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MacDermott Lecture 2014: Virtuous voices: the advocate's contribution to the rule of law †

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It is a great privilege for me to be invited to deliver this annual lecture in honour of Lord MacDermott, one of the most eminent alumni of, and teachers at, this university, and a judge of international reputation. Unlike his august successors in the office of Lord Chief Justice of Northern Ireland, he took up that post *after* rather than before becoming a Lord of Appeal in Ordinary in what was surely an *upwardly* mobile career move.

Lord Kerr, last year's MacDermott lecturer, in his felicitous opening remarks, acknowledged how daunting it was to follow so long a line of distinguished lawyers to the lectern. I feel no less daunted in following Lord Kerr, not least because, whether I appeared before him in the High Court in Belfast, in the House of Lords or in the Supreme Court, I cannot recollect ever having been the recipient of a judgment in my client's favour. I for my part fear that next year's MacDermott lecturer, whoever he or she may be, will feel absolved from any need to pay any tribute to his or her immediate predecessor.

I never had the pleasure of meeting Lord MacDermott, but, in 1964, as a recent history graduate converting to law and in search of a sound guide to law's fundamental purpose and principles, I read his Hamlyn lectures delivered in 1957 on the theme 'Protection from Power under English Law',[1] the epithet 'English' being descriptive of the nature of the law being considered rather than imposing some geographical limitation. They included a prescient chapter on the power of the executive which looked forward to the modernisation of the supervisory jurisdiction, still at what Professor Sir William Wade QC has characterised as 'a low ebb'[2] but whose engagement Lord MacDermott described as work frequently requiring 'skill of a high order'.[3] That Delphic reference apart, Lord MacDermott did not comment on what contribution, if any, lawyers (other than judges) made

† First published in NILQ 65(4) (2014) 429–448.

1 Lord MacDermott, *Protection from Power* (Stevens & Sons 1957).

2 W Wade and C Forsyth, *Administrative Law* (10th edn OUP 2009) 412.

3 MacDermott (n 1 above) 97.

to the protection from power which he regarded as an aspect of the rule of law,[4] he contented himself only with the cautious observation that 'lawyers as a body are slow to depart from the settled way of things'.[5]

It is, however, the nature of that contribution which I wish to explore in your company tonight. While my theme, the advocate's contribution to the rule of law, is intrinsically perennial and knows no boundaries of time or place, my illustrations, to provide practical underpinning to otherwise theoretical and rootless musings, will be topical. They will focus from a barrister's perspective on recent events in England and Wales – that entity that, for the present at any rate, we can still describe as part, but not the whole, of Great Britain. Rudyard Kipling penned the line: 'What do they know of England who only England know?' To which my manifestly inadequate response has to be 'more at any rate of England than of the world beyond'.

At one level one may appreciate Lord MacDermott's abstinence from the theme. After all, is it not elementary that law, where not made by legislation, primary or secondary, or in exercise of the ever-diminishing prerogative powers, is *made* by judges, and not by those who argue cases before them? But that is surely not the whole picture.

In a letter to *The Times* on 10 February of this year from the chairman of the Bar Council, sundry heads of Bar associations and a *single female pupil barrister* – the inclusion of the latter being a somewhat transparent forensic tactic – the signatories fulminated: 'As the Lord Chancellor finalises plans to cut legal aid even further, barristers are coming to voice a unified opposition to changes which, if implemented, would have a devastating effect on the public's access to justice and The Rule of Law.' – the initials in the latter phrase being given, for emphasis, capital letters. One is tempted to comment, if unfairly, that (adapting Mandy Rice Davies's legendary riposte when told that Lord Astor had denied having an affair with her) 'Well they would say that wouldn't they?' It requires no particularly penetrating insight to note that there will also be a devastating effect on counsel's fees, where dependent on the public purse, and on their expectations, whether legitimate or otherwise, of a certain standard of living whatever that might be.[5a]

On 11 July 2013 in an earlier more measured response, as befits the second chamber, Baroness Deech, chair of the Legal Services Board (LSB), introduced a Motion to Take Note 'of the effects of cuts in legal aid funding on the justice system in England and Wales'. She ended her speech by saying that she was 'convinced that the protection of

4 Ibid 7.

5 Ibid 131.

5a A matter on which the House of Lords felt unable to pronounce: [2001] 1 Costs LR 7, [17]–[18].

the profession and of the public that is enshrined in Section 1 of the Legal Services Act will be undermined by the proposals of the Ministry of Justice as they stand'. There was scarcely any speaker who did not invoke the concept of the rule of law to justify their assault on the government's proposals.

This debate between the Ministry of Justice and the Bar Council has been played out in the public eye. The Justice Secretary wishes to cut £200m from the legal aid budget by 2018/2019.[6] He claims that expenditure on legal aid is in relative terms higher than in countries of equivalent size and standing. The Bar Council accuses him of dodgy dossiers, which seek to suggest that the earnings of the few so-called fat cats are trumpeted to distract attention from the multitude of starving kittens. One QC went so far as to argue that he could be charged with furthering his career by making false statements in contravention of s 2 of the Fraud Act 2006.[7] Into that debate I shall not seek to enter save to say that the Bar Council seems to have currently the better of the general argument since Sir Andrew Dilnot, head of the UK Statistics Authority, has warned the Ministry of Justice that its figures 'were indeed calculated to mislead'.[8]

The resistance of the profession to that proposed diminution in public funding came to a head when barristers declined either to defend alleged fraudsters whose cases fell within the category of so-called 'very high cost cases' in response to the government's threat to impose cuts of 30 per cent in fees on top of a series of previous reductions:[9] *or* to accept briefs for cases where colleagues were double booked – so called 'returns'. They intensified that resistance with a day of strikes

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6 Government's response on 27 February 2014, *Transforming Legal Aid: Next Steps* (Ministry of Justice 2014).

7 *The Independent on Sunday* (London 9 February 2014).

8 *The Times* (London 19 March 2013).

9 F Gibb, 'Barristers Say "No" and Put Fraud Trials in Jeopardy' *The Times* (London 23 December 2013). In *R v Crawley* [2014] 2 Cr App R 8, the Court of Appeal allowed an appeal against a decision of the Crown Court at Southwark staying an indictment of a conspiracy to defraud on the basis that the pool of qualified advocates was too small: 'The agreed test to be applied was: "Is there a realistic prospect of competent advocates with sufficient time to prepare being available in the foreseeable future?" At the date of the hearing before the judge, on our analysis, there was a sufficient prospect of a sufficient number of Public Defender Service advocates who were then available who would enable a trial to proceed in January 2015. That pool included a sufficient number of advocates of the rank of QC and was available at the date of the hearing. Consistent with the judge's finding at para 59 that the defence should instruct its advocates at a time which 'does not jeopardise the date set for trial', the obvious obligations on the defence should have been to instruct advocates at that point so as to retain them for a January 2015 trial.' [45].

on 6 January 2014,[10] with a second round on 7 March 2014 – the efficacy of the former only somewhat impaired by the fact that one of a cohort of young female barristers, carefully posed for the mandatory press photograph, was carrying a Louis Vuitton handbag. On 27 March 2014, the Justice Secretary agreed to postpone implementation of the savings until after the election in 2015 – a truce, if not an armistice.[11] Not this year, but next year, which could mean, depending on the vagaries of the popular vote, sometime, but not, I suspect, never.

