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The Servants

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BARRISTERS' CLERKS, THE LAW'S MIDDLEMEN. By *John Flood.* Manchester, England: Manchester University Press. 1983. Pp. vii, 164. $22.

I. THE WORLD OF THE ENGLISH BAR

Even before the advent of *Rumpole of the Bailey,*[1] it was common knowledge in America that England has a bifurcated legal profession comprised of bewigged courtroom advocates (barristers) and business-suited clients' representatives (solicitors).[2] Few Americans, however, have progressed far beyond this bright-line distinction. One of the great values of John Flood's book, *Barristers' Clerks, The Law's Middlemen,* is that in its brief span it affords the reader access to an important corner of the world of English legal practice and thereby helps to elucidate the entire English system.

In order to understand what barristers' clerks do it is necessary to understand a number of things about their masters. Barristers are specialists most of whose work is concerned with issues arising out of potential litigation. The process leading to admission to practice is both time-consuming and costly. First, candidates must be "called to the Bar." In order to be called each applicant must affiliate with one of the four Inns of Court.[3] Affiliation can only be achieved if the can-

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1. Although John Mortimer was the creator of the rotund barrister-sleuth featured in RUMPOLE OF THE BAILEY (1980), THE TRIALS OF RUMPOLE (1981) and RUMPOLE'S RETURN (1982), it is the actor Leo McKern who, through his television portrayal, has come to personify for many Americans the archetypal English barrister.

2. Solicitors are, however, permitted to appear and argue in "county courts, magistrates' courts, certain proceedings in the Crown Court, certain tribunals and . . . bankruptcy matters in the High Court." R. WALKER, THE ENGLISH LEGAL SYSTEM 235 (5th ed. 1980) (footnotes omitted).

3. The four Inns are Inner Temple, Middle Temple, Gray's Inn and Lincoln's Inn. The Inns were originally the living and dining quarters of medieval advocates. Over a number of centuries they evolved into societies charged by the judiciary with the responsibility of overseeing the training and conduct of barristers. *See* 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 414-31 (1st ed. 1909); 4 W. HOLDSWORTH, *supra* (3d ed. 1924), at 263-72; 12 W. HOLDSWORTH, *supra* (6th ed. 1938), at 15-40; R. JACKSON, THE MACHINERY OF JUSTICE IN ENGLAND 426-28 (7th ed. 1977). Today they act collegially to regulate the members of the Bar through a Senate established in 1966. *See* R. WALKER, *supra* note 2, at 253.

didate satisfies a general educational requirement and undertakes preliminary vocational training,[4] "keeps term" by regularly dining at one of the Inns,[5] demonstrates good moral character,[6] avoids involvement in certain unacceptable occupations,[7] and pays the requisite fees.[8]

Once called to the Bar candidates must undertake an uncompensated twelve-month apprenticeship (pupilage) with a senior barrister (pupil master).[9] Upon successful completion of the pupilage a barrister is eligible to practice. The new barrister can only do so, however, if accepted as a member of a set of chambers (usually described as obtaining a "tenancy" in that set). Chambers are somewhat similar to American law offices,[10] but their establishment and operation are rigidly controlled by the Inns of Court to insure the independence of each barrister. In London, where the vast majority of barristers practice,[11] virtually all chambers are located within the confines of the four Inns.[12] The number of places in chambers is severely circumscribed and more than one-half of those seeking a tenancy may not find one.[13] Although barristers must join a set of chambers, each is considered a sole practitioner and is prohibited from entering into any partnership

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4. *See* R. JACKSON, *supra* note 3, at 437-42; M. ZANDER, LEGAL SERVICES FOR THE COMMUNITY 176 (1978).

5. Dining in one's Inn a certain number of times per term for twelve terms is part of the process of qualification. On application it can be done in the year of the vocational course and the year after Call. Dining costs in all between £25 and £40 depending on the Inn — plus the cost of travel and overnight accommodation for those who come from out of London.

M. ZANDER, *supra* note 4, at 377 n.32.

6. *Id.* at 176.

7. Prohibited professions include solicitor, patent agent and parliamentary agent as well as "any other occupation which in the opinion of the Masters of the Bench 'is incompatible with the position of a student seeking call to the Bar.'" *Id.* (quoting CONSOLIDATED REGULATIONS OF THE HONOURABLE SOCIETIES OF LINCOLN'S INN, INNER TEMPLE, MIDDLE TEMPLE AND GRAY'S INN).

8. For an English student from an English university, fees are likely to include: admission to the Inn (£82-85); tuition for vocational training (£320); bar examination (£20); and call to the Bar (£75) (all figures as of 1976). *Id.* at 376-77.

9. "Any barrister who has continuously practiced for five years may take on a pupil. The pupil reads his pupilmaster's papers, follows him to Court, and occasionally does some drafting for him." P. 12 n.10.

10. Chambers are similar to traditional partnerships because there is a mutual fund of goodwill, a system for work and fee sharing, *see* note 40 *infra* and accompanying text, and a regular sharing of expenses. Hazell, *Clerks and Fees,* in THE BAR ON TRIAL 99, 124 (R. Hazell ed. 1978). *But see* note 14 *infra* and accompanying text.

11. *See* M. ZANDER, *supra* note 4, at 28 (In 1977 there were 3881 barristers in practice; of this number only 1127 (29%) practice wholly or in large measure outside London.).

12. Today there is no requirement that all chambers be located in the four Inns of Court. *See* W. BOULTON, A GUIDE TO CONDUCT AND ETIQUETTE AT THE BAR OF ENGLAND AND WALES 61 (5th ed. 1975). However, as late as 1965 barristers were being disbarred for practicing in London chambers located outside one of the four Inns. *See* B. ABEL-SMITH & R. STEVENS, IN SEARCH OF JUSTICE 103 (1968).

13. *See* Hazell, *Introduction to the Bar,* in THE BAR ON TRIAL, *supra* note 10, at 22.

arrangements.[14] Each must develop and sustain his or her own practice.

Regulations regarding legal practice tightly constrain the conduct of members of the Bar. Barristers are neither allowed to seek legal business,[15] nor to have unmediated contact with lay clients.[16] Virtually all consultations and employment are initiated, arranged and overseen by solicitors. Traditionally, barristers have been expected to serve clients on a first-come-first-served basis (a principle referred to as the "cab-rank rule").[17] Any solicitor is free, at least in theory, to avail his client of the services of any barrister. Once retained, the barrister must rely on the solicitor to do virtually all the factual investigation required to prepare the case for trial. It is the solicitor's responsibility to interview witnesses and identify the evidentiary materials that will be presented in court.[18] In the usual case ending in a trial, the barrister's only functions are courtroom advocacy and steps taken in preparation for courtroom appearances.

Barristers are prohibited from directly negotiating fees for their services.[19] Compensation is generally fixed by an agreement between the solicitor and the barrister's clerk. For this reason, among others, it is required that each barrister have a clerk.[20] Payments to barristers for work performed are classified as honoraria and cannot be recovered by legal action. As a concomitant no contract is held to exist

14. Despite the similarities of chambers to partnership arrangements, *see* note 10 *supra,* barristers are said to be forbidden to engage in any sort of practice "in the least degree resembling partnership." W. BOULTON, *supra* note 12, at 6.

15. "Any form of advertising or touting by a barrister is contrary to professional etiquette." W. BOULTON, *supra* note 12, at 7 (footnote omitted). It should be noted that barristers' obligations "are governed solely by the dictates of professional etiquette." R. WALKER, *supra* note 2, at 258.

16. "The general rule is that barristers do not see or advise clients or accept briefs or appear as advocates on behalf of clients without the intervention of a solicitor." W. BOULTON, *supra* note 12, at 8 (footnote omitted). This is a custom of rather recent origin, not recognized until the eighteenth century. *See* R. WALKER, *supra* note 2, at 235 n.3.

17. "Counsel is bound to accept any brief in the Courts in which he professes to practise at a proper professional fee dependent on the length and difficulty of the case, but special circumstances may justify his refusal, at his discretion, to accept a particular brief." W. BOULTON, *supra* note 12, at 6 (footnote omitted).

18. "It is recognised practice that witnesses (other than the parties and experts or professional witnesses who are instructing counsel), should not be present at consultations or conferences with counsel and that counsel should not interview such witnesses before or during a trial." *Id.* at 12. *See also* R. MEGARRY, LAWYER AND LITIGANT IN ENGLAND 46-48 (1962) (claiming that the purpose of this rule is to reduce the risk of witness tampering).

19. "Brief fees are fixed by arrangment between the instructing solicitor or his clerk, and counsel's clerk, but it is permissible in cases of special difficulty for counsel to discuss the amount of a fee personally with the instructing solicitor." W. BOULTON, *supra* note 12, at 50 (footnote omitted). Traditionally barristers have had no desire to get involved in the fee fixing process. As Megarry states, "Fees are clerk's business, and counsel gratefully and trustingly leaves it to him." R. MEGARRY, *supra* note 18, at 60.

20. *See* W. BOULTON, *supra* note 12, at 6.

between barristers and those who employ them.[21] Barristers are immune from actions for breach of contract and from malpractice claims related to services provided either at trial or in preparing a case for trial.[22]

The barristers' clerk is the administrator employed by all the barristers in a set of chambers to conduct the business of that chambers and of each affiliated barrister. The clerk is responsible for "negotiating his barristers' fees and collecting them, obtaining work for his barristers, supervising their and the chambers' accounts, helping to schedule cases and checking the daily court lists for his barristers and the solicitors" (p. 3). The clerk is the intermediary who bridges the legally mandated gaps separating barrister from solicitor and client. He also manages the internal functioning of chambers. In this capacity the clerk serves as intermediary between younger and older barristers as well as the manager of each barrister's career. The clerk is the servant who relieves his masters of the day-to-day chores involved in making a living by practicing law.

II. STUDYING BARRISTERS' CLERKS

John Flood calls his work an "ethnographic" study of barristers' clerks (p. 134). By this he means a detailed description and analysis of "the culturally significant behaviors of a . . . small well-defined community" (p. 150 n.1). Such a study requires "prolonged face-to-face contacts with members of the local group, direct participation in some of the group's activities, and a greater emphasis on intensive work with informants than on the use of documentary or survey data" (p. 150 n.1). In carrying out his study, Flood, then a graduate student in socio-legal studies at the School of Law of the University of Warwick, spent months among barristers' clerks. He lived their life, shared their work, and assumed their outlook. The product of these experiences is a book that succeeds in shedding light upon a previously unknown part of the legal world.

Flood's study begins with an examination of clerks' career patterns. Clerks most frequently begin their careers at school-leaving age,[23] when they are hired into chambers as errand boys. Boys are selected and carefully supervised by the senior clerk in each set of chambers. The boys are predominantly "white British males" of working class background and are likely to share the sexual and ethnic

21. *See* Rondel v. W., [1966] 3 All E.R. 657, 661-64 (C.A. 1966) (Lord Denning, M.R., detailing history of rules prohibiting both suits for fees and contracts between barristers and clients), *affd. sub nom.* Rondel v. Worsley, [1967] 3 All E.R. 993 (H.L. 1967); R. WALKER, *supra* note 2, at 255 (relation between barrister and client *sui generis*).

22. *See* Rondel v. W., [1966] 3 All E.R. at 661-62, 667.

23. In an earlier era school-leaving age might have been 13 or 14. Today it is generally a bit older. P. 17.

prejudices that predominate among their seniors (p. 18). Virtually all a boy's training is of the practical variety and the boy who demonstrates an aptitude for clerking will, within a couple of years, be promoted to the position of junior clerk. He is likely to remain a junior clerk for an extended period (ten or more years is not uncommon) (p. 23). A junior clerk usually receives a fixed salary and carries out most of the routine functions necessary to the operation of chambers. Eventually, successful juniors will make application for a senior clerk position. Almost invariably application is made in a different set of chambers than those in which the applicant has previously worked. The senior clerk is in charge of all the administrative operations of chambers. He is generally paid on a commission basis, receiving up to ten percent of each of his barrister's fees. In a large chambers (of which there are a great many today) the senior clerk is likely to earn a significantly higher salary than most of his junior barristers.[24]

The clerk's career is remarkably insular. From a very early age boys are immersed in the world of the Inns of Court. They are supervised, counselled and judged exclusively by their senior colleagues. Not even barristers seem to have much direct influence on a clerk's training or behavior.[25] Their allegiance is to their isolated fraternity. In this environment prejudices against outsiders and new ideas are likely to be accentuated (p. 18).

According to Flood, clerks see themselves as the architects of their barristers' careers. New barristers often need clerks to find them work. Neophytes have little reputation to trade on and may get little business unless their clerks take matters in hand. Despite this dependency, formal relations between barrister and clerk emphasize the barrister's superior status. The clerk always addresses his barristers formally,[26] while they address him by his Christian name (p. 39). Flood suggests that behind this facade the clerk holds real power over young barristers because he is responsible for the negotiation and collection of all their fees. Moreover, it is the clerk who is charged with the responsibility of dealing with pupils and tenants who fail to secure the situations they seek. He eases the rejected pupil out of chambers and adjusts barrister expectations to match limited prospects. To Flood this suggests that the clerk is the puppet-master who controls his barristers. "By quietly manipulating unseen strings the clerk prompts and restrains his governors' behavior . . . ." (p. 55).

Although Flood contends that the clerk may be of critical impor-

24. *See* M. ZANDER, THE STATE OF KNOWLEDGE ABOUT THE ENGLISH LEGAL PROFESSION 31 (1980) (quoting 1 FINAL REPORT OF THE ROYAL COMMISSION ON LEGAL SERVICES 487 (1979)).

25. *See, e.g.*, Hazell, *supra* note 10, at 113 (In 1974, the Bar Council refused to allow a pupil even to spend time observing the operation of a clerk's office.).

26. Barristers are generally referred to as "Sir," "Mr. ——," "Miss," "Miss ——" or "Mrs. ——." Pp. 39, 61 n.11.

tance to senior as well as junior barristers, most of the evidence suggests that senior members of the Bar are free of clerk control.[27] In essence, it is the young who are subjected to the clerk's domination. Flood thinks that this arrangment is perpetuated because it provides the Bar with an effective way of deterring rapid expansion and minimizes the power of new barristers. The clerk serves as the " 'gatekeeper' or filter" through which barristers are screened (p. 132). Clerks help assure that not too many young barristers pass through to threaten the positions or economic well-being of their senior brethren. The clerk is also useful because his prejudices (especially against women and ethnic minorities) mirror the unarticulated biases of the Bar and can be relied upon to help exclude outsiders from the club (p. 132). Flood concludes, "The Bar maintains clean hands while the clerks do its dirty work" (p. 133).

Flood provides a detailed analysis of the sources of barristers' business and the clerks' role in business getting. Because barristers are prohibited by ethical constraints from seeking work directly it is up to the clerks to make the arrangements that keep barristers busy. Clerks do this by maintaining contact with those solicitors, solicitors' clerks and government officials[28] who have legal work to distribute. Within limits clerks are expected to tout all these potential sources of business. The clerks' goal is to establish ongoing relationships that will ensure a steady flow of cases into chambers. Solicitors are to be kept as happy as possible. Clerks must carefully attend to each solicitor's interests and even go so far as to defend solicitors against their barristers when the latter insist on the collection of outstanding fees (p. 74). In the clerks' world the most important thing is the steady flow of business. Therefore, clerks seldom attempt to inflate individual fees, struggling instead to maintain fees at a level that will guarantee continued custom (p. 76).

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27. *See* text following note 39 *infra*. The one important exception to this proposition is that barristers often rely on advice from their clerks in deciding whether to seek elevation to the special position of Queen's Counsel (Q.C.):

> Originally Queen's Counsel were appointed for the work of the Crown, but by the end of the eighteenth century it became a regular practice for successful men to apply for the appointment. The appointment is made by the Lord Chancellor; there are no qualifications, but it is understood that at least ten years' standing is required, together with an indefinable degree of success as a junior. The purpose of becoming a Queen's Counsel has for long had nothing to do with Crown work; the old rule that he must not appear against the Crown now means that leave to do so must be obtained, as when he appears for the defence in a criminal case, but the leave is given automatically. A number of conventions give Queen's Counsel the position of a superior grade of barrister.

R. JACKSON, *supra* note 3, at 429. Special advice may be needed because the kinds of work Q.C.s can perform are limited and, therefore, practical judgments about business prospects are a necessary part of the decision-making process.

28. "The Bar's remuneration survey conducted for the Royal Commission showed that barristers earn 43 per cent of their income from public funds (16 per cent for prosecution work, 19 per cent from criminal legal aid and 8 percent from civil legal aid) . . . ." M. ZANDER, *supra* note 4, at 37. For a somewhat more detailed description of the kinds of work done, see B. ABEL-SMITH & R. STEVENS, *supra* note 12, at 112-14.

Once a flow of work has been assured, clerks are likely to attempt to upgrade the quality of cases taken. This is done by declining minor cases and by favoring matters brought in by "better-quality firms" of solicitors (p. 70). Notwithstanding the cab-rank rule, clerks pick and choose among the cases offered their barristers. By asking excessive fees or emphasizing the likelihood of long delays clerks are able to control the flow of business. According to Flood, the clerks' approach to business selection has rendered the cab-rank rule "substantially a myth" (p. 80).

Each clerk's objective is to have all his barristers fully occupied. To achieve this end the clerk books as much work as possible for each barrister. Because of the vagaries inherent in legal practice and judicial scheduling there is frequent overbooking.[29] When a barrister is overbooked some of his work must be returned to the solicitors who engaged him and new counsel must be found to handle the returned brief. Most often briefs are returned at the last moment, permitting the new barrister very little time to prepare. In these circumstances the quality of representation is bound to suffer. "The frenetic pace of activity [resulting in the return or reassignment of briefs] . . . creates a 'battery farm' atmosphere which tends to dehumanise the clients' cases" (p. 72).

III. Strengths and Shortcomings

Perhaps the greatest strength of *Barristers' Clerks* is its wealth of detailed information about the clerks' milieu. Flood's first-hand observations and anecdotal illustrations bring the world of the Inns of Court to life. We are shown the real stuff of the clerks' job and from it can construct a clearer picture of legal practice in England. Flood's intimate contact with the clerks has led him to adopt a sympathetic view of their ways. His friendly attitude is of great value as a counterbalance to the generally negative attitudes adopted by a number of other modern commentators.[30] He is especially effective in refuting the critics' charge that clerks inflate legal fees in individual cases as a means of augmenting their income.[31] In this instance, and throughout the book, Flood places the clerks in the context of a system broader than the single case and intelligently assesses the pressures that lead them to act as they do.

Flood's work also helps dispel a number of myths about the English Bar. For example, he carefully scrutinizes the claim that barris-

29. *See* Hazell, *supra* note 10, at 120.

30. For commentary critical of barristers' clerks, see B. Abel-Smith & R. Stevens, *supra* note 12, at 288; M. Zander, Lawyers and the Public Interest 83-95 (1968); Hazell, *supra* note 10, at 105-24.

31. *See* text following note 28 *supra*. Such charges are made in all the sources cited at note 30 *supra*.

ters abide by the cab-rank rule and demonstrates that the Bar does not work on a first-come-first-served basis. Dissolving such myths helps open the way to a more accurate assessment of the legitimacy of barrister claims to a variety of special advantages, including immunity from liability for malpractice and exclusivity of audience in the high courts.[32]

Flood also deserves praise for the candor with which he describes his research methods and experience.[33] In a long appendix entitled "Biography of a Research Project," Flood provides a detailed description of his work. His exacting description of his feelings and techniques make it possible for the reader to identify both the advantages and drawbacks of his warm relations with the clerks.[34]

The strengths of Flood's book — its mass of detail, wealth of anecdotal material and empathy with its subjects — also give rise to a number of serious weaknesses. Concentration on detail and anecdote keeps Flood from providing the "systematic study" he says is needed (p. 1). A preoccupation with the present inhibits Flood from carefully examining the historical context in which the clerk system developed. Without an historical framework Flood is hard-pressed to comprehend all the implications of what he sees.

Although historians have seldom directly addressed the question of the development of barristers' clerks[35] there is, in historical works concerning the Bar, an abundance of information bearing upon the question. A single example should suffice to demonstrate the utility of such historical data. Raymond Cocks, in his recent examination of the development of the Bar[36] suggests that during the nineteenth century there was a dramatic shift in the way legal business was conducted in England.[37] At the start of the 1800's, barristers generally practiced alone or with a small group of friends. Virtually every barrister had his own clerk and office. By the end of the century barristers no longer practiced in this way but had organized themselves into

32. Flood notes that the Bar has generally relied on the cab-rank rule to justify its right to exclusive audience. P. 80. Lord Denning appears to rely on the same principle to justify barristers' immunity from malpractice claims. *See* Rondel v. W., [1966] 3 All E.R. 657, 665 (C.A. 1966), *aff'd. sub nom.* Rondel v. Worsley, [1967] 3 All E.R. 993 (H.L. 1967).

33. I am grateful to Professor Myron Glazer for bringing this point to my attention. For a sensitive analysis of the interpersonal problems posed by field research, see M. GLAZER, THE RESEARCH ADVENTURE (1972).

34. An expanded description of Flood's research methodology appears in Flood, *Researching Barrister's* [sic] *Clerks,* in LAW AND SOCIAL ENQUIRY: CASE STUDIES OF RESEARCH 158 (R. Luckham ed. 1981).

35. Flood demonstrates the difficulty of finding sources that *directly* examine the history of barristers' clerks. Even Holdsworth's encyclopedic A HISTORY OF ENGLISH LAW does not seem to address the question. P. 14 n.26. *But see* note 36 *infra* and accompanying text.

36. R. COCKS, FOUNDATIONS OF THE MODERN BAR (1983). The following discussion of historical material is drawn from Cocks's work.

37. *Id.* at 9-10.

chambers run by senior barristers and managed by a single clerk. The suggestion Cocks makes about this change is that it reflects the growing desire of Victorian barristers to ensure the stability of the Bar against any unsettling influence that might be exerted by younger barristers (who were then coming into the profession in large numbers).[38]

Chambers appear, at least in part, to represent the imposition of a hierarchical mechanism to curb junior barristers and assure the continuing power of their elders. This historical information provides a valuable context in which to view the present relations between clerks and young barristers. Although Flood recognizes that clerks are used to "filter" and control young barristers he fails to understand the broader context in which this is taking place. Flood's narrowness of vision leads him to ascribe too much power and importance to the clerks when, in reality, they are the pawns of a Bar dedicated throughout much of its recent history to the perpetuation of the power of its senior members.

Flood's empathy with the clerks helps him understand and explain much of their behavior. However, this warmth of feeling clouds his judgment on a number of issues. Flood accepts as true certain of the myths clerks have propagated about themselves. Perhaps most unfortunate is his acceptance of the clerks' view that they are puppet-masters who manipulate their barristers' lives.[39] Flood's own evidence suggests the limited value of this image. Senior barristers are generally free of their clerks' control. They can and do refuse to handle matters scheduled for them by their clerks (p. 43), dispute fees fixed by their clerks (pp. 43-44) and delay payment of commissions owed to their clerks (p. 51). Senior members of the Bar have also acted collegially in derogation of the clerks' interests, as in the period 1969-1970, when the separate clerk's fee was abolished and the groundwork laid for reducing the size of commissions (pp. 124-26).

It is the young barrister, then, over whom the clerk exerts the greatest power. Even in this setting, however, the clerk's power is subject to a variety of limits. Unfortunately, Flood does not adequately consider these limits. For example, much of a barrister's early work is directed to him by senior members of chambers without the mediation of the clerk. Often senior barristers will have their young colleagues prepare cases or write opinions for them. This subcontracting procedure is called "devilling" and accounts for a not insignificant part of a young barrister's early income and experience.[40] The young barrister who serves one of his seniors as "devil" is building his reputation and

38. *Id.*

39. Flood's attitude is best illustrated by the drawing on the book's dust jacket, which depicts a clerk pulling the strings that control a gesticulating barrister.

40. "Devilling" has been defined as:

> The well-established custom at the English Bar . . . of obtaining assistance from another barrister in drafting and researching the relevant tract of law, in which case the barrister

income without the clerk's intercession. Further, favorable impressions formed during a young barrister's pupilage may help secure his or her position with senior barristers and limit the scope of the clerk's authority.[41] Finally, as much as one-half the legal work handled by barristers is paid for by the government rather than private parties.[42] In cases involving government payments work is garnered and fees fixed with very little intercession by the clerk. These considerations do not demonstrate that clerks have no power over young barristers but do suggest that there are significant limits on the clerks' power, especially when senior barristers choose to exercise countervailing authority.

Accepting the myth of mastery not only leads to inaccuracy about the clerks' power but to the exceptionable conclusion that clerks are responsible for much of the prejudicial behavior encountered by women and members of minority groups who seek to practice law. An analysis less committed to the proposition of clerk control would have been more likely to pursue the observed coincidence between barristers' and clerks' biases (p. 132). Apropos of this observation it may be said of prejudice, as of so much else affecting the Bar, that the clerks are used by senior barristers to handle their "dirty work." Thus, it would seem more fair to blame the Bar for prejudice than to hold the clerks responsible.

Flood's preoccupation with the clerks causes other problems as well. It deprives him of information essential to a full understanding of the clerks' place in the legal system. Flood so closely identifies with his subjects that he sees barristers as menacing adversaries[43] and makes little effort to talk to members of the Bar for fear that his clerk friends will think he has been "contaminated" by such contacts (p. 136). The absence of barristers' opinions robs *Barristers' Clerks* of a valuable perspective. It leads Flood to lend excessive credence to the clerks' assertions about their authority.

Flood's allegiance to the clerks also distorts his perception of the part solicitors play in the legal process. He accepts the clerks' view that they themselves are the business getters responsible for the flow of cases into chambers. A careful examination of solicitors' opinions might have undermined this view. Flood admits that it is hard to mea-

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instructed remains responsible for the work done. A barrister who employs a devil must pay adequate and reasonable remuneration for the work actually done.

OXFORD COMPANION TO THE LAW 354 (D. Walker ed. 1980). Devilling is permissible in a variety of settings, *see* W. BOULTON, *supra* note 12, at 27-29, and is an especially important source of work for young barristers. *See* B. ABEL-SMITH & R. STEVENS, *supra* note 12, at 109.

41. *See* R. MEGARRY, *supra* note 18, at 35-36.

42. *See* note 28 *supra;* Hazell, *supra* note 10, at 109 (with the advent of government financing, the fee negotiating function of the clerk has declined in importance).

43. Flood seldom refers to conversations with barristers. The lengthiest reference of this sort involves a remarkably unpleasant cross-examination. In this hostile exchange the barrister is depicted as a threatening inquisitor suspicious of Flood's work. *See* pp. 147-48.

sure the efficacy of clerks' activities in generating business (p. 24), and that overt touting has declined in recent years (p. 74). He clings, however, to the conviction that clerks are vital to the development of business. This view discounts solicitor loyalty to certain chambers or barristers and fails to consider solicitors' views on the ways they approach the problem of selecting counsel. A careful examination of solicitors' opinions rather than an acceptance of the clerks' position might have shed more light on the question.

Finally, although most of *Barristers' Clerks* is written in a clear and accessible style, the jargon of an ethnographic study sometimes creeps in to mar the quality of the presentation. Phrases from the sociological literature like "cooled out"[44] intrude into the text without adequate definition. Although most such phrases are eventually explained, the reader may be kept in the dark for many pages. Similarly annoying is Flood's tendency in the "Conclusion" sections of several of his chapters to superimpose a sociological interpretation on his materials when that interpretation is either unsupported by the preceding text or is only tenuously tied to what has come before.

IV. THE ISOLATION OF THE ENGLISH BAR

One of Flood's most important conclusions is that "[t]he Bar maintains clean hands while the clerks do its dirty work" (p. 133). This pattern is reflected in the solicitation of business, the management of young barristers, and the processing of cases. It has the most serious implications for the English legal profession because it means that at almost every turn barristers segregate themselves from contact with the world around them. They seldom deal directly with clients, solicitors or court officials; the members of each of these groups are held at arm's length or dealt with by the clerks. Clients have virtually no means of influencing their barristers' behavior. Indeed, lay clients can only obtain a barrister's assistance through the intercession of a solicitor. Economic leverage is nonexistent[45] and there are virtually no legal remedies for the dissatisfied.[46] Solicitors are also kept at a distance. Much of the communication between barristers and solicitors is handled through written instructions.[47] Seldom is there any

44. "Those [young clerks] who are not prepared to wait . . . can be 'cooled out' with little regard for their feelings." P. 27.

45. *See* text at notes 16-17 *supra*.

46. *See* notes 21-22 *supra* and accompanying text.

47. Benjamin Kaplan neatly described the process of communication between barrister and solicitor:

> In a case of consequence, the solicitor will have retained a barrister to settle the pleadings. When the case has been set down for trial, or perhaps earlier, the advice of a barrister is sought "on the evidence": he is handed a bundle consisting of witnesses' statements and other material assembled by the solicitor, with perhaps some commentary subjoined. The barrister is to advise how the case can be strengthened for trial; he may suggest that further questions be put to witnesses or that the theory of claim or defense be shifted, which may

sustained dialogue, and on the crucial question of fees no communication whatsoever is permitted. Nor do barristers have any contact with court administrators. All dealings concerning the processing of cases are handled by the clerks (pp. 85-96). The barristers' isolation is accentuated by their unique style of dress, mode of speech and general demeanor in the courtroom.[48]

Senior barristers' relations with their younger colleagues reflect a similar pattern. Unless older advocates are interested in exploiting the services of juniors in circumstances like devilling, the young are likely to be kept at a distance. Young barristers' careers are managed by clerks who serve as the chief target of criticism if anything goes wrong. The clerks do the disagreeable jobs of removing unsuccessful candidates and placating less successful practitioners. The senior members of chambers are seldom required to attend to these problems. The system assures that senior barristers will not have to assume any responsibility for the development of their juniors unless they choose to do so.

The cost of such isolation is considerable. England, like the United States, relies on the adversary process. One of the premises of this process is that litigants control their cases.[49] Litigant control has a variety of advantages, including enhanced prospects of litigant satisfaction,[50] increased likelihood that the courts will identify and decide the questions the litigants see as fundamental[51] and improved prospects that counsel will zealously represent each client's interests.[52] The isolation of barristers vitiates these advantages. Satisfaction is not likely to be enhanced when the parties are removed from the management of their cases. Similarly, responsiveness to the fundamental con-

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call for investigation on a new line with possible amendment of the pleadings. Finally, the barrister receives the brief for trial. The bundle of papers now reappears, perhaps enlarged and improved. Besides poring over this material, the barrister will probably interview the lay client and any experts appearing on his side; according to protocol he will not see them alone but in the solicitor's presence. But the understood professional canon prohibits him ordinarily from seeing the other witnesses whom he will be calling to give evidence. And he will usually have no pretrial recourse, even secondhand through his instructing solicitor, to the witnesses who will be called on the other side; he may indeed be ignorant of their identity.

Kaplan, *An American Lawyer in the Queen's Courts: Impressions of English Civil Procedure*, 69 MICH. L. REV. 821, 831 (1971).

48. *See* Hazell, *Preface*, THE BAR ON TRIAL, *supra* note 10, at 12; *see also* R. MEGARRY, *supra* note 18, at 14 ("Clients rarely get close enough to [a barrister's] shoulder to weep upon it . . . .").

49. *See* Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice has Affected Adjudication in American Courts*, 29 BUFFALO L. REV. 487, 525 (1980).

50. *See* J. THIBAUT & L. WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 77-80 (1975); Adams, *Towards a Mobilization of the Adversary Process*, 12 OSGOODE HALL L. J. 569, 576 (1974).

51. *See* Adams, *supra* note 50, at 576-77; Lea & Walker, *Efficient Procedure*, 57 N.C. L. REV. 361, 376 (1979).

52. *See* D. MELLINKOFF, THE CONSCIENCE OF A LAWYER 270-74 (1973).

cerns of litigants is likely to be impaired when trial counsel avoid contacts with clients that facilitate the identification of such concerns.

In 1821, Lord Brougham was engaged to defend Queen Caroline in a case charging her with adultery. During that proceeding Brougham had occasion to articulate what he though to be the standard of representation required in an adversary proceeding. He said:

> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.[53]

It is significant that Brougham's statement was never endorsed by the English Bar.[54] Its view seems to be a cooler one stressing the separation of counsel from client rather than their identity.[55] The absence of zealous commitment to each client increases the prospect that counsel will give his or her first allegiance to the court. This in turn may produce a system more concerned with society's generalized interests than with each individual's claims.[56]

Isolation also has an effect on the quality of the work performed by barristers. Because barristers have little intimate contact with clients, it is unlikely that they will form a passionate attachment to any client's cause. The absence of intense commitment increases the likelihood of late withdrawal from representation. The frequency with which briefs are returned underscores the barristers' lack of attach-

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53. 2 Trial of Queen Caroline 8 (1821), *quoted in* D. MELLINKOFF, *supra* note 52, at 189.

54. *See* D. MELLINKOFF, *supra* note 52, at 189, 272-73. I do not mean to suggest that Lord Brougham's view is universally accepted in America, however. The quoted passage has influential detractors. *See, e.g.*, Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1036 (1975).

55. *See, e.g.*, W. BOULTON, *supra* note 12, at 70-78.

56. In Rondel v. W., [1966] 3 All E.R. 657, 665 (C.A. 1966), *affd. sub nom.* Rondel v. Worsley, [1967] 3 All E.R. 993 (H.L. 1967), Lord Denning emphasized the barrister's allegiance to the court:

> He has a duty to the court which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants: or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice. He must not consciously mis-state the facts. He must not knowingly conceal the truth. He must not unjustly make a charge of fraud, that is, without evidence to support it. He must produce all the relevant authorities, even those that are against him. He must see that his client discloses, if ordered, the relevant documents, even those that are fatal to his case. He must disregard the most specific instructions of his client, if they conflict with his duty to the court. The code which requires a barrister to do all this is not a code of law. It is a code of honour. If he breaks it, he is offending against the rules of the profession and is subject to its discipline . . . .

See also Rondel v. Worsley, [1967] 3 All E.R. 993, 998-99 (H.L. 1967) (Lord Reid stressing duty of barristers to courts); R. JACKSON, *supra* note 3, at 454.

ment[57] and often results in the handling of cases by barristers who have had extremely little time to prepare. Not only does the quality of representation suffer in these circumstances but the value of each case is diminished in the barristers' eyes. As Flood observes, the return of briefs "dehumanise[s] the clients' cases" (p. 72).

Isolation fosters stagnation within the Bar. New ideas and methods are fenced out. Judgments are likely to be based on long-lived traditions preserved by barristers insulated from change. The conservatism of the Bar can be a valuable asset, especially when it works to preserve institutions vital to the defense of citizens' rights.[58] It can, however, prove disastrous when it operates to preserve antiquated practices of value to no one but the Bar. An unfortunately large part of the activity of the English Bar has been devoted to the defense of arcana.[59] Reform has been painfully slow and old methods have been preserved long beyond the time of their utility.

Connected with the Bar's conservatism is its tendency to perpetuate a number of misleading myths about itself. These myths make a penetrating analysis of present conditions exceedingly difficult. One among many such myths is the cab-rank rule. The first-come-first-served principle has been relied upon as one of the chief justifications for the barristers' rights to exclusive audience before the high courts and freedom from liability for malpractice.[60] Yet as Flood convincingly demonstrates, the cab-rank rule is no longer operative. In light of this finding, questions should be raised about the continuing propriety of exclusive audience and freedom from malpractice liability. These questions, however, have not been raised within the Bar.

Finally, isolation tends to institutionalize prejudice against those who traditionally have been excluded from the Bar. There is clear evidence that both women and ethnic minorities have been discriminated against in their efforts to become barristers.[61] Unfortunately, the structure of the English legal system has deflected much of the criticism about prejudice from barristers to their clerks. This has insulated

57. *See* text following note 29 *supra*. The practice of returning briefs is specifically recognized in the barristers' rules of etiquette. *See* W. BOULTON, *supra* note 12, at 21 ("Briefs are as a rule delivered and accepted on the understanding that it is possible that a counsel may be prevented from attending the case."). Both critics of and apologists for the English Bar have, however, sharply criticized the frequency of returns. *See* R. MEGARRY, *supra* note 18, at 77-78 (return of briefs imposes serious burdens on clients and can influence quality of advocacy); M. Zander, *supra* note 4, at 184-87 (finding poor preparation in a very high proportion of criminal cases in part because of late return of briefs).

58. *See* Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L. J. 713, 739 (1983).

59. *See* B. ABEL-SMITH & R. STEVENS, LAWYERS AND THE COURTS 79-110 (1967); R. COCKS, *supra* note 36, at 85-102.

60. *See* note 32 *supra*.

61. *See* M. ZANDER, *supra* note 24, at 88 (women barristers earn less than their male counterparts at every level of practice); Kennedy, *Women at the Bar*, in THE BAR ON TRIAL, *supra* note 10, at 150-56.

the Bar from pressure to make meaningful change. While the American Bar has not been a paragon of equal opportunity,[62] it has proved amenable to pressure for social change. The same cannot be said of the English Bar. Its aloofness has fostered continuing discrimination.

Readers should not go to *Barristers' Clerks* in the hope of finding a general exposition of English legal practice. Rather, what it provides is a detailed analysis of a small community within the English system. Careful scrutiny of that community reveals a great deal about the way English advocates go about their job. It also supplies us with fresh insights into why barristers act the way they do. Such information is a valuable resource, because it helps us to understand the system better and because it provides us a basis upon which to fashion intelligent criticisms of existing attitudes and structures.

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62. *See* Hishon v. King & Spalding, 104 S. Ct. 2229 (1984); *see generally* J. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976).