of a Trojan horse for fusion, the Bar Council requested that the money ‘should be used for the purpose of improving and extending the usefulness of the system at present existing in both branches of the Profession’. Matters reached a point where a joint committee of the Inns and the Law Society approved a draft charter. The Law Society was enthusiastic about shared governance but was again defeated by the Inns. The threat to the Inns was vanquished when the money was then divided equally between the educational bodies of each branch.

As the century progressed, rightly or wrongly, the modern convention that a university and a legal profession have different educational objectives finally became entrenched with the reports of The Royal Commission on University Education in London.

899 Abel-Smith, p.174.
900 General Council of the Bar, Annual Statement, (1903-04), p.5.
901 Abel-Smith, p.176-7.
(the Haldane Commission).\textsuperscript{902} The Commission’s conclusion was that ‘there is a purely professional training which cannot usually be given in a university but for which we think a university education in professional subjects is the best foundation and preparation’.\textsuperscript{903}

As Daniel Duman put it, ‘in a period when demands of men infused with utilitarian principles transformed the face of professional England [...] the Bar with one of most archaic of governing organisations, the Inns, was the only major profession to emerge virtually unaltered by the prevailing social forces’.\textsuperscript{904} It had, however, made one decisive concession to utilitarianism, albeit reluctantly, in the shape of compulsory examinations which appears to have assuaged public opinion sufficiently to allow the Bar to continue its potent traditions and identity in the public imagination. Once examinations were instituted, the public was less concerned with arcane structures and mechanics.

\textsuperscript{902} The Royal Commission on University Education in London, 1\textsuperscript{St} Report, (1910); Final Report (1913).
\textsuperscript{903} Final Report, (1913), HMSO., Cmd.6717, para 333.
\textsuperscript{904} Duman, The English and Colonial Bars, p.34.
SECTION E

CHAPTER 9 – Conclusions

The study set out to answer the research question: ‘What were the reasons for the changes in public perceptions of the Victorian criminal Bar from the negative images of the 1840s and 50s to the professional models of the 1880’s and 90s?’ Based upon primary historical sources, this thesis offers two thematic explanations. Firstly, as explored in Section C, the succession and timing of these opposing identities had a direct causal correspondence with changes in courtroom styles, conduct and ethics. Secondly, as explored in Section D, there was a parallel improvement in public image brought about by reforms, albeit limited, in legal education and quality control.

Taking these two themes in turn, the public reputation of the mid-century criminal Bar was already low before the enactment of the 1836 Prisoners’ Counsel Act which established the right of defence counsel to address juries directly – ‘full defence by counsel’. One rapid outcome of this new freedom was a tangible deterioration in courtroom behaviour and, consequently, a further decline in public respect. This particularly manifested itself in a series of cases in the 1840s and 50s which offended against public notions of professional morality as espoused in the increasingly influential popular press. This short period provided the crucible within which the limits of acceptable advocacy were forged. This study identifies a direct causal link between contemporary press disapproval of forensic excess and the subsequent development of greater stylistic and ethical restraint so that, by the end of the century, public esteem had so improved that the leading counsel came to be lauded and acclaimed as proper professional models. Modern conventions of professional conduct and propriety can be seen to have evolved from this historical process.
The unavoidable conclusion from the primary sources explored in Chapter Four is that the mid-century criminal Bar and, most particularly, Old Bailey practitioners, were regarded with considerable opprobrium. The vehemence of press hostility is striking. The 1836 statutory extension of counsel’s role was shortly followed by a number of notorious cases, collectively labelled ‘the licence of counsel controversies’. These trials featured questionable behaviour which variously included assertions of personal belief in the client’s innocence, tearfulness, casting blame on third parties despite private instructions to the contrary and melodramatic appeals to the deity. The underlying justification of this disregard for behavioural boundaries was said to be the supposed axiom that, once counsel accepted a defence brief, he was duty-bound to secure an acquittal ‘by all expedient means’. The conduct of counsel and the ethical issues in these cases are analysed in detail in Chapter Four.

Public interest in these well-reported cases was extensive and the response of much of the mainstream and legal press featured allegations of dishonesty, hypocrisy and amorality. In 1845 relations between the Bar and leading newspapers, including *The Times* and the *Examiner*, came to be characterised as ‘The War between the Bar and the Press’ when the Oxford and Western Circuit messes forbade their members from newspaper reporting on trials. Accordingly, the starting point for this thesis is the core finding that the already poor reputation of the Criminal Bar reached its nadir in the two decades as a result of the 1836 Act.

This part of the study culminates in Chapter Five with the conclusion that, from that point onwards, responsive changes both in style and behaviour resulted in a shift in public expectations of the criminal Bar. The factors which had led to this ‘turnaround’ by the 1880’s and 1890s included the abandonment of the ‘by all expedient means’ maxim, stricter judicial control of trial conduct as a result of the increased professionalism of judges following the Judicature Acts 1873-5, the Bar’s own enhanced sense of unity as a body with common
standards and, most significantly, the exercise of greater rhetorical restraint in jury advocacy.

One test of the criminal Bar’s improved standing is that the careers of leading practitioners were not only followed and praised in the mainstream press but were elevated into fitting models of professionalism for the late-Victorian public.

Turning to the second theme, primary evidence also establishes that, until late in the century, the Bar’s lack of systematic education and qualification were also the focus of significant press attention and criticism. The Inns of Court had determinedly resisted the introduction of the educational and qualifying standards common to most other Victorian professions - most pertinently, that of attorneys and solicitors. The gravamen of the press concern was that this state of affairs militated against the national interest. The Bar, on the other hand, was content with its self-regarding entitlement to regulate its training by means of a traditional internal discourse between successive generations. The absorption of gentlemanly values through a classical Oxbridge education was deemed appropriate and sufficient. The small law faculties of the two universities had fallen into desuetude and attendance at the limited number of law lectures provided by the Inns was discretionary. Reformers within the profession and organisations such as the Law Amendment Society pressed for change leading to the 1846 Parliamentary Committee and the 1855 Royal Commission on Legal Education but their cogent recommendations were largely ignored by the Inns and by successive legislatures. When Oxford and Cambridge did institute re-invigorated law courses, aspiring barristers were uninterested as they had no bearing on qualification for practice. The growing press scorn and sarcasm mirrored that which had greeted the ‘licence of counsel controversies’ around the same period. Moreover, the imperial responsibility to properly train colonial administrators and judiciary was now a feature of Parliamentary debates. By the 1870s, faced with increasingly trenchant press comment and the growing threat of legislative intervention, the Inns decided upon a strategy of containment.
through compromise and concession. Accordingly, they instituted a scheme of lectures followed by various incremental schemes of compulsory examination to be administered by the Council of Legal Education. In the 1880s following dissatisfaction with the administration and teaching methods of the Council, substantial improvements were made. These measures did not fully meet reformers’ demands for a universal qualification for both branches of the legal profession, an independent ‘university of law’ and a formal incorporation of the Inns. However, reform of these remaining deficiencies in the Bar’s governance no longer fired the public imagination. Moreover, barristers were never going to relinquish their social exclusivity and, by now, solicitors as a body were largely content with their own autonomy and symbiotic relationship with the Bar. Accordingly, with the central mechanism for quality control in place with the institution of compulsory examinations, public anxiety was assuaged and, accordingly, the interest of the popular press fell away.

The causal stages of the historical process which had transformed the image of the criminal barrister had thus been replicated in the evolution of legal education. In this latter case, the first stage, that of public concerns over the lack of professional education and qualifying control, slowly but inevitably led to the second stage, that of improvement, which, in turn, led to the final stage of public approval. When blended with Victorian respect for the Bar’s deep-rooted traditions, the final outcome of these complementary processes was a marked elevation in the public standing of the Bar. The apparent combination of forensic propriety and specialised qualification transformed the criminal barrister, in particular, into a fitting professional model for the times.

Many of the rules which govern courtroom conduct today, now formalised by the Bar Standards Board, were shaped by mid-Victorian counsel testing the ethical boundaries of criminal advocacy. Acceptable behaviour was determined as much by the critical responses of
the popular and legal press as it was by the profession itself. By way of example, stratagems such as declarations of personal belief and assertions of fact or law known by the advocate to be false are absolutely impermissible. Secondly, adverse public opinion produced the modern duality in legal education, ultimately entrenched by *The Royal Commission on University Education in London* (the Haldane Commission) in 1913, by which the universities are responsible for the teaching of Law while the profession separately trains barristers for practice through pupillage and a one year practical course at the CLE.

Inevitably, there remain different aspects of nineteenth century criminal practice which fall outside this study but which merit further scholarship – not least, the cultural and practical consequences of the ‘dock brief’, the judicial assignment of counsel and the absence of an equivalent to ‘legal aid’ until the Poor Prisoners’ Defence Acts of 1903 and 1930. The extensive use of contemporary press sources in the present work has provided a holistic portrayal of the criminal Bar which is greater than its parts. The thematic novelty of this particular study lies in the fact that it analyses the two most important components of the criminal Bar’s negative reputation – its behaviour and lack of education – and joins them to form a sequential and parallel historical process of resolution and improvement.

The most significant conclusion of this thesis is, therefore, that the identifiable characteristics of the modern Bar emerged out of the reconciliation of the Victorian public’s concerns at the Bar’s cultural, behavioural and structural failings. The thesis offers a thorough analysis of the causation and roots of modern professional habits and education.

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