To put these controversies over remuneration into some context, I read in a recent biography of Thomas Scrutton, the great commercial judge, that at the Bar in the late Victorian era – well before the notion of legal aid was even a glimmer in the governmental eye – fashionable leaders were paid a brief fee whether or not they actually appeared in Court – oh happy days! – and the reference in the law reports to juniors accompanied by the parenthesis (with Mr X QC) actually meant, not infrequently, *without* Mr X QC.[12]

But is the reference to the rule of law whether in *The Times* letter or in the House of Lords a mere rhetorical flourish or would the extinction of the professional advocate – to press the point to its limits – actually threaten the rule of law – a protean concept,[13] but which I *shall* use in the narrow sense of ensuring that justice is done according to law rather than in the broader sense of ensuring that the law itself is just and, if so, why?

Let me start with a statement so obvious that it is often overlooked. While legal giants debate whether hard cases make bad law – Oliver Wendell Holmes taking one view,[14] Lord Denning another[15] – what is beyond argument is that it is *cases* that make law.

Disputes about what the law on a particular issue is or should be is the stuff of academic commentary or of mooting competitions. Nonetheless, until some litigant, sometimes *on* the advice of counsel, sometimes *against* it, chooses to bring the matter to court, the issue will be undecided. (I have here omitted reference to the litigant in the dock, who lacks the essential element of choice.)

And the cases so brought have to reflect real issues. The civil courts will only exceptionally grant declaratory judgments about whether some person's conduct, actual or anticipated, would violate the law of the land, if the question is likely to come before, *a fortiori*, is actually

10 *The Times* (London 7 January 2014).
11 His offer was accepted by the Criminal Bar Association Council in May 2014, 6.
12 David Foxton, *The Life of Thomas Scrutton* (CUP 2014) 92.
13 T Bingham, *The Rule of Law* (Allen Lane 2010).
14 *Northern Securities v US* 193 US197, 400.
15 *Re Vandervell Trusts (No 2)* [1974] ch 269, 322.

before the criminal courts.[16] In private law it is well established that the courts will not decide hypothetical cases[17] and, even in public law, where there has been some relaxation of that stern rule, as Lord Slynn put it in *ex parte Salem*: 'Appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so.'[18] It is no part of the judge's role to give unsolicited advisory opinions.

There are related restraints on what can or cannot be the subject of adjudication at the highest level. The Supreme Court nowadays has almost complete control over its docket but can only select from cases contested before the lower courts, and in which there is an application for permission to appeal; and even then, for the most part, maintains the practice that it will not decide points which counsel has not argued.[19] In short, judges consume what the advocate cooks.

Advocates need not merely serve up a *table d'hôte* or even a standard *à la carte* menu. They can be more creative. Two of what are now standard interlocutory remedies in private law (the Mareva injunction,[20] which prevents dissipation of assets before judgment is delivered, and the Anton Piller order,[21] which prevents potential destruction of evidence of infringements of intellectual property) were both the inventions of counsel in the respective cases which bear the remedy's name. In the former, Lord Denning MR said that Mr Rix – later a senior judge in the Court of Appeal – 'has been very helpful'.[22] In the latter case, Lord Denning MR attributed 'credit' or, as he said with uncharacteristic caution, 'responsibility' to Hugh Laddie – later a High Court judge in the Chancery Division.[23] When these developments of the jurisdiction to grant injunctive relief were sought in association, they permitted one traditionally educated judge elegantly to make a classical pun by speaking of 'piling Piller on Mareva' in lieu – as you will all, of course, be aware – of 'piling Pelion on Ossa'[24] which described, in the Greek myth, the use made of these mountains by the giants Otus and Ephialtes to storm Olympus.[25] Since the use of Latin in our courts

16 *Zamir and Woolf: The Declaratory Judgment* (4th edn Sweet & Maxwell 2011) para 4-184.
17 *Ainsbury v Millington* [1987] 1 WLR 379, 380–1.
18 *R v Secretary of State for the Home Department ex parte Salem* [1999] 1 AC 450, 456–7.
19 A Patterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart 2013).
20 *Mareva v Internet Bulkcarriers* [1975] ZHR 509.
21 *Anton Piller v Manufacturing Process Ltd* [1976] 1 Ch 55.
22 *Mareva* (n 20 above) 510.
23 *Anton Piller* (n 21 above) 58.
24 *Bekhor v Bilton* [1981] QB 923, 955, per Stephenson LJ.
25 Virgil, *Georgics*, 281.

is now frowned upon, such gratuitous displays of judicial scholarship are, alas, unlikely to be repeated.

And even if sometimes an advocate seems to bend the bow too far and provoke astringent judicial observations about his 'fertile mind'[26] – on a par with the phrase 'with the greatest respect' which, in the court context, means its exact opposite – in other instances the fertility bears palatable fruit. *Ridge v Baldwin* stands out as one of the major cases[27] which started to reshape public law in the swinging sixties and where Lord Reid was able to chart how once lively concepts of natural justice had been diverted into a dark tunnel but could now be exposed again to light. But it was Desmond Ackner QC, later a Law Lord and the outstanding advocate of his generation, whose submissions, as the law report reveals, helped shape Lord Reid's speech. At the other end of the scale one may instance Lord Nicholls' magisterial clarification of the law of resulting trusts in the Privy Council in an appeal from Brunei,[28] where I was counsel for the victorious appellant, but where the most charitable reading of the summary of my submissions could discern no visible connection between them and the advice given by the Board to Her Majesty. Indeed, I confess that there was none!

These examples, whether of the sublime or of the ridiculous, remind one of another important matter. In England the adversarial process, even in the highest courts, is essentially, if not exclusively, an oral process. We have not yet replicated the procedures of the US Supreme Court where advocates are conventionally limited to half an hour with no injury time for the frequent interruptions usually caused by the justices arguing amongst themselves. Still less have we replicated the processes of the European Court of Justice, where the only golden rule is that the proceedings must conclude in time for a leisurely lunch,[29] and the pre-hearing courtesy meeting in the judges' chambers resembles a bazaar in which the President will seek to bargain down the half hour presumptively allotted to each of the lawyers. Even in Singapore, a noted custodian of the colonial legal tradition, an appellate judge Rajah JA recently noted in an argument about whether overseas counsel Lord Goldsmith, the former attorney general, should be admitted to plead a case:[30] 'The appellate process in the Singapore

26 *Zamir v Secretary of State for the Home Department* [1980] AC 930, 951, *per* Lord Wilberforce on Louis Blom Cooper QC.

27 The others, also bearing Lord Reid's distinctive imprint, being *Padfield v MAAF* [1968] AC 1997 and *Animismic v FCC* [1969] 2 AC 47.

28 *Royal Brunei Airlines v Tan* [1995] AC 378.

29 D Richards and M Beloff, 'The View from the Bar' in G Barling and M Brealey (eds), *Practitioners Handbook of EC Law* (Trenton Publishing, Bar European Group, Bar Council 1998) ch 2, paras 2.20–2.28.

30 *Re Lord Goldsmith* [2013] SGHC 181, [29].

Court of Appeal has evolved to be more writing-centred than that in many other common law systems.' It would be too austere to conclude that written submissions do not equate to advocacy, but nonetheless it is surely the *dialogue* between bench and Bar which gives oral advocacy not only its savour but its strength.

For, in a classic adversarial system, it is appreciated that it is out of the clash of submissions that the judgments will be fashioned. Lord Eldon, twice Lord Chancellor in the early nineteenth century and for an unrivalled period of 26 years, said: 'Truth is best discovered by powerful statements on both sides of the question',[31] though (as is well known) he sometimes took an unconscionable amount of time to decide what the truth was. The essay on him in the Dictionary of National Biography refers to 'the arrears with which he was constantly reproached'[32] – an odd literary epitaph for someone whose maxim was that 'a lawyer should live like a hermit and work like a horse'.[33] Lord Pannick QC, in his keynote address to the Bar Conference in 2013, put it more amply: 'the law is best administered by independent judges who hear arguments on both sides of a case before they make up their mind. The advocate exemplifies the valuable principle that there is always another point of view, a different perspective, an alternative explanation.' And Mr Justice Megarry, in his judgment in *Cordell v Clanfield Properties*, put it more pithily that 'argued law is tough law',[34] citing in support a dictum of Hankford J of 1409, which he had excavated from the Year Books, and which, though in a mixture of medieval French and Latin, lost nothing in translation: 'Today, as of old, by good disputing shall the truth be known.'

And in such a system, in both criminal and civil cases, it is the *advocate* who decides what material is placed before the court. The common law system is *not* inquisitorial. Judges can rule on what evidence is or is not admissible – though rules as to admissibility are becoming ever more flexible – but cannot compel an advocate to adduce particular evidence, nor can they search out evidence themselves, nor, critically, must they enter into the arena in the way in which they did as an advocate – a habit that some judges find easier to foreswear than others!

And when there is a fact-finding body whom the judge must direct, their duty is to sum up the facts and identify the competing arguments, not to find facts, or fashion arguments of their own.

In the Channel Islands, the tribunal of fact is constituted by jurats and the trial judge, the office-holder sometimes being a commissioner,

31 *Ex parte Lloyds* [1822] Mont 70, 72.
32 *Dictionary of National Biography* vol XLII (OUP 2004) 993.
33 Ibid 988.
34 *Cordell v Claufield Properties Ltd* [1969] 2 Ch 9, 17.

has a different role, but the basic principle of judicial restraint remains the same. In a recent case on an appeal from Jersey, the Privy Council said:

> Naturally, in Jersey, where the facts are decided by the Jurats (the Commissioner retiring with the Jurats but not joining in the fact-finding unless the Jurats disagree), the facts are not summed up. But that cannot begin to justify the Commissioner seeking to give the Jurats the benefit of his analytical powers by way of his own extensive examination of the witnesses, or indicating his thinking by the nature of his questions and comments.[35]

The judge then is a referee, not a player. So it was that Sir Robin Dunn, who ended his career on the English Court of Appeal and wrote in his memoir: 'It was not until I became a judge that I realised how dependent the Bench is upon the Bar.'[36] That realisation was not the less accurate for being somewhat belated.

Advocacy, the source of that dependency, is, in so far as it is an art at all, a transient one. Even a transcript cannot capture the immediacy of its impact – assuming it has an impact – upon its audience – the tribunal to whom it is properly addressed. Televised trials will capture it a little better and will at least add to civic understanding as long as advocates are not seduced into playing to the gallery rather than focusing their attention on those whom it is their function to seek to persuade; I confess that I have never been tempted in the Supreme Court to think that the object of my exercise is to provide entertainment to that quixotic group, who, for whatever inexplicable reason, while away their daytime in watching the court's dedicated channel.

'You cannot', as yet another retired judge, Sir Peter Bristow, said in his memoirs – autobiography is an occupational hazard of judges who have hung up their wigs – 'find the advocacy skills in the books. You have to learn them from your betters and think them through for yourself as you go along.'[37] Dame Elizabeth Lane, the first woman to be appointed to the High Court bench in England, in her autobiography identified four pillars of advocacy which can be summarised as good health, good temper, good voice and last, but by no means least, good luck.[38]

Some adopt more subtle, even suspect, techniques. Peter Bristow recalled: 'In our Chambers we kept a drawer full of old-school and club and regimental ties. Should we for example deploy service, club or old

35 *Michel v R* [2009] UKPC 49, [34].

36 R Dunn, *Sword and Wig* (Quiller Press 1993) 169.

37 P Bristow, J*udge for Yourself* (William Kimber 1986) 38. Education in advocacy has now become fashionable and is provided in all the Inns of Court with Grays Inn being the pioneer.

38 E Lane, *Hear the Other Side* (Butterworths 1988) 60–2.

school tie?'[39] This anachronistic advice is of limited utility, unless the advocate was appearing unrobed before a judge, and of no utility when the advocate appeared in full legal fig before a jury – there are no old school bands – and, equally, *utterly* useless for the female advocate.

George Carman, the so-called silver fox – the vulpine metaphor being favoured for defamation lawyers[40] – certainly had Dame Elizabeth's fourth desideratum; in no less than three of his major forensic triumphs, his case for the defence was rescued by the adventitious – or so one *must* assume – arrival of a critical piece of evidence midway through or even just before the end of the trial.[41] In two of them he established that the TV journalist Janie Allen and TV soap star Gillian Taylforth, who each sued in respect of stories of exotic sexual activity, were far from vestal virgins. (I must declare an interest as the unsuccessful counsel for the plaintiff in the latter). In the third, he established that Jonathan Aitken MP, who defended a claim that, when a minister, he had allowed his bill at the Ritz Hotel in Paris to be paid by rich Arabs with whom he was dealing, on the basis that the bill had been paid at reception by his wife, was guilty of perjury since last-minute evidence from British Airways showed that, at the material time, his wife had actually been in Switzerland, of which judicial notice could be taken that Paris is *not* the capital city.

Yet other advocates rise to the top by techniques that *appear* counterproductive. Lord Devlin's account of the trial over which he presided of Dr John Bodkin Adams, accused but acquitted of murdering his patients in anticipation of a legacy, contains this cameo description of leading counsel for the prosecution: 'His disagreeableness was so pervasive, his persistence so interminable, the obstructions he manned, so far flung, his objectives so apparently insignificant, that sooner or later you were bound to ask whether the game was worth the candle, and if you asked yourself that you were finished.'[42] This did not, however, impede the career of the object of judicial derision, Sir Reginald Manningham Buller, immortalised by the journalist Bernard Levin as 'Sir Reginald Bullying Manner', who held in succession both law offices of the crown, ascended to the Woolsack and ended his professional life as a Lord of Appeal in Ordinary with the title Viscount Dilhorne.

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39 Bristow (n 37 above) 40.

40 Gilbert Beyfus, the Carman of the 1950s, was known as 'The Old Fox': see I Adamson, *The Old Fox* (Chancelot Rise 1963).

41 D Carman, *No Ordinary Man: The Life of George Carman* (Hodder & Stoughton 2000) 166–7 (Janie Allen), 178–9 (Gillian Taylforth), 243–4 (Jonathan Aitken).

42 P Devlin, *Easing the Passing: The Trial of Bodkin Adams* (Bodley Head 1985) 39.

How much influence advocates in fact have on the outcome of cases is not capable of exact measurement. According to Alan Patterson in his recent seminal study of how judgments have been and are reached in the Court of Final Appeal,[43] a number of his interviewees from the ranks of *counsel* 'were sceptical as to how often in the final court advocacy had a determinative effect on the ultimate outcome of appeals',[44] whereas 'the Law Lords and Justices were in general rather more positive as to the impact of good advocacy'[45] – as he put it, 'fortunately'. Were it not so, many clients would be paying substantial fees to no purpose.

In *Torfaen Borough County Council v Douglas Wallis Ltd*,[46] a consumer protection case brought against the company for selling food past its use-by date, where the Supreme Court was deprived of argument on both sides from the Bar, Lord Toulson commented in his leading judgment:

> The company was not represented on hearing of the appeal. The reasons are understandable but the result is unfortunate. It is a small family company. In these circumstances the court asked a member of its legal staff to prepare a note of points which might have been made on behalf of the company … Nevertheless it is still unfortunate that the Court did not have the benefit of argument from both sides.

If the size of the contribution of the advocate to the resolution of civil cases may be debatable, it is all but dispositive in criminal cases with a lay, not legal, tribunal of fact – magistrate or jury. Lord Judge, the recently retired Lord Chief Justice of England and Wales, said:

> The administration of justice depends on the quality of the advocacy deployed on each side. The jury will do its conscientious best. The Judge will make the decisions and give the directions believed by him to be appropriate. But the analysis of each side's case and all the evidence, and its importance to the case, so as to enable both judge and jury to exercise their own responsibilities depends upon high quality advocacy. And we are not discussing some disembodied theory. This is the day to day stuff of reality. It is in the public interest that the guilty should be convicted. It is in the public interest, as well as the interest of the innocent defendant, that he should be acquitted. For a truly innocent defendant to be convicted is a disaster. These disasters happen even in the best run trials with the best quality advocacy. Poor quality advocacy by either side simply increases the prospects of the guilty being acquitted, or the innocent being convicted. In the process of adversarial trial before a jury it really is as stark and simple as that.[47]

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43 Up to October 2009, the Appellate Committee of the House of Lords, since then the Supreme Court.

44 Patterson (n 19 above) 49.

45 Ibid 50.

46 *Torfaen Borough County Council v Douglas Wallis Ltd* [2013] UKSC 59, [9].

47 Kalisher Lecture 2009.

As Lord Pannick said in the speech referred to above:[47a] 'the work of lawyers on legal aid . . . makes an essential contribution to the administration of justice, defending the innocent and validating the conviction of the guilty'. Nor is the matter of concern only to the particular prosecution or defence. It bears precisely on the confidence that the community has in the legal system as a public service.

Now, given that advocates have so vital a role to play, it is imperative that they are not free to pick and choose when to play it.

In May 2012 the LSB, the legal regulators' own regulator, ever enthusiastic to bend the bow of its novel powers, commissioned two academics to analyse the impact on the market of the cab rank rule by which barristers are, in broad terms, obliged, subject to availability, adequacy of expertise and absence of conflict of interest, to represent any person who calls upon their services; however distasteful that person's character or cause. This duty has since at least the time of Henry VII[48] been part of the creed of the profession. Nonetheless, in their report published in 2013,[49] the academics concluded that: 'the logic of our report argues that the rule serves no clear purpose . . . while it can be lauded as a professional principle enshrining virtuous values, as a rule it is redundant'.

They based themselves, first, on pure economic literature, which they described as 'scant' and which they regarded as 'very sparse and ultimately not very illuminating'; second, on interviews with so-called 'stakeholders' whose testimony was given in exchange for a guarantee of anonymity; and, third, on sundry blogs and tweets. This may seem a fragile foundation on which to recommend abolition of a professional rule which dates back several centuries but this in no way deterred the authors.

There were three main points of suggested substance argued by them against retention of the rule. First, that other providers of legal services are not subject to it so why should the Bar be so subject? Second, that the rule has not been enforced and so is meaningless. And, third, that one of its purported rationales is devoid of force since there is no real problem with barristers being associated with their clients and so being dissuaded from providing representation to those whose cases do not, for whatever reason, engage immediate, or, indeed, any sympathy.

As to the first, the fact that other providers of legal services do not adopt the higher standard of conduct required by the rule can surely not

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47a See page 57 above.

48 The address of the then Chief Justice to the new sergeants-in-law included the exhortation: 'Ye shall refuse to take no man under the protection of Your good counsel.'

49 J Flood and M Hviid, *The Cab Rank Rule: Its Meaning and Purpose in the New Legal Services Market* (LSB 2013).

be a reason for abolishing the application of the rule to the Bar which supports its retention. If anything, it is an argument for application of the rule to those other providers. To enshrine the lowest common denominator in the practices of all branches of the legal professions is not the most obvious way to promote the rule of law.

As to the second, the assertion that because 'there is no evidence that it has ever been the subject of enforcement proceedings'[50] it serves no useful purpose and is not in fact adhered to is likewise a strange piece of reasoning. The fact that proceedings have not been brought[51] to enforce a rule does not mean that it has no effect on conduct. Indeed, quite the contrary conclusion will often flow: namely, that the rule *is* efficacious and *does* in fact guide conduct.

The rules contain an important statement of principle about the aspirations of the Bar and of the values which it, and indeed, society seeks to pursue.

As to the third, as explained by Lord Hobhouse in *Arthur Hall v Simmonds*,[52] the rule protects barristers against being criticised for 'giving their services to a client with a bad reputation' as it negates the identification of the advocate with the cause of his or her client. It therefore assists to provide him or her with protection against governmental or popular victimisation.

There is, contrary to the academics' premise, a real and present-day problem of counsel being associated, wrongly, with the cause they pursue for their clients. In 2012, two Asian barristers withdrew from the trial of a group of Asian men accused of running a paedophile ring (referred to by the media as 'the Rochdale grooming trial') after being intimidated and physically assaulted at the start of the case by far-right demonstrators outside Liverpool Crown Court.[53]

The Delhi rape case and the Mumbai terrorist survivor case demonstrate further the difficulties faced by defendants in jurisdictions where representation of a client suggests association *with that* client, with the consequence that lawyers for those charged with such serious offences cannot easily be found.

Barely a month ago, a lawyer representing the former military ruler of Pakistan, Pervez Musharraf, in a treason trial arising out of the 2007

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50 Ibid 2.

51 This factual assertion is in fact incorrect. But in any event it is in principle in the public interest that a lay client who cannot obtain representation from an advocate should be able, however *infrequently* the need to do so may arise, to complain of a breach of the cab rank rule as a matter of professional misconduct since the cab rank rule would otherwise be writ in water.

52 *Arthur Hall v Simmons* [2002] 1 AC 612.

53 www.thetimes.co.uk/tto/news/uk/crime/article3408066 and www.bbc.co.uk/news/uk/-england-17989463. [Links no long working.]

imposition of emergency rule was threatened in an anonymous letter with beheading and the destruction of his children.[54]

There is much anecdotal evidence that lay and professional clients in many areas of practice, including defamation,[55] seek to coerce sets of chambers into acting only for one side or the other, by coupling an offer of instructions in a *particular* case with a threat to withhold further instructions in *future* cases if the set does not accede to such demands – an offer, which to borrow the *dictum* of Marlon Brando in *The Godfather*, is proposed as an offer they can't refuse. The cab rank rule does not merely allow but actually obliges chambers, and counsel in them as a matter of professional conduct, *not* to accept this position, even if, necessarily, to their financial disadvantage.

In a legal culture whose roots are the same, but whose branches have developed in wholly different directions, the USA, in the field of media law an advocate will appear either for newspapers or against them; and it would be regarded as inconsistent, rather than consistent, with professional principle and practice to switch sides from day to day. I submit that the approach of the English Bar is to be preferred.

Certainly, the judiciary appear to be in no doubt about the cab rank rule's continued vitality. In *Rondel v Worsley*[56] in 1969, Lord Reid, in upholding barristers' traditional immunity from claims for negligence, said, about the position and duties of a barrister or advocate appearing in court on behalf of a client: 'It has long been recognised that no Counsel is entitled to refuse to act in a sphere in which he practises and on being tendered a proper fee, for any person however unpopular or even offensive he or his opinions may be, and it is *essential* that duty must be continued. Justice cannot be done and cannot be seen to be done otherwise.'

In *Arthur JS Hall & Co v Simons*[57] in 2002 when the same immunity was overturned, Lord Hobhouse of Woodborough said of the rule:

> It is in fact a fundamental and essential part of a liberal legal system. Even the most unpopular and antisocial are entitled to legal representation and to the protection of proper legal procedures. The European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969) confirms such a right.'

In *R v Ulcay*,[58] the Lord Chief Justice stressed the importance of the rule despite its claimed evasion:

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54 *The Times* (London 14 March 2014).
55 But also banking, intellectual property and tax law.
56 *Rondel v Worsley* [1969] 1 AC 191, 227D.
57 *JS Hall & Co v Simons* [2002] 1 AC 615 (HL).
58 *R v Ulcay* [2008] 1 WLR 1209 (CA), [40].

> The cab-rank rule is essential to the proper administration of justice. We simply emphasise that if the cab-rank rule creates obligations on counsel in civil proceedings, it does so with yet greater emphasis in criminal proceedings, not least because to a far greater extent than civil proceedings, criminal proceedings involve defendants charged with offences which attract strong public aversion, with the possibility of lengthy prison sentences, when more than ever, the administration of justice requires that the defendant should be properly represented, so allowing the proper exercise of his entitlement at common law and his Convention rights under article 6.

Nor is the rule just an English legal curiosity. As observed by Brennan J in the High Court of Australia in *Giannarelli v Wraith*:

> If access to legal representation before the courts were dependent on counsel's predilections as to the acceptability of the cause or the munificence of the client, it would be difficult to bring unpopular causes to court and the profession would become the puppet of the powerful.[59]

Sir Sydney Kentridge QC, speaking of his experience of acting for opponents of the apartheid regime in 1986, expressed the importance of the rule in eloquent and practical terms as follows:

> ... in some types of cases – particularly in treason trials, of which there are many in South Africa – defending counsel is sustained and strengthened by the understanding of his professional colleagues – among whom for these purposes I include the judges – that what he is doing for his client, however much it may hurt or offend persons in authority, is no more than his duty. The rule also ensures that the independence of the advocate is generally recognised even by the public at large – the advocate is not necessarily associated with the views of his client. This may seem pusillanimous. Why should we care what anyone thinks of us? If we all had the courage of an Erskine or a Clarence Darrow, we should not require that sort of protection. But I assure you that for ordinary mortals the support of this professional tradition can be very comforting indeed.[60]

While Sir Sydney is himself no ordinary mortal but fit to be ranked with those with whom he declines to compare himself, his observation loses nothing in pertinence because of his modesty.

So, as explained by Lord Bingham in his chapter on a fair trial[61] in his book on *The Rule of Law*, 'scarcely less important than an independent judiciary is an independent legal profession, fearless in its representation of those who cannot represent themselves, however unpopular or distasteful their case may be'.

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59 *Giannarelli v Wraith* (1988) 81 BLR 417, 439.

60 Lecture at the Middle Temple, January 1986, entitled 'The South African Bar: A Moral Dilemma?', reproduced in Sir Sydney Kentridge QC, *A Free Country* (Hart 2012) 23.

61 Bingham (n 13 above) 92.

The academics' analysis appeared oblivious to the fact that the legal profession, while it inhabits a market, is not *only* a participant in a market, and mercifully the report has, at any rate for now, disappeared into the oubliette of history.

The fact that a barrister is not identified with his or her client has the *additional* advantage that the court will repose greater confidence in his or her submissions than if such identification were perceived or perceptible.

Judges themselves are by tradition and training expected to suppress – as far as is possible – their personal or political predilections when ruling on cases that come before them. But, over the last year, several members of the Supreme Court have yielded to the temptation of expressing their views on a topic of extreme sensitivity – the extent to which the domestic courts should defer to the Strasbourg Court's interpretation of the European Convention on Human Rights in applying those of its key provisions (and they form a substantial majority) that have been incorporated into domestic law by the Human Rights Act 1998. The issue has achieved salience over a range of cases, including the exclusive use of hearsay evidence to achieve a conviction, the rights of prisoners to vote and whole life sentences.

The basic law is clear enough. The Human Rights Act 1998 provides only that British courts must 'take into account' the decisions emanating from Strasbourg.[62] In *Ullah*,[63] Lord Bingham said that they should apply them 'no more but certainly no less' which, in Al Skeini, Lord Simon Brown countered with 'no less but certainly no more'.[64] The gap revealed by these obscurely differing emphases has widened into a chasm. On the one side, Lady Hale is an outrider in the Bingham camp contending for *Ullah*,[65] plus advocating that the domestic courts should be free to adopt a more generous construction to Convention rights than the European Court of Human Rights. On the other side, Lord Justice Laws argued that domestic courts should be free to adopt a less generous – or native – interpretation of those rights;[66] and Lord Judge proposed that the Human Rights Act 1998 be amended to make that clear.[67]

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62 S 2(1).

63 *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, [20].

64 *R (Al Skeini) v Secretary of State for Defence* [2008] 1 AC 153, [106].

65 Warwick Law Lecture 2013, 'What's the Point of Human Rights', 10–11.

66 Third Hamlyn Lecture, 'The Common Law and Europe', paras 30–4, *The Common Law Constitution* (CUP 2013).

67 Lecture to the Constitution Unit, 'Constitutional Change: Unfinished Business', 4 December 2013, para 40.

Meanwhile Lord Sumption[68] was concerned that the European Court had 'gone well beyond the language, object or purpose of the Convention' in a manner which posed 'a threat to democracy', a view which Lord Mance elsewhere described as 'apocalyptic'.[69] (Lady Justice Arden, in private life, Lady Mance, has advocated a three-year stay on the rulings of the European Court of Human Rights which lay down new law.)[70] To cap it all, Lord Neuberger[71] has stated: 'The idea of courts overruling decisions of the UK Parliament, as is substantially the effect of what the Strasbourg and Luxembourg Courts can do, is little short of offensive to our notions of constitutional propriety.' Truly a court divided against itself – and one whose revelations of judicial philosophy will inform the approach adopted by advocates who appear before them.

Advocates by contrast do not enjoy even such limited licence in their professional role. Their beliefs are irrelevant to the arguments they present. Indeed, for an advocate to state to the courts his or her belief is a solecism; advocates neutrally submit. Such convictions, as they may have, are parked outside the doors of the court. Their independence is in that sense of a purer variety than that of the judges.

But is the advocate's devotion to a client's cause an unqualified benefit? In a speech last year to the St Petersburg International Legal Forum on the theme 'Learning from Each Other', the dean of the Oxford law faculty explained that, in teaching law: 'We have to focus on dispute resolution, because of the way in which the common law has developed over centuries, through the decisions of judges in trials and appeals.'[72]

But he added, provocatively:

> there are drawbacks to a common law legal education, even to a good one. We never put this on our university publicity materials but let's face the facts; we teach students how to make bad arguments sound plausible . . . We equip students to become part of an industry in which they can charge high fees for legal services in support of claims that should not be brought and in making defences against claims that should not be resisted. This form of education supports the rule of law. But the rule of law is not altogether a good thing.

And he supplied an alleged example: 'If a murderer has a good defence lawyer and a fair trial, the lawyer may prevent justice from being done', while referring in the same sentence, in deaconal paradox

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68 Razlan Shah Lecture in Malaysia, 'The Limits of the Law', 20 November 2013.
69 'Destruction or Metamorphosis of the Legal Order', 14 December 2013.
70 'An English Judge in Europe', 27 March 2014, para 70.
71 Freshfields Annual Lecture 2014, 'The British and Europe'.
72 (2013) 17 Oxford Law News 7.

to the counter case 'yet our country is worse off if a murderer cannot get a good lawyer.'[73]

While I would acknowledge the dean's analysis as superficially plausible, I would also describe it as misguided. For intrinsic to it is a sense of omniscience which, while it may be understandable in an academic, is alien to a practitioner. It confuses hindsight with foresight. It assumes that, before a case has even been argued, the answer to it is certain. Yet, it is for the judge, not the lawyer, to provide that answer. As Lord Denning observed in *Tombling v Universal Co Ltd*:[74] 'Cicero makes the distinction that it is the duty of the judge to pursue the truth, but it is permitted to the advocate to argue what only has a semblance of it.' Norman Birkett, one of the pre-eminent counsel in the golden age of advocacy, in a famous *Face to Face* television interview with John Freeman, said that he had not infrequently defended clients whom he believed to be guilty, but never one whom he knew to be so.[75] In a democracy subject to the rule of law, it is no business of counsel to judge their client. As Baron Bramwell observed: 'A client is entitled to say to his counsel "I want your advocacy, not your judgement, I prefer that of the Court".'[76]

Alex McBride's recent literary *jeu d'esprit*, *Defending the Guilty*,[77] an account of the professional life of a criminal barrister, is a book with a title which abbreviates rather than illuminates the truth. Defence counsel is representing someone who, however formidable may be the prosecution case, until convicted enjoys the presumption of innocence. Indeed, if defence counsel was in receipt of an admission by the client that the client had actually done that of which he or she was accused, the ambit of the defence would be restricted to putting the prosecution to proof rather than advancing a positive case inconsistent with the client's instructions. A fairer but less engaging title would be 'Defending a person who, notwithstanding my arguments, was found by the tribunal of fact beyond reasonable doubt to be guilty as charged'. As an exercise in sales promotion such a title would, of course, be less attractive to the publishers!

So, to the dean of the Oxford law school, I would make the riposte: 'The rule of law *is* altogether a good thing.' And the fact that in litigation the right result is not always achieved does not make it less so. Advocates, even judges, are only human!

But whatever techniques they deploy, how far *should* advocates go in their desire to promote their clients' interests. The parents of the

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73 Oxford Law News (n 72 above).
74 *Tombling v Universal Co Ltd* [1951] 2 TLR 289, 297.
75 Norman Birkett, *Montgomery Hyde* (Hamish Hamilton 1964) 488.
76 *Johnson v Emerson* (1871) LR 6 Ex 329, 367.
77 Penguin 2010.

murdered 13-year-old Milly Dowler had their own sex lives subjected to prolonged scrutiny by defence counsel for Levi Bellfield, ultimately convicted of Milly's murder – as well, of course, as having their voicemails hacked by journalists for the *News of the World*. Frances Andrade committed suicide after giving evidence against a former music teacher, Michael Brewer, accused of having sexually assaulted her when she was his pupil, apparently in consequence of her ordeal in the witness box, which, she confided in a text to a friend, made her feel that 'she had been raped all over again'. Domestic goddess Nigella Lawson, a prosecution witness in the trial of the Grillo sisters who were accused of defrauding her former husband Charles Saatchi, was accused of being a habitual user of drugs by the sisters' defence counsel to sustain a line of argument that she had licensed payments from her husband's bank account as a price for the sisters' silence. Prosecutors are under a professional obligation not to seek conviction at any cost. It may be that a similar restraint should be imposed on defence counsel rather than that they should enjoy, subject only to control by the court, what Nigella's brother, the prominent journalist Dominic Lawson, described as an 'unchecked destructive licence'?[78]

The degree to which the court's control is effective is itself controversial. Judge Robin Johnson, who had reversed an earlier ruling to exclude evidence about Ms Lawson's alleged drug-taking, was compelled to abort questions by a Ms Arden, counsel for Francesca Grillo, only when she asked Ms Lawson whether she had received a Mother's Day card with a spliff attached to it and the words 'to enjoy later' with the direction: 'That ends your cross-examination. I'm not having any more. You have exhausted my patience.' – a not entirely principled or satisfactory safeguard.

Sometimes the boundaries of forensic propriety, if not transgressed, may be thought to come close to being so in ways other than the harassment of witnesses. In the three-week trial of two al-Qaeda sympathisers for the murder of Fusilier Rigby, the advocate for Michael Adjebolo reminded the jury that it was for the prosecution to prove its case: 'The onus is on the prosecution to prove intent to kill or do really serious bodily injury.' – a submission correct in law, but somewhat ambitious given that his client had been seen to kill the soldier on the public highway and had been photographed with the murder weapon – a blood-stained machete – in his hands. Counsel also argued that his client was a soldier in war believing himself to be engaged 'in a legitimate armed conflict against an odious regime' and therefore could not have breached the queen's peace – a submission, as the judge held, incorrect in law.

78 'My Sister was Found Guilty – And She Was Given No Defence' *The Sunday Times* (London 22 December 2013).

The same advocate's dramatic and eloquent introduction ('There is no greater honour than to stand up for someone who is innocent of a charge . . .') savoured of exaggerated optimism and was also inappropriate insofar as it implied his belief in his client's innocence – which was no more relevant than would have been his belief in his client's guilt.

In *R v Farooqui and Others v R*,[79] a terrorist case, the convictions of Mr Farooqui and his co-accused were challenged last year on the basis of 'flagrant misconduct and alleged professional incompetence'[80] of Mr Farooqui's advocate. The catalogue of misconduct included: giving evidence himself – his client having declined to do so; making submissions about facts not themselves adduced in evidence; making critical comments about the prosecution police witnesses, notably that they had been guilty of entrapment, which they had been given no opportunity to answer; and making unwarranted personal attacks on the judge, the prosecution and even other defence counsel who were said to be guilty of 'sucking up' to the judge because they conducted their cases in a manner different to his own.[81]

In stressing that 'the trial process is not a game',[82] the Court of Appeal emphasised as well that:

> . . . the advocate is not the client's mouthpiece[83] ... In short the advocate is bound to advance the defendant's case on the basis of what his client tells him is the truth, but save for well-established principles ... the advocate, and the advocate alone remains responsible for the forensic decisions and strategy. That is the foundation of the right to appear as an advocate with the privileges and responsibilities of an advocate, and, as an advocate burdened with twin responsibilities, both to the client and to the court.[84]

It added only that 'in the course of any trial, like everyone else, the advocate is bound ultimately to abide by the rulings of the court'.[85]

Farooqui itself has re-emphasised the well-known principle that lawyers' duties to the court may conflict with duties owed by lawyers to their clients.[86] The reconciliation is also well known. As was said by Mason CJ in *Giannerelli v Wraith*:

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79 *R v Farooqui and Others v R* [2013] EWCA Crim 649.
80 Ibid [1].
81 Ibid [110]–[15].
82 Ibid [114].
83 Ibid [108].
84 *Farooqui* (n 79 above) [108]
85 Ibid [109].
86 D Ipp, 'Lawyers' Duties to the Court' (1998) LQR 63.

> It is not that a barrister's duty to the court creates such a conflict with his duty to his client that the dividing line is unclear. The duty to the court is paramount even if the client gives instructions to the contrary.[87]

This paramountcy is justified by reason of the court being the representative of the public interest in the administration of justice. As Lon Fuller, the noted Harvard legal philosopher wrote:

> The lawyer's highest loyalty is at the same time the most intangible. It is a loyalty that runs, not to persons, but to procedures and institutions. The lawyer's role imposes on him a trusteeship for the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends.[88]

This proposition is well illustrated by the precept and practice that counsel must, if the other side is unrepresented, even draw the court's attention to what the other side might have said. In the *Torfaen* case, Lord Toulson mentioned that the note prepared by legal staff had been disclosed to counsel for the local authority and added:

> This was disclosed to Mr Jonathon Kirk QC, who represented the council. In addition, mindful that he was appearing for a public authority against an unrepresented respondent, Mr Kirk himself invited the court to consider those points which we would have regarded as fairly capable of argument if he had been instructed on the other side. This was in accordance with the best tradition of the bar and we believe that it has enabled us fairly to evaluate all the arguments. [9]

David Ipp, a Singaporean Judge, wrote: 'The administration of justice requires the processes of the court to be protected from abuse and particular duties enable courts to police their own procedures. They must not countenance the use of litigious procedures for purposes for which they were not intended, and from excessive zeal.'[89] But advocates should also be astute to police themselves.

It has always been necessary to ensure that only those who enjoy the privileges of advocacy deserve it. Historically, the Bar was subject to sanctions for professional misconduct imposed by judges of the High Court acting as visitors to the Inns of Court. As I have already mentioned, advocates are now subject to the same liability for negligence if they breach their duty of care as other professionals are,

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87 *Giannarelli* (n 59 above) 421.

88 L Fuller and J Randall, 'Professional Responsibility: Report of the Joint Conference' (1958) 44 ARA J 1159, 1162.

89 Ipp (n 86 above) 105.

although still enjoying absolute privilege from the perspective of the law of defamation as do other participants in judicial proceedings.[90]

Nonetheless, a sea change occurred with the coming into effect of the Legal Services Act (LSA) 2007, which substantially reformed the provision of legal services in England and Wales. At its heart were eight regulatory objectives which included 'supporting the constitutional principle of the Rule of Law'[91] and 'promoting and maintaining adherence to the professional principles'[92] 'which themselves required that' 'authorised persons should maintain proper standards of work.'[93] Part 2 of the Act established the LSB, whose domain extended to oversight of, amongst others, the Bar Standards Board to whom the Bar Council had delegated its own regulatory functions.

The LSB determined to drive forward a quality assurance scheme for advocates (QASA). There were no less than four rounds of consultation and commissioning of further reports. The mountains laboured and produced not so much as Horace's ridiculous mouse, but an animal of an entirely different nature – an evaluation scheme by judges for all advocates to be introduced in stages with the criminal Bar being the first target. Market forces were no longer deemed sufficient to weed out the incompetent, nor the acquisition of points for continuing professional development – a euphemism if ever there was one – to improve them.

It was unsurprising that the Bar should challenge the scheme and no less surprising that the challenge has been at any rate *to date* unsuccessful, given the support of the majority of the senior judiciary.[94] The impetus behind the challenge, based on the thesis that for judges to have to mark advocates who appeared before them would compromise the integrity of both, is to be found in a lecture by Lord Justice Moses where he posed the question: 'Can anyone who has spent any time in Court listening to advocacy really believe that a system of marking will encourage, influence or inspire, or will it deaden and crush in pursuit of a bland and colourless uniformity?'[95]

Lord Denning said succinctly: 'Courage and courtesy should go hand in hand.'[96] Lord Justice Moses clearly thought that a courtesy might survive but courage would not and, in consequence, the court would

90 *Munster v Lamb* (1883) 11 QBD 588, 603–4, per Brett MR. Barristers are also liable in appropriate circumstances to wasted costs orders: *Ridehalgh v Horsefield* [1994] Ch 205; *Medcalf v Mardell* [2003] 1 AC 120.

91 LSA 2007, s 1(1)(b).

92 Ibid s 1(1)(h)

93 Ibid s 1(3)(b).

94 *R on the Application of Lumsdon and Others v LSB* [2013] EWHC 28 (Admin).

95 South Eastern Circuits Ebsworth Lecture 2012.

96 'The Road to Justice', Lord Denning Stevens in his Hamlyn Lecture 1954, 55–6.

be deprived of the quality of uninhibited argument that it required to reach the right result, whereas for their part judges might hesitate conscientiously to criticise advocates for fear of being sued.

The Administrative Court rejected all these arguments. While recognising expressly that the independence and impartiality of the criminal Bar, both prosecutor and defence, enshrined 'values to the great advantage of the rule of law in this country',[97] it considered implicitly that the QASA promoted rather than impaired it.[98]

Let me now seek to weave the threads of this lecture into something that more closely resembles a seamless robe than a patchwork quilt and hark back to Lord MacDermott's lectures on protection from power. For, coupled with the albeit postponed reduction in legal aid is the imminent curtailment of judicial review – through the vehicle of the Criminal Justice and Courts Bill currently before the Westminster Parliament.[98a] Since judicial review is concerned with ensuring that government itself is not guilty of abuse or misuse of power, it has never been popular with governments of whatever political complexion.[99] Whilst the Lord Chancellor was himself a judge he could and did defend the judiciary against attack. The present incumbent, a politician not a lawyer, has no judicial role.[100]

But, although complaints about judicial overreach by ministers where they are the objects of unfavourable judgments are legion, the target of the Lord Chancellor, who retains statutory responsibility for judicial independence[101] and is properly mindful of that particular constitutional duty, is the advocates, not the judges.

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97 *Lumsdon* (n 94 above) [1].

98 It also rejected arguments that the scheme, contended to be an authorisation scheme, was disproportionate and at odds accordingly with the EU Services Directive 2006/123/6c and of Article 1 of the First Protocol to the European Convention on Human Rights said to protect the advocates' asset in the form of an established practice and clientele.

98a At the time of writing the outcome is unknown. The Bill returns to the Commons in November 2014 where reversals in the House of Lords are themselves likely to be reversed.

99 See for an appreciation now more than a decade old, Lord Woolf, 'Judicial Review: The Tensions between the Executive and the Judiciary' (1998) LQR 579.

100 Indeed, the title Lord Chancellor, which the Justice Secretary currently enjoys, now has no greater substance than the smile on Lewis Carroll's Cheshire cat. Given its significant differences in terms of function with that of the office-holders prior to the coming into effect of the Constitutional Reform Act 2005, the name itself could be said to constitute a misleading statement as well as being past its sell-by date.

101 Constitutional Reform Act 2005, s 3(6)(a).

In the foreword to his response to the consultation on judicial review the Lord Chancellor wrote:[102]

> I believe in protecting judicial review as a check on unlawful executive action, but I am equally clear that it should not be abused to act as a brake on growth. In my view judicial review has extended far beyond its original concept, and too often cases are pursued as a campaigning tool or simply to delay legitimate proposals. That is bad for the economy and the tax payer, and also bad for public confidence in the Justice system.

He added in the substantive part of the document:

> the Government's view is that the better way to deliver its policy is through a strong package of financial reforms to limit the pursuit of weak claims, especially but not only by aiming to deprive parties and interveners of protective costs orders unless permission has been granted.[103]

The devil is in the detail – it amounts to death by a thousand cuts![104]

But what is notable is that the case against what are perceived to be extravagant applications for judicial review is couched in economic, not constitutional, terms. Yet the Lord Chancellor had another relevant obligation under the Constitutional Reform Act 2005 which is set out in its initial section, but assumed in its very language to be of far greater vintage:

> This Act does not adversely affect –
>
> (a) the existing constitutional principle of the rule of law: or
>
> (b) *the Lord Chancellor's existing constitutional role in relation to that principle* [emphasis added].

The same monocular approach informs the Lord Chancellor's explanation for postponement of his legal aid reforms: 'I wanted to do what I could to ease their effect on *lawyers*.' The Lord Chancellor, with the greatest respect, has wrongly focused on the singer, not the song; who lawyers are, not what they do. In the words of Lord Henry in Oscar Wilde's *Picture of Dorian Gray*, his department knows the price of everything, but the value of nothing.

For these two streams of reforms, curtailment of legal aid and of judicial review, are interrelated, not distinct. As Lord Faulks QC said in the House of Lords debate on the former:

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102 *Judicial Review – Proposals for Further Reform: The Government Response* Cm 8811 (Ministry of Justice 2014) para 35.

103 Ibid para 5.

104 See the critique by Sir Stephen Sedley, 'Not in the Public Interest' (2014) 36(5) London Review of Books 6 March and Rowena Moffat and Sarita Thomas, 'And Then They Came for Judicial Review: Proposals for Further Reform' (2014) JIANL 237.

> what is at stake is not just the standard of living of lawyers; but the ability for members of the public to obtain competent representation when facing criminal charges, the consequences of marital breakdown, abuse of power by public authorities, threats of repossession of their homes or deprivation of contact with children or grandchildren. The cuts affect the most vulnerable; asylum seekers, prisoners, the mentally ill.[104a]

Lord Faulks has himself been since promoted to the Ministry of Justice and hence presumably disabled from reprising his critical observations; better no doubt, as Lyndon Johnson once said of a critic, to have him doing something inside the tent outwards rather than outside the tent inwards – in this, a public lecture, I bowdlerise the verb the former President actually used.

Lord Neuberger, President of the Supreme Court, has added in a newspaper interview this melancholy reflection: 'cut price litigation leads to unrepresented litigants and worse lawyers'.[105] The direct consequences are elongation of hearings and increase in costs of the courts themselves, but more importantly the indirect consequences are the risk of judicial error and hence of injustice.

In R v Crawling the Court of Appeal articulated similar sentiments and ended with the exhortation: 'It is of fundamental importance that the MoJ led by the Lord Chancellor and the professions continue to try and resolve the impasse that presumably stands in the way of delivery of justice in the more complex cases.'[105a]

In *Re R (A Child)*, Lady Justice Black said:

> This case is illustrative of an increasing problem faced by this court. More and more litigants appear in front of us in person. Where, as here, the appellant is unrepresented, this requires all those involved in the appeal process to take on burdens that they would not normally have to bear. The court office finds itself having to attempt to make sure that the parties to the litigation are notified of the appeal because litigants in person do not always know who should be served; the only respondent named by M here was LA. The bundles that the court requires in order to determine the appeal are often not provided by the litigant, or are incomplete, and proper papers have to be assembled by the court, not infrequently at the request of the judges allocated to hear the case when they embark upon their preparation for the hearing just days before it is

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104a 11 July 2014.

105 See F Gibb, 'Is the Rise of DIY Litigants the Death Knell for Court Lawyers?' *The Times* (London 22 May 2014) which suggested that judges might have to take a more proactive role to respond to the absence of lawyers.

105a At fn 9, [58]–[59]. The London Criminal Courts Solicitors Association achieved a temporary triumph by having quashed a decision about Duty Provider Work contracts available to solicitors on reduced fees: [2014] EWHC 3020 (Admin). Mr Justice Burnett who handed down the decision, based on unfair consultation, was shortly afterwards promoted to the Court of Appeal.

> due to start. The grounds of appeal that can properly be advanced have to be identified by the judge hearing the permission application and the arguments in support of them may have to be pinpointed by the court hearing the appeal.
>
> I said more about the cost to individuals and to the legal system of the absence of legal assistance in *Re O-A*, a private law children case decided on 4 April 2014. Everyone involved in public and private law children cases is attempting to achieve the best possible result for the children whose welfare is at the heart of the proceedings and, without legal representatives for the parties, that task is infinitely more difficult.[105b]

For, there is alas, a limit to which courts can assist litigants in person. In a decision in the Jersey Court of Appeal, in an appeal on a charge of grievous and serious assault, the court noted:[106]

> The applicant was of course a litigant in person. Obviously a court will seek to assist such a litigant in his presentation but *not* at the expense of the rules of evidence and proper procedures appropriate to lawyers.

It can be said of the Bar, not only that it presents arguments better than litigants in person – an under-ambitious aspiration – not that it does it perfectly, but rather, as was said of James Bond in the Carly Simon lyric, 'Nobody does it *better*.'[107]

In short, my thesis is that the fulfilment of the forensic function by a profession, educated, conscious of its plural duties and the balance to be struck between them, subject to proper education, monitoring and, where necessary, discipline, and ever-faithful to its fundamental principle, the cab rank rule, is necessary for the prevention of injustice and the protection of the rule of law.

The many changes to which the Bar of England and Wales has been subjected over the last 20 years may appear to deflect its attention from some of its core values.[108] An increasing number of qualified barristers in an age of austerity prefer the security offered in the employed sector. Yes, as Sir Ivan Lawrence, one of the diminishing number of lawyers active both in the Commons and in the courts, said: 'The *independence* of the self-employed lawyer owing allegiance to his client not to an employer telling him what is in the best interests of the firm is of

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105b [2014] EWCA Civ 597, [6] and [9], and is similar to: *Wright v Wright* [2013] EWCA Civ 234, per Ward LJ, [2]; *Q v R* [2014] EWHC 7, per the President, [19]; *C (A Child)* [2014] 1 WLR 2182, per Ryder LJ, [4]. See also A Zuckerman, 'No Justice without Lawyers: The Myth of an Inquisitorial Solution' [2014] CJQ 355.

106 *R v Baglin* [2014] JCA 41.

107 The theme song of the film *The Spy Who Loved Me*.

108 'Although 42% of the Bar carry out pro bono work': Counsel Chairman's Column November 2013, para 41.

particular importance to the integrity of the justice system.'[109] – an independence put at particular risk if the employer is the state. The vision said by sceptics to be prevalent in the Ministry of Justice of a future where a Crown Prosecution Service is confronted by a state defender system is not one calculated to inspire public confidence.

Concurrently, the emphasis on marketing and branding of sets of chambers, as if they were *de facto* if not *de jure* partnerships, *rather than* an association of independent practitioners; the imminent ability now to convert chambers into partnerships and even to become subsumed in commercial entities; as well as the deliberate withholding of labour by barristers suggests that – paradoxically – they are adopting features both of business and of trade unions. The possibility for a barrister to practise as a limited company with consequent tax and limited liability advantages and, even with his or her spouse as a shareholder, has been advertised in a recent brochure by a firm of chartered accountants.[110] This, if nothing else, would add new hazards to the phenomenon of 'conscious uncoupling'.[111]

As trial is not, as was said in *Faroqui*, a game. Nonetheless, Grantland Rice, the American sports journalist, penned a quatrain, which is usually attributed to cricket but in fact refers to basketball, but would be equally appropriate to advocacy;

> For when the one Great Scorer comes.
>
> To write against your name,
>
> He marks – not that you won or lost –
>
> But how you played the game.

A trade, profession, or a vocation? That is, as it always was, the choice for the Bar. On how it exercises that choice will depend in part the future of the rule of law itself.[112]

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109 *My Life of Crime* (Book Guild 2010) 40.

110 *Barristers and Incorporation* (Place Campbells Chartered Accountants 2014).

111 Attributed to the actress Gwyneth Paltrow announcing her divorce from Chris Martin of the group Coldplay.

112 As far as possible where events have moved on since the delivery of the lecture, I have sought to reflect that in the footnotes. MJBQC.