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# Legal Professional De(Re)Regulation, Equality, and Inclusion, and the Contested Space of Professionalism Within the Legal Market in England and Wales

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# LEGAL PROFESSIONAL DE(RE)REGULATION, EQUALITY, AND INCLUSION, AND THE CONTESTED SPACE OF PROFESSIONALISM WITHIN THE LEGAL MARKET IN ENGLAND AND WALES

Lisa Webley\*

## INTRODUCTION

The legal profession in England and Wales is undergoing an unprecedented process of de(re)regulation<sup>1</sup> as a result of the Legal Services Act 2007<sup>2</sup> (LSA 2007 or LSA). New types of legal businesses are emerging, and law graduates—who previously had not found a place within the regulated admitted legal profession—appear to be entering new facets of the legal marketplace, albeit often in precarious circumstances via circuitous routes.<sup>3</sup> Moreover, globalization and the increased mobility of legal professionals around Europe and industrialized and industrializing common law countries are also reshaping sections of the legal market.<sup>4</sup>

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\* Professor of Empirical Legal Studies, University of Westminster. I am grateful for the contributions of all who organized, hosted, and contributed to *The Challenge of Equity and Inclusion in the Legal Profession: An International and Comparative Perspective* Colloquium held at Fordham University School of Law. For an overview of the colloquium, see Deborah L. Rhode, *Foreword: Diversity in the Legal Profession: A Comparative Perspective*, 83 *FORDHAM L. REV.* 2241 (2015).

1. I have used de(re)regulation to connote the confluence of a move to deregulate the legal profession, namely to remove much of its apparatus and power of self-regulation, and to reregulate the legal profession along market principles in accordance with New Labour's Third Way regulatory policy, discussed later in the Article.

2. Legal Services Act, 2007, c. 29 (Eng.).

3. On legal business innovation, see Lisa Webley, *When Is a Family Lawyer a Lawyer?*, in *DELIVERING FAMILY JUSTICE IN THE 21ST CENTURY* (Mavis Maclean et al. eds., forthcoming May 2015). On entry into the legal sector, see generally HILARY SOMMERLAD, LISA WEBLEY, LIZ DUFF, DANIEL MUZIO & JENNIFER TOMLINSON, *DIVERSITY IN THE LEGAL PROFESSION IN ENGLAND AND WALES: A QUALITATIVE STUDY OF BARRIERS AND INDIVIDUAL CHOICES* (2013), and Hilary Sommerlad, *The New "Professionalism" in England and Wales: Talent, Diversity, and a Legal Precariat*, in *DIVERSITY IN PRACTICE: RHETORIC AND REALITY* (Robert Nelson et al. eds., forthcoming 2015).

4. See John Flood, *The Re-Landscaping of the Legal Profession: Large Law Firms and Professional Re-Regulation*, 59 *CURRENT SOC'Y* 507, 521 (2011). For example, the E.U. freedom of movement treaty provisions and subsequent mutual recognition of legal professional qualifications has played a role in this. It has led to the growth in the number of Registered Foreign Lawyers practicing in England and Wales (for figures see *Regulated Population Statistics*, SOLICITORS REGULATION AUTH., [http://www.sra.org.uk/sra/how-we-work/reports/data/population\\_solicitors.page](http://www.sra.org.uk/sra/how-we-work/reports/data/population_solicitors.page)), some of whom will requalify as solicitors in

Although the new market model may be encouraging legal employers to hire a broader cohort of law graduates, including those historically denied access to a full career in law, it is also encouraging greater role and status differentiation as between lawyers.<sup>5</sup> The new model obfuscates the barriers that face nonwhite and working class law graduates who wish to become fully admitted members of the profession.<sup>6</sup> Further, while equality and inclusion discourse is well rehearsed regarding professional admission and promotion,<sup>7</sup> that terminology is less prominent in the access to justice debate. Thus, it is unclear if market innovations are prompting greater equality and inclusion for marginalized would-be clients or allowing the state and the legal profession(s) to evade the fundamental rule of law precept of access to justice for all.

This Article aims to examine equality and inclusion in legal services from the perspectives of would-be lawyers and would-be clients. It begins by examining the state and solicitors' changing relationship regarding access to justice, professional independence, and the rule of law. It then considers the changes that the LSA 2007 wrought, and whether this neoliberal turn can deliver equality and inclusion within the profession and by the profession for those seeking redress with legal help. It also explores whether de(re)regulation may be altering the legal profession(s)'s ability to act as gatekeeper to the profession(s) and whether this too may have an impact on equality and inclusion within the legal services sector and the protection of consumers' legal rights.<sup>8</sup>

#### I. THE SOLICITORS' PROFESSION AND THE STATE: EQUALITY AND INCLUSION THROUGH PARTNERSHIP?

Civil legal aid is a useful case study through which to chart solicitors' profession compact with the state.<sup>9</sup> It also provides a vehicle through

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England and Wales through the Qualified Lawyers Transfer Scheme (for details of the scheme, see *Qualified Lawyers Transfer Scheme*, SOLICITORS REGULATION AUTH., <http://www.sra.org.uk/qlts/>).

5. See Webley, *supra* note 3.

6. See SOMMERLAD ET AL., *supra* note 3, at 25–30; Lisa Webley et al., *Access to a Career in the Legal Profession in England and Wales: Race, Class and the Role of Educational Background*, in DIVERSITY IN PRACTICE, *supra* note 3.

7. For gender-related equality and diversity literature, see generally Lisa Webley & Liz Duff, *Women Solicitors As a Barometer for Problems Within the Legal Profession—Time to Put Values Before Profits?*, 34 J.L. & SOC'Y 374 (2007). For literature on minorities and the profession, see generally Hilary Sommerlad, *Minorities, Merit, and Misrecognition in the Globalized Profession*, 80 FORDHAM L. REV. 2481 (2012).

8. A note on the difficulty of terminology regarding the legal profession(s) in England and Wales: because the profession is split (the main branches being solicitors, barristers, and chartered legal executives), it is difficult to talk of the legal profession as a monolith. Further, each branch is increasingly heterogeneous, and thus at times I refer to individual branches of the profession(s) and sectors within them, although the switches in approach are not ideal.

9. For a detailed and forensic insight into legal aid development in England, Wales, and Scotland, see generally ALAN PATERSON, HAMLIN LECTURES 2010: LAWYERS AND THE PUBLIC GOOD 59–124 (2012).

which to view the waning influence of political and economic liberalism,<sup>10</sup> as successive governments introduced neoliberal reforms to embed market economics and consumer choice within the discourse of access to justice and legal service provision.<sup>11</sup>

A. *The Scheme at Its Inception: Liberal Collectivism: The Middle Way*

The civil legal aid system in England and Wales emerged from the postwar *Butskellite* consensus as a form of Middle Way collective welfare provision offered via a state-market partnership to serve the practical needs of a liberal market.<sup>12</sup> It was introduced by the Attlee Labour government in the Legal Aid and Advice Act 1949.<sup>13</sup> A liberal collectivist state-market partnership was an ideal mechanism to adopt given that it developed from the previous pro bono charitable model already operated by the Law Society.<sup>14</sup> The structures of the charitable relief model were simply amended to permit an expanded, yet state-subsidized, solution to legal need.<sup>15</sup> The system was administered by the then-solicitors' professional body on behalf of the state (the Law Society of England and Wales), and the day-to-day services were provided by private practice lawyers operating within a state-defined scheme. Payment for the work was made from general taxation. This scheme provided a mechanism by which people of moderate and limited means could enforce and defend their legal rights and responsibilities. Given the relatively limited litigation culture at that time, the civil legal aid system facilitated a redistribution of legal costs across

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10. Liberalism is a contested term and there is insufficient space in this Article to examine competing conceptions here. For the purposes of this discussion, liberalism is considered to be an ideology that seeks to maximize citizens' freedom through the exercise of individual rights, within a moderate state adhering to a democratic tradition. It regulates business and the market so as to limit concentrations of power; it provides a welfare state so as to reduce inequality through some measure of redistribution of power and/or capital. For a fuller discussion, see Simon Clarke, *The Neoliberal Theory of Society, in NEOLIBERALISM: A CRITICAL READER* (Alfredo Saad-Filho & Deborah Johnston eds., 2005).

11. For a discussion of the politics of lawyering, see generally LAWYERS AND THE RISE OF WESTERN POLITICAL LIBERALISM: EUROPE AND NORTH AMERICA FROM THE EIGHTEENTH TO TWENTIETH CENTURIES (Terrence Halliday & Lucien Karpik eds., 1997); Terrence Halliday, *The Politics of Lawyers: An Emerging Agenda*, 24 L. & SOC. INQUIRY 1007 (1999); Stuart A. Scheingold, *Taking Weber Seriously: Lawyers, Politics and the Liberal State*, 24 L. & SOC. INQUIRY 1061 (1999).

12. PETE ALCOCK, *SOCIAL POLICY IN BRITAIN 186–88* (3d ed. 2008).

13. Legal Aid and Advice Act, 1949, 12 & 13 Geo. 6, c. 51 (Eng.).

14. See Richard I. Morgan, *The Introduction of Civil Legal Aid in England and Wales, 1914–1949*, 5 TWENTIETH CENTURY BRIT. HIST. 38, 41–44 (1994); Maureen Spencer, *Public Subsidies Without Strings—Labour and the Lawyers at the Birth of Legal Aid*, 9 INT'L J. LEGAL PROF. 251 (2002). For a discussion of the pro bono publico tradition in the legal profession, see generally Andrew Boon & Avis Whyte, "Charity and Beating Begins at Home": *The Aetiology of the New Culture of Pro Bono Publico*, 2 LEGAL ETHICS 169 (1999), and Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1 (2004).

15. Legal aid costs could be recovered from the non-legally aided losing opponent. Further costs could be recovered (to an extent) from a legally aided winning party (through the statutory charge) and thus the scheme, while not cost neutral, allowed for recovery of costs to the taxpayer in some situations. For information on the operation of the statutory charge, see LEGAL AID AGENCY, *THE STATUTORY CHARGE MANUAL 2–10* (2014).

taxpayers, rather than a redistribution of wealth between them. In doing so, most citizens had the ability to obtain legal advice and the opportunity to access justice.<sup>16</sup> There was congruence between the scheme's aims: a means by which the state could offer some measure of social protection to citizens through recourse to law while supporting the market as an engine of prosperity, and Keynesianism, the prevailing economic theory.<sup>17</sup>

The Rushcliffe Committee, which took evidence on the merits of establishing a national legal aid system, determined that a private practice model was essential given that the rule of law demanded that a claimant's legal dispute against the state be administered and conducted by an independent, rather than state employed, lawyer.<sup>18</sup> During the period between its inception and the Conservative government's return to power in 1979, the scope and reach of the civil legal aid system broadened to reflect the original intentions of the Rushcliffe Committee, rather than the 1949 compromise brokered among the Treasury, the Lord Chancellor's Department, and the Law Society.<sup>19</sup> As expectations about access to justice developed, the power and the role of solicitors increased and, consequently, so did the English Bar. The legal profession had instantiated its professional status through these negotiations by underlining its lynchpin role in ensuring the rule of law, particularly important at a time when the consequences of a breakdown of the rule of law were all too evident in nearby countries.

### B. Neoliberal Reforms: The New Market Model

At the height of the scheme an estimated 80 percent of the population was eligible for civil legal advice and assistance (including court representation) for a wide range of matters. By the early 1990s, however,

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16. See Susanne MacGregor, *Welfare, Neo-Liberalism and New Paternalism: Three Ways for Social Policy in Late Capitalist Societies*, 67 *CAP. & CLASS* 91, 100 (1999); Richard Moorhead, *Legal Aid in the Eye of a Storm: Rationing, Contracting and a New Institutionalism*, 25 *J.L. & SOC'Y* 365, 367 (1998); Spencer, *supra* note 14, at 270. "An outstanding characteristic of expenditure on legal matters is that people may, through no fault of their own, be involved in litigation, the costs of which bear no relation to their financial circumstances and against which they could not reasonably be expected to make provision in advance." Spencer, *supra* note 14, at 264 (citing PUBLIC RECORD OFFICE, AST 20/40 DRAFT MEMORANDUM ON LEGAL AID (Mar. 1945)).

17. This scheme could, following Talcott Parsons, be viewed as a functional mechanism to effect legitimation of the normative order through the conduit of a private practice actor who would both (1) represent the client and manage his expectations of the state, and (2) give an aura of authority and neutrality to the law (as well as legitimacy to the client's concerns). See TALCOTT PARSONS, *ESSAYS IN SOCIOLOGICAL THEORY* 34–49 (1954); TALCOTT PARSONS, *SOCIETIES: EVOLUTIONARY AND COMPARATIVE PERSPECTIVES* 10–11 (Alex Inkeles ed., 1966). Alan Paterson considers professionalism to be a neocontractual relationship by which the lawyer fulfills important social functions according to a contract with society. See PATERSON, *supra* note 9, at 16.

18. REPORT OF THE COMMITTEE ON LEGAL AID AND LEGAL ADVICE IN ENGLAND AND WALES, CMD. NO. 6641, at 23 (1945); see also Morgan, *supra* note 14, at 68; Spencer, *supra* note 14, at 259.

19. See Morgan, *supra* note 14, at 38; Spencer, *supra* note 14, at 255; see also DEP'T FOR CONSTITUTIONAL AFFAIRS, *A FAIRER DEAL FOR LEGAL AID* 8 (2005).

eligibility had dropped below 40 percent and the scope of the scheme had begun to shrink.<sup>20</sup> The civil legal aid scheme appeared, superficially, to have conformed to Hayek's contention that the state should allow a market to function with limited distortion caused through state interference: legal aid clients could choose their lawyer freely and the lawyer would conduct the case as she or he would do for a privately paying client.<sup>21</sup> But the case was taxpayer funded, and the burgeoning legal aid bill was incompatible with the Thatcherite government's aim of public spending retrenchment to counteract the economic difficulties of the early 1980s.<sup>22</sup> The discourse had shifted from Keynesianism to neoliberalism, and policies aimed at achieving this were pursued relentlessly.<sup>23</sup>

Neoliberalism is an umbrella ideology that brings together the intellectual, bureaucratic, and political realms.<sup>24</sup> Its Anglo-American, post-welfare, capitalist, right-leaning roots have dominated the intellectual realm, where the market is deemed to be a neutral force for individual freedom and prosperity. But, interestingly, most of the sites of recent struggle have been within left-leaning European countries with social democratic, welfarist, Keynesian traditions; the market has become so embedded in political and public postwar consciousness that the organizing principle of the market has found a home across the mainstream political spectrum.<sup>25</sup> The bureaucratic regulatory responses may differ in left- and right-leaning environments, but the hallmarks of neoliberalism have been evident in both: liberalization (including the "desacralization" of institutions that have historically been protected from market competition, such as the legal profession), deregulation, privatization, depoliticization, and monetarism.<sup>26</sup> In its ideological heartland, the political realm, market-centric politics have prevailed as the market has been reified to a common sense totalizing force for good.<sup>27</sup> This has had a profound impact on legal professional autonomy, notions of inclusion within the legal market and by the legal market, and the nature of the duty to provide access to justice as a social and political good.

The neoliberal model seeks to (1) address social issues with reference to market principles, (2) limit a "dependency culture," and (3) incentivize creative private solutions that encourage consumer choice and power.<sup>28</sup> From the mid-1980s the government acted in keeping with Charles

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20. See STEVE HYNES & JON ROBINS, *LEGAL ACTION GRP., THE JUSTICE GAP: WHATEVER HAPPENED TO LEGAL AID?* 21 (2009).

21. See FRIEDRICH A. VON HAYEK, *THE ROAD TO SERFDOM* 41 (1994) (1944).

22. See Philip A. Thomas, *Thatcher's Will*, 19 J.L. & Soc'y 1, 9 (1992).

23. See *id.*; see also Hilary Sommerlad, *Managerialism and the Legal Profession: A New Professional Paradigm*, 2 INT'L J. LEGAL PROF. 159, 165 (1995).

24. See Stephanie Lee Mudge, *The State of the Art: What is Neo-Liberalism*, 6 SOCIO-ECON. REV. 703, 704-05 (2008).

25. *Id.* at 704.

26. *Id.*

27. *Id.* at 705.

28. See ALCOCK, *supra* note 12, at 183-86.

Murray's neoliberal thesis,<sup>29</sup> to remove what it considered to be perverse incentives of lawyer-induced demand.<sup>30</sup> There was a perception of a developing litigation culture where the state paid for much of the bill and the client took little of the risk.<sup>31</sup> Businesses and the state were considered to be the victims of vexatious claims brought by underserving claimants represented by self-interested lawyers operating within a legal services market that was bloated and dysfunctional (classic neoliberal claims).<sup>32</sup> These were all clear market distortions that led to market failure and, in turn, resulted in a reduction in social well-being and greater unemployment, neoliberalists contended.<sup>33</sup> Thus, means testing was reformed to cut eligibility for the civil legal scheme. Subsequently, there were cuts in legal aid payment rates and, for the first time, a hard cap on legal aid expenditure.<sup>34</sup> The administration of the scheme was transferred from the profession to a new statutory body, the Legal Aid Board, to be run on new public management principles.<sup>35</sup> It could be argued, on the one hand, that the continued power of the legal profession resulted in an incremental "salami slicing" of the civil legal aid scheme, rather than a one-off radical reform.<sup>36</sup> On the other hand, the grip of market individualism led different factions within the profession(s) to fight to keep their own areas within scope while allowing others to be sacrificed.<sup>37</sup> The price of keeping the scheme, albeit in a blanched-out form, was the introduction of accountability measures through a regulatory system that foreshadowed the introduction of independent regulation of the legal profession later to be

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29. See generally CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY 1950–1980* (1984). See also ALAN DEACON, *PERSPECTIVES ON WELFARE: IDEAS, IDEOLOGIES AND POLICY DEBATES* 32–42 (2002).

30. See Moorhead, *supra* note 16, at 376; Roger Smith, *Legal Aid on an Ebbing Tide*, 23 J.L. & SOC'Y 570, 574 (1996).

31. In most forms of dispute in the United Kingdom, the loser pays the winner's legal costs unless otherwise agreed. Historically, this was not the case if the loser was a legal aid client (costs protection has since been reformed). It was argued that this model incentivized the privately paying client to settle before court so as not to incur additional court costs regardless of whether they won or not. For figures associated with this contention, see Smith, *supra* note 30, at 571–72.

32. See MacGregor, *supra* note 16, at 103–07.

33. See Thomas I. Palley, *From Keynesianism to Neoliberalism: Shifting Paradigms in Economics*, in NEOLIBERALISM, *supra* note 10, at 20–29.

34. See Tamara Goriely, *Rushcliffe Fifty Year On: The Changing Role of Civil Legal Aid Within the Welfare State*, 21 J.L. & SOC'Y 545, 556 (1994); Smith, *supra* note 30, at 571–72; Spencer, *supra* note 14, at 266; Thomas, *supra* note 22, at 9.

35. For a detailed discussion of these changes in the civil legal aid system, see generally Moorhead, *supra* note 16; Sommerlad, *supra* note 23; Hilary Sommerlad, *The Implementation of Quality Initiatives and the New Public Management in the Legal Aid Sector in England and Wales: Bureaucratisation, Stratification and Surveillance*, 6 INT'L J. LEGAL PROF. 311 (1999).

36. For a discussion of constituencies of power within a welfare state context, see Macgregor, *supra* note 16, at 105. For a discussion of the legal profession as a constituency, see Thomas, *supra* note 22, at 5.

37. See Spencer, *supra* note 14, at 260–61. Paterson contends that legal professionals stifled the public's voice and thus defined what was in the public interest. See PATERSON, *supra* note 9, at 62.

introduced by the LSA 2007.<sup>38</sup> Over time the scheme also opened up the legal aid market to those outside traditional legal practice, operating in not-for-profit advice agencies.<sup>39</sup> This was proof that nonlawyer organizations could deliver services effectively, and to a quality standard. High street lawyers were unable to repel the state's incursion into their territory, and the elite corporate branch of the profession did not come to their aid. Collective action had drained away with the last vestiges of Keynesianism, to be replaced by a neoliberal competition; as Margaret Thornton indicates, "competition is necessarily corrosive of community."<sup>40</sup> The legal profession as an institution was gradually being desacralized and individual lawyers, like much of society, quietly depoliticized.

To complement civil legal aid the government introduced a market solution to access justice: a fee regime known as "conditional fee arrangements" which was a forerunner of the "no win no fee" agreements often employed today.<sup>41</sup> These arrangements were intended to shift financial risk from the state to the profession for all but the poorest in society. Over time fee regimes were relaxed even further.<sup>42</sup> A residual welfare state model, at the service of the market, was closer to being realized, with fewer clients eligible for legal aid assistance, and the market freed to provide creative fee solutions to non-legally aided "consumers."<sup>43</sup> The commitment of lawyers to undertake legal aid began to wane, and as the economy was reshaped and Adam Smith's market expansion mechanism<sup>44</sup> developed to afford a greater division of labor resulting in specialization in service, the profession became more fragmented and

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38. For a discussion of regulation and new public management in a legal aid context, see HILARY SOMMERLAD & PETER SANDERSON, TRAINING AND REGULATING THOSE PROVIDING PUBLICLY FUNDED LEGAL ADVICE SERVICES: A CASE STUDY OF CIVIL PROVISION 37–76 (2008); Richard Moorhead et al., *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 LAW & SOC'Y REV. 765, 794–800 (2003); Richard Moorhead, *Third Way Regulation? Community Legal Service Partnerships*, 64 MOD. L. REV. 543, 544–56 (2001).

39. See Moorhead et al., *supra* note 38, at 772–75.

40. See Margaret Thornton, *Neoliberal Melancholia: The Case of Feminist Legal Scholarship*, 20 AUSTL. FEMINIST L.J. 7, 7 (2004).

41. See generally Maureen Spencer, *The Common Law Legacy and Access to Justice: Contingency Fees and the Birth of Civil Legal Aid*, 9 NOTTINGHAM L.J. 32 (2000). Solicitors were permitted to waive their legal fees in instances where their client did not win, although the client remained liable for the opponent's legal costs. However, the solicitors had to charge the full fee plus a premium in a successful case, a strictly controlled predetermined percentage of the fees. See Hilary Sommerlad, *Some Reflections on the Relationship Between Citizenship, Access to Justice, and the Reform of Legal Aid*, 31 J.L. & SOC'Y 345, 345–46 (2004) (explaining the shift from a duty to provide access to justice to a market risk–opportunity calculation); see also RICHARD MOORHEAD ET AL., SCOPING PROJECT ON NO WIN NO FEE AGREEMENTS IN ENGLAND AND WALES 23 (2009); Stella Yarrow & Pamela Abrams, *Conditional Fees: The Challenge to Ethics*, 2 LEGAL ETHICS 192, 193–97 (1999).

42. For up-to-date information on fee regimes in England and Wales, see *Main Changes*, MINISTRY OF JUSTICE (Nov. 7, 2014), <http://www.justice.gov.uk/civil-justice-reforms/main-changes>.

43. See ALCOCK, *supra* note 12, at 185.

44. See generally ADAM SMITH, THE WEALTH OF NATIONS (1776).



segmented.<sup>45</sup> The profession that had used the importance of access to justice as the key reason for its independence from the state did not or could not make up the shortfall in supply to meet consumer need with non-state subsidized services. A whole swathe of clients were returned to a prewar position of limited access to legal redress. The Conservative government's approaches had not only changed the civil legal aid system, but neoliberalism also encouraged much of the profession to adopt a more obviously business-led model of service provision. The monolithic conception of old-style professionalism was challenged, as was its potential for collective action.<sup>46</sup>

Even the terminology used by government and by sections of the legal profession gradually changed to reflect this switch: the "practice of law" became the "provision of legal services," and "legal professionals" became "legal service providers."<sup>47</sup> While some sections of the profession fiercely resisted these changes, most notably much of the English Bar and some solicitors who remained ideologically committed to legal aid as a social justice project, others embraced them wholeheartedly.<sup>48</sup> Much of the access to justice discussion had shifted from universalism to individualism, mediated by market principles.<sup>49</sup> So had professional practice.

## II. THE LEGAL SERVICE ACT 2007: EQUALITY AND INCLUSION FOR LEGAL CONSUMERS THROUGH THE MARKET?

The LSA 2007 was enacted by a New Labour center-left government espousing the Third Way ideology at the height of the economic boom. The Third Way ideology requires the government to take an active role in investing in human and other resources so as to develop entrepreneurialism to create wealth, which can then be used to develop economic security and allow for redistribution.<sup>50</sup> The Third Way ideology differs from classical social democracy in that it considers wealth creation to be fundamental to economic security and redistribution, but although the Third Way seeks to humanize the market, it accepts the theoretical tenets of neoliberalism

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45. See Sommerlad, *supra* note 23, at 165; Thomas, *supra* note 22, at 7. For a discussion of the ideological foundations of neoliberalism, see Clarke, *supra* note 10, at 50–59. For a discussion of the importance of specialization to the quality of legal work undertaken, see generally Moorhead et al., *supra* note 38.

46. See MacGregor, *supra* note 16, at 102–07; Thomas, *supra* note 22, at 2–3 (arguing that professional deregulation and developments in favor of an enterprise culture were not wholly government led, as some of these policies reflected what was already happening in some sectors of the legal profession).

47. See Thomas, *supra* note 22, at 5.

48. The Chairman of the Bar Council stated: "[J]ustice cannot be measured in terms of competition and consumerism; justice is not a consumer durable; it is the hallmark of a civilised and democratic society." Thomas, *supra* note 22, at 5 (citation omitted).

49. See MacGregor, *supra* note 16, at 110; see also Hilary Sommerlad, *Reflections on the Reconfiguration of Access to Justice*, 15 INT'L J. LEGAL PROF. 179, 181–83 (2008).

50. See ANTHONY GIDDENS, *THE THIRD WAY: THE RENEWAL OF SOCIAL DEMOCRACY* 99 (1998).

regarding income distribution and the stability of capital economies.<sup>51</sup> It differs in its bureaucratic response by placing emphasis on regulatory mechanisms to incentivize businesses and the professions to serve consumer interests, rather than leaving it to the market to determine whether to serve those interests.<sup>52</sup>

Consequently, a new regulatory environment was introduced to break up professional monopolies and invigorate the legal market, while reducing the asymmetries of power between the consumer and service provider. This was a step on the way to Milton Friedman's "elementary . . . proposition that both parties to an economic transaction benefit from it, *provided the transaction is bi-laterally voluntary and informed.*"<sup>53</sup> The LSA 2007 uncoupled the machinery of admission, professional complaint, and discipline from the original professional bodies. The Law Society of England and Wales, the General Council of the Bar, and the Chartered Institute of Legal Executives continue to act as professional associations for their members, have a campaigning role, and provide membership services. But the admission and disciplinary arms have been reallocated to independent (frontline) regulators with majority lay representation.<sup>54</sup> Consumer complaints are now made to the independent Legal Ombudsman (LeO), which has exclusive first instance jurisdiction over complaints' redress in respect of admitted legal professionals, although discipline rests with the frontline regulators.<sup>55</sup> The LSA 2007 also established an independent oversight regulator, the Legal Services Board (LSB), with statutory powers and duties to ensure that the regulatory objectives of the LSA are realized either through the frontline regulators or through direct intervention if necessary.<sup>56</sup> A consumer panel has been established to advise the LSB on the consumer standpoint and barriers to accessing quality legal services at the right price in the right way.<sup>57</sup> Professional autonomy has been removed in favor of an independent risk-based, outcome-focused approach to regulation and quality assurance, similar to regulatory policy in

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51. For a discussion of New Labour and the Third Way from an economic perspective, see generally Philip Arestis & Malcolm Sawyer, *The Economics of the Third Way*, 6 *NEW POL. ECON.* 255 (2001); Palley, *supra* note 33, at 20–29.

52. For a brief discussion of the differences between the Third Way ideology and classic social democracy, see Palley, *supra* note 33, at 20–29.

53. See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 13 (1982).

54. These are the Solicitors Regulation Authority (SRA), the Bar Standards Board (BSB), and for chartered legal executives the Ilex Professional Standards (IPS).

55. Legal Services Act, 2007, c. 29, §§ 112–161, schs. 16–19 (Eng.).

56. The regulatory objectives are:

(a) protecting and promoting the public interest; (b) supporting the constitutional principle of the rule of law; (c) improving access to justice; (d) protecting and promoting the interests of consumers; (e) promoting competition in the provision of services . . . ; (f) encouraging an independent, strong, diverse and effective legal profession; (g) increasing public understanding of the citizen's legal rights and duties; (h) promoting and maintaining adherence to the professional principles.

*Id.* § 1(1).

57. *Id.* § 8.

the financial services and related sectors.<sup>58</sup> The regulatory intervention of the LSB serves as an agent of the Third Way to further entrepreneurialism in the legal services market while regulating so as to provide a measure of consumer protection.

The reforms pose a real challenge to duty and service-based conceptions of professionalism, although fit more easily with Paterson's neocontractualism.<sup>59</sup> Essential features of the professions include self-regulatory status, training and admission, complaints handling, disciplinary functions, an exclusive jurisdiction over particular types of work, and, in some definitions, responsibility to public service or duty.<sup>60</sup> Gatekeeping controls provide a means to socialize nascent professionals and police the technical basis of the professional community.<sup>61</sup> Regulation and ethical precepts provide a mechanism through which ongoing supervision may be undertaken, wrongdoing may be punished (to a greater or lesser extent), and status may be maintained or improved.<sup>62</sup> The gatekeeping, accreditation, and regulation roles reassure the public, may be used to repel the state's power, and are considered fundamental given that the profession's claim to legitimacy rests on its role in the maintenance of the rule of law. Critics of traditional models of professionalism, such as Richard Abel, argue that the legal profession sets entry requirements to create a barrier to limit the

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58. See OFFICE OF FAIR TRADING, REPORT ON COMPETITION IN PROFESSIONS: A REPORT BY THE DIRECTOR GENERAL OF FAIR TRADING 2–10 (2001). For a worked example of how economic theory and competition law may lead to an incursion in a rule of professional practice, see JOHN FLOOD & MORTEN HVIID, THE CAB RANK RULE: ITS MEANING AND PURPOSE IN THE NEW LEGAL SERVICES MARKET: REPORT FOR THE LEGAL SERVICES BOARD 14–22 (2013).

59. See generally Alan A. Paterson, *Professionalism and the Legal Services Market*, 3 INT'L J. LEGAL PROF. 137 (1996). For a discussion of professionalism and requirements linked to the ability to maintain professional autonomy, see generally Richard L. Abel, *The Rise of Professionalism*, 6 BRITISH J.L. & SOC'Y 82 (1979). See also ANDREW ABBOTT, THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR (1988); MAGALI S. LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS (1977).

60. For an in-depth discussion of the essential features of the professions, see generally THE END OF THE PROFESSIONS?: THE RESTRUCTURING OF PROFESSIONAL WORK (Jane Broadbent et al. eds., 1997) (charting the development of the professions and features considered to be essential by most, but not all, professions). See also Gerald Hanlon & Joanna Shapland, *Professional Disintegration?*, in THE END OF THE PROFESSIONS?, *supra*, at 103–122; PATERSON, *supra* note 9, at 5–58; Robert Dingwall & Paul Fenn, "A Respectable Profession"? *Sociological and Economic Perspectives on the Regulation of Professional Services*, 7 INT'L REV. L. & ECON. 51, 52 (1987); Herbert M. Kritzer, *The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World*, 33 L. & SOC'Y REV. 713, 729–30 (1999); Paterson, *supra* note 59, at 137; Harold L. Wilensky, *The Professionalization of Everyone?*, 70 AM. J. SOC. 137, 138 (1964).

61. See LARSON, *supra* note 59, at 204; Abel, *supra* note 59, at 82; Penny Cavenagh, Chris Dewberry & Paul Jones, *Becoming Professional: When and How Does It Start? A Comparative Study of First-Year Medical and Law Students in the UK*, 34 MED. EDUC. 897 (2000).

62. See Andrew Boon, *From Public Service to Service Industry: The Impact of Socialisation and Work on the Motivation and Values of Lawyers*, 12 INT'L J. LEGAL PROF. 229 (2005); Lisa Webley, *Gate-Keeper, Supervisor or Mentor? The Role of Professional Bodies in the Regulation And Professional Development of Solicitors and Family Mediators Undertaking Divorce Matters in England and Wales*, 32 J. SOC. WELFARE & FAM. L. 119 (2010).

number of lawyers who reach full professional status so as to restrict supply of legal services and drive up prices.<sup>63</sup> The justification that professional self-regulation ensures quality and competence is backed up by little empirical evidence.<sup>64</sup> It is specialization, rather than professional affiliation, that appears to be the key to quality.<sup>65</sup> Professional autonomy in policing its membership also allowed old hierarchies to persist, and the naturally conservative solicitors' and barristers' professions reproduced themselves very effectively and were relatively ineffective at addressing consumer complaints.<sup>66</sup> In addition, some factions of the profession had linked their future to a pure business model, yet had retained a conservative model of power and privilege. Regulatory intervention in the legal sector was the natural culmination of the intellectual and bureaucratic elements of neoliberal market ideology, a function of the profession's perceived failure to create a market that functions to meet the public need for legal help when state funding was withdrawn.

The LSA 2007 reforms need to be seen in the context of England's historically narrow unauthorized practice of law rules, which were not amended by the LSA. Contrary to many other jurisdictions, most legal activities are not reserved to admitted legal professionals; there are only six reserved activities that must be undertaken by qualified and admitted (authorized) lawyers.<sup>67</sup> No single branch of the legal profession is authorized to conduct all six activities, although it is possible for individuals within each branch to undertake further accreditation to gain additional authorization to undertake more areas of reserved work.<sup>68</sup> These provisions are not new, they were extant even before the introduction of the

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63. See RICHARD L. ABEL, ENGLISH LAWYERS BETWEEN MARKET AND STATE: THE POLITICS OF PROFESSIONALISM (2003); Richard L. Abel, *Taking Professionalism Seriously*, 1989 ANN. SURV. AM. L. 41, 43–44. *But see* PATERSON, *supra* note 9, at 53 (asserting that the lawyer professionalism is embedded within neocontractualism, which allows for change over time).

64. And indeed there is some evidence to the contrary. See RICHARD MOORHEAD, AVROM SHERR, LISA WEBLEY, SARAH ROGERS, LORRAINE SHERR, ALAN PATERSON & SIMON DOMBERGER, QUALITY AND COST: FINAL REPORT ON THE CONTRACTING OF CIVIL, NON-FAMILY ADVICE AND ASSISTANCE PILOT (2001); Moorhead et al., *supra* note 38, at 795.

65. See Moorhead et al., *supra* note 38, at 795, 799–800.

66. See RICHARD MOORHEAD ET AL., WILLING BLINDNESS?: OSS COMPLAINTS HANDLING PROCEDURES 37 (2000); Lisa Webley et al., *Access to a Career in the Legal Profession in England and Wales: Race, Class and the Role of Educational Background*, in DIVERSITY IN PRACTICE, *supra* note 3.

67. Legal Services Act, 2007, c. 29, § 12 (Eng.). The reserved activities are set out in the LSA 2007 schedules 2 and 12 but predate the Act: (1) the exercise of rights of audience (i.e., appearing as an advocate before a court); (2) the conduct of litigation (i.e., issuing proceedings before a court and commencing, prosecuting, or defending those proceedings); (3) reserved instrument activities (i.e., dealing with the transfer of land or property under specific legal provisions including registration of land); (4) probate activities (i.e., handling probate/estate matters for clients); (5) notarial activities (i.e., work governed by the Public Notaries Act 1801); and (6) the administration of oaths (e.g., swearing affidavits, taking oaths). *Id.* For a counterpoint in the U.S. context, see generally Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981).

68. Legal Services Act, 2007, c. 29, §§ 12–21, sch. 2 (Eng.).

civil legal aid scheme, but the dynamic changes to legal professional regulation and law firm ownership have brought them to the attention of a much wider audience, and the new regulatory context is now more attractive to legal neophytes.<sup>69</sup> The LSA 2007 has opened up the legal services sector to those who wish to invest in legal businesses; alternative business structures allow for the licensing of nonlawyer-owned businesses to provide authorized (reserved) legal services by authorized legal professionals, which was impermissible until the introduction of the LSA. But given that the legal profession(s)'s abilities to take collective action have been undermined, and that the reserved activity rules increasingly pit one legal professional branch against another, one legal professional against another, division of labor and market competition are assured in an environment in which admitted legal professionals and those with no legal accreditation compete vigorously for consumers.

The dazzling array of options open to consumers, the huge knowledge asymmetry in a messy professional arena, and the lack of consistent regulation make this a difficult environment to navigate successfully for consumers.<sup>70</sup> The risk of legal costs and the potential rewards of legal action are now borne by individual consumers and shared, in some instances, with lawyers, rather than by the taxpayer through the legal aid scheme. It is a little early to be able to track trends in access to justice, but early indications suggest that increasing numbers of clients are self-representing and may not be able to seek expert evidence to support their cases.<sup>71</sup> Alternative providers and greater publicity of non-reserved services may increase options for consumers at a price they can afford.<sup>72</sup> But non-reserved services undertaken by service providers who are not formally admitted to one of the branches of the profession remain beyond the jurisdiction of the LeO, giving rise to consumer protection concerns as well as a distorted market. The solicitors profession's standing in the debate would be much improved by switching admission to the Roll of solicitors (albeit with a requirement of a period of work-based training under supervision) to before the training contract phase so as to permit regulation of this cadre of lawyers who are seeking employment in the new

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69. See Webley, *supra* note 3.

70. For further discussion on the legal service markets, see Richard Moorhead, *Why There Might Be a Market for Lemons: Some Thoughts on Competition, Quality and Regulation in Legal Service Markets*, in UNDERSTANDING THE ECONOMIC RATIONALE FOR LEGAL SERVICES REGULATION—A COLLECTION OF ESSAYS 24 (Legal Services Board ed., 2011). Richard Moorhead argues that competition on quality is critically dependent on the consumer's knowledge of quality so that he or she may act on that knowledge to make rational decisions. *Id.* He also indicates that clients have relatively limited knowledge about differences in lawyer quality, making assumptions that they are relatively similar in their abilities. *Id.*

71. See RICHARD MOORHEAD & MARK SEFTON, DEP'T FOR CONSTITUTIONAL AFFAIRS, LITIGANTS IN PERSON: UNREPRESENTED LITIGANTS IN FIRST INSTANCE PROCEEDINGS 251–52 (2005); LIZ TRINDER ET AL., MINISTRY JUSTICE, LITIGANTS IN PERSON IN PRIVATE FAMILY LAW CASES 73–74 (2014); KIM WILLIAMS, MINISTRY JUST., LITIGANTS IN PERSON: A LITERATURE REVIEW 3 (2011).

72. See Webley, *supra* note 3.

market without professional affiliation or regulation.<sup>73</sup> This would bring far more legal service providers within the scope of the regulated profession and enormously increase the diversity of the professional bodies, creating a stronger voice in the legal service market. It would also dilute the profession's gatekeeping role and, therefore, some may be anxious about reduction in exclusivity claims and, thus, of status. As things stand, it is extremely difficult for consumers to know who is an admitted lawyer. Distinctions between different professional groupings are difficult to pinpoint, as are the consequences of those affiliations. But rather than working together to send a unified message to the public about admission, regulation, and consumer protection, each professional branch is attempting to capitalize on market deregulation so as to gain a share of each other's traditional markets.

Further, by bearing down on eligibility for legal aid and taking most people out of the scope of the civil scheme, successive governments have managed with clever sleight of hand to remove legal aid funding from the forefront of public consciousness. The public does not see the nexus between access to civil justice and the rule of law and has largely accepted state rhetoric that lawyers are in league with business rather than champions for the ordinary citizen.<sup>74</sup> The LSA 2007 reforms may deliver a plurality of services at a range of costs, but it is not yet clear that they can deliver inclusion and equality for legal consumers. Nor is it likely that professional bodies will be able to provide much help to legal consumers in this regard. The depoliticization ushered in by neoliberalism and its academic equivalent postmodernism, both of which turn attention away from macro claims to focus attention on the micro, and the individual, has neutered political social justice movements and depoliticized much of the professional elite, including the legal profession<sup>75</sup> and its client base.<sup>76</sup> If the market cannot provide access to justice, the profession is unlikely at present to be able to mobilize its members and the public to affect political change.

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73. The new Bar Code regulates all barristers (fully qualified or otherwise) for reserved and unreserved matters post call/admission to the Bar but pre-pupillage. See BAR STANDARDS BD., THE BAR STANDARDS BOARD HANDBOOK R. 17.1, 17.8 (2014). They are not fully admitted to practice but they are members of a professional association and are regulated by the frontline regulator the BSB. For details, see Marc Mason, *UK: Room at the Inns—The Increased Scope of Regulation Under the New Bar Standards Board Handbook for England and Wales*, 17 LEGAL ETHICS 143 (2014).

74. See, e.g., Sadiq Khan, *Cutting Legal Aid Is an Easy Gimmick—This Is Part of a Pattern*, GUARDIAN (Feb. 27, 2014), <http://www.theguardian.com/commentisfree/2014/feb/27/cutting-legal-aid-reform-chris-grayling-justice-system>.

75. The criminal Bar, however, has recently held an unprecedented strike to protest against cuts to criminal legal aid. See Jonathan Ames, *Crime Barristers Strike Over Legal Aid Cuts As Solicitors Call for Leaders to Resign*, LAWYER, Mar. 7, 2014, available at <http://www.thelawyer.com/news/crime-barristers-strike-over-legal-aid-cuts-as-solicitors-call-for-leaders-to-resign/3017273.article>.

76. For a discussion of neoliberalism, the depoliticization, and the postmodern turn, see Thornton, *supra* note 40, at 9.

III. THE LEGAL PROFESSIONS:  
CAN THE FREE MARKET DELIVER GREATER EQUALITY  
AND INCLUSION FOR ASPIRANT LEGAL PROFESSIONALS?

The profile of law graduates in England and Wales has markedly diversified over the past thirty years.<sup>77</sup> From the mid-1980s, the solicitors profession (and to a lesser extent the Bar) needed to increase in size to serve the expanding business market. This expansion coincided with the state-supported expansion of higher education places to meet broader market needs: the proportion of U.K. seventeen- to thirty-year-olds who attended university fluctuated between 10 and 15 percent during late 1960s to 1980s, then rose steadily to approximately 40 percent in 2000, and has now reached approximately 49 percent of that age group.<sup>78</sup> Undergraduate tuition fees were, primarily, met by the state rather than by the students themselves until the introduction of undergraduate student fees in 1998.<sup>79</sup> Further, access to the legal profession was extended, albeit tentatively and briefly from the late 1980s to the early 2000s; registered traineeships increased by 62.4 percent between 1989 and 1990 and 1999 and 2000—from 3524 to 5285.<sup>80</sup> Given that the traditional pool of elites was insufficient to meet market needs, the population of black, Asian, minority ethnic (BAME)<sup>81</sup> and female entrants to the legal profession increased.<sup>82</sup>

Today, law school graduating cohorts continue to diversify.<sup>83</sup> The proportion of law graduates who self-define as BAME is about 32 percent

77. See LAW SOC'Y, TRENDS IN THE SOLICITORS' PROFESSION 2013, at 32–36 (2014).

78. For a discussion of this trend, see Haroon Chowdry et al., *Widening Participation in Higher Education: Analysis Using Linked Administrative Data*, 176 J. ROYAL STAT. SOC'Y 431 (2013), and IAN WALKER & YU ZHU, DEP'T FOR BUS., INNOVATION & SKILLS, THE IMPACT OF UNIVERSITY DEGREES ON THE LIFE CYCLE OF EARNINGS: SOME FURTHER ANALYSIS 36–49 (2013).

79. See SECURING A SUSTAINABLE FUTURE FOR HIGHER EDUCATION: AN INDEPENDENT REVIEW OF HIGHER EDUCATION FUNDING & STUDENT FINANCE 18–19 (2010). The fees regimes was as follows: £1,000 per year in 1998; £3,000 per year in 2004; £3,290 per year in 2011; and, up to £9,000 per year in 2012. Even given the introduction of fees, the diversification of the law graduate population continued as students continued to be drawn to vocationally orientated degree subjects. See UNIVERSITIES UK, PATTERNS AND TRENDS IN UK HIGHER EDUCATION 10–14 (2012).

80. See BILL COLE, LAW SOC'Y, TRENDS IN THE SOLICITORS' PROFESSION: ANNUAL STATISTICAL REPORT 2000, at 65–67 (2000).

81. Black, Asian, and minority ethnic (BAME) is the phraseology used in the United Kingdom in place of the U.S. phraseology of “minorities.”

82. See COLE, *supra* note 80, at 65–67. In 1999, 15.8 percent of traineeships went to BAME law graduates and 56.9 percent went to female law graduates. *Id.* at 66. Forty-eight percent of them were registered in London with more than half registered in the square mile of the City of London pointing to commercial expansion at the time. *Id.* at 66–67.

83. The LL.B. is a three-year undergraduate law degree, similar to the J.D. qualification. All LL.B. degree programs must be approved by the Joint Academic Stages Board, which has a similar function to American Bar Association accreditation. LL.B. degrees are classed as qualifying law degrees, meaning that once a student has successfully attained an LL.B. (Hons) degree she or he may continue on to the one-year vocational qualification required to train to be a solicitor (the Legal Practice Course) or a barrister (Bar Professional Training Course). After that a would-be solicitor would need to secure a two-year training contract in a law firm or equivalent and undertake some final examinations, and a would-be barrister would need to secure two six-month pupillages. Training contracts and pupillages are forms

of the graduating population,<sup>84</sup> and the U.K. BAME population is recorded as 14 percent (it has increased from 6 percent in 1991 to 9 percent in 2001).<sup>85</sup> Yet the diversity of the professions has not kept pace. The point of attrition is evident at the compulsory work-based training stage, when the BAME population drops from over 30 percent at the vocational stage of education, to 13 percent (pupil barristers) and 22 percent (trainee solicitors), demonstrating the persistence of raced and classed hiring practices. Those from less traditionally privileged professional backgrounds remain at a great disadvantage in securing professionally legitimated training that affords the opportunity to become admitted legal professionals (as solicitors and barristers).<sup>86</sup> BAME lawyers have greater difficulty in accessing vocational in-practice training, and when they do, they are concentrated within the less prestigious parts of the professions and have greater attrition rates from the legal profession relative to their white counterparts.<sup>87</sup> They are proportionately more likely to be in solo practice than are white solicitors; this may be due, in part, to the greater difficulties they face with gaining entry into, and progression within, the more lucrative and established parts of the profession.<sup>88</sup> Additional promotion barriers confront the essentialist category of women; they are admitted in proportion to their graduating numbers but still struggle to progress at the same rate as men.<sup>89</sup> There is some evidence that the Bar is drawing its pupils from an increasingly privileged class background; the solicitor's profession is not

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of heavily supervised paid practice that operate similar to apprenticeships. Post completion of a training contract or the pupillages, the solicitor or barrister is fully qualified but is still required to work within a supervised context for an additional three years before they have full practice rights or the opportunity to practice solo. Consequently, in most instances it is compulsory to gain one of a limited number of training contracts or pupillages to be able to practice law as an admitted legal professional (to undertake reserved activities) unless one takes the CILEx route to qualification to become a chartered legal executive.

84. It is considered that approximately 10 percent of law graduates on qualifying law degrees are overseas students, some of which will self-define as BAME although it is unclear the extent to which this affects the figures presented above. Further, not all LPC/BPTC and training contract/pupillage applicants will have undertaken an undergraduate LL.B. degree. Approximately 5000 students a year undertake the Graduate Diploma in Law course, which is an intensive graduate program that one may take following successful completion of a non-law undergraduate degree. See Lisa Webley, *What Empirical Legal Studies Tell Us About the Legal Profession*, Professorial Inaugural Lecture (Mar. 20, 2013), available at <https://www.youtube.com/watch?v=ixaiOrliaRw>.

85. See OFFICE FOR NAT'L STATISTICS, *ETHNICITY AND NATIONAL IDENTITY IN ENGLAND AND WALES 2011*, at 1, 4 (2012), available at <http://www.ons.gov.uk/ons/rel/census/2011-census/key-statistics-for-local-authorities-in-england-and-wales/rpt-ethnicity.html>.

86. See SOMMERLAD ET AL., *supra* note 3, at 58–60; Webley et al., *supra* note 6.

87. See SOLICITORS REGULATORY AUTH., *INDEPENDENT REVIEW INTO DISPROPORTIONATE REGULATORY OUTCOMES FOR BLACK AND MINORITY ETHNIC SOLICITORS 7* (2008), available at <http://www.sra.org.uk/ouseley/>; see also LAW SOC'Y, *ETHNIC DIVERSITY IN LAW FIRMS—UNDERSTANDING THE BARRIERS 4* (2010).

88. See Lisa Webley, *United Kingdom: What Robinson v. Solicitors Regulation Authority Tells Us About the Contested Terrain of Race and Disciplinary Processes*, 16 *LEGAL ETHICS* 236, 241 (2013).

89. For a discussion, see Webley & Duff, *supra* note 7.



immune from this charge, either, as a recent study concluded.<sup>90</sup> A pronounced link between class and race in British society<sup>91</sup> exacerbates the barriers BAME law graduates face.<sup>92</sup> Traditional law firm and chambers hiring practices focus on cultural capital held in greater measure by social elites believing them to be intellectual elites too; this results in unequal opportunities<sup>93</sup> and unequal access to a career in the legal profession.<sup>94</sup> Although the Law Society and Bar Council have noted these concerns, they have been more inclined to encourage measures that aim to raise the aspirations of BAME school pupils to attend elite law schools rather than to challenge the prevailing view that elite schooling necessarily indicates lawyer excellence.<sup>95</sup>

Is the supply-side market free to choose who it accepts within it and in what role? The figures above would suggest that it is, as it is still largely admitted legal professionals who choose whom to hire as trainees and pupils and, consequently, who joins them in the legitimated, higher status end of the legal services market. Those that cannot gain entry are free to work as paralegals, or to join the non-reserved sector. But they do not enjoy the same status, they are not subject to the same disciplinary provisions, and they are not within the jurisdiction of the LeO. Does this serve the demand side well? The LSB has been given a statutory obligation to encourage an independent, strong, diverse, and effective legal profession,

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90. In 2010–2011, more than one-third (34.5 percent) of pupillages were awarded to elite educated “Oxbridge” (Oxford or Cambridge) graduates, and this figure appears to be increasing (23.7 percent were Oxbridge-educated in the previous year), although publicly available data makes it difficult to confirm this. *See* BAR STANDARDS BD., BAR BAROMETER TRENDS IN THE PROFILE OF THE BAR 49 (2011); BAR STANDARDS BD., BAR BAROMETER TRENDS IN THE PROFILE OF THE BAR 49 (2012); *see also* OFFICE FOR NAT’L STATISTICS, *supra* note 85, at 4. Although it is argued that an elite education brings with it elite abilities, there is little evidence to suggest this is actually true, and there is strong evidence that class background plays an important role in gaining the grades required to enter elite institutions. *See* Webley et al., *supra* note 6.

91. *See* ETHNICITY, SOCIAL MOBILITY, AND PUBLIC POLICY: COMPARING THE USA AND UK 3–5 (Glenn C. Loury et al. eds., 2005); Louise Archer, *Constructing Minority Ethnic Middle Class Identity: An Exploratory Study with Parents, Pupils and Young Professionals*, 4 SOC. 134, 144 (2011).

92. *See, e.g.*, BEVERLY SKEGGS, FORMATIONS OF CLASS & GENDER: BECOMING RESPECTABLE 94–95 (1997); John H. Goldthorpe, *Rent, Class Conflict, and Class Structure: A Commentary on Sørensen*, 105 AM. J. SOC. 1572, 1573 (2000).

93. *See* Max Weber, *Economic and Social History*, in MAX WEBER SELECTIONS IN TRANSLATION 285 (W.G. Runciman ed., E. Matthews trans., 1978); *see also* Richard Breen, *Foundations of a Neo-Weberian Class Analysis*, in APPROACHES TO CLASS ANALYSIS 31–50 (Erik Olin Wright ed., 2005).

94. *See* EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 371 (George Simpson trans., 1964); ALAN MILBURN, UNLEASHING ASPIRATION: THE FINAL REPORT OF THE PANEL ON FAIR ACCESS TO THE PROFESSIONS (2009); ALAN MILBURN, FAIR ACCESS TO PROFESSIONAL CAREERS: A PROGRESS REPORT BY THE INDEPENDENT REVIEWER ON SOCIAL MOBILITY AND CHILD POVERTY 2 (May 2012).

95. For more information on the Law Society’s emphasis on the PRIME scheme, *see* LAW SOC’Y, PRIME AND SOCIAL MOBILITY (2013), *available at* <http://www.lawsociety.org.uk/policy-campaigns/articles/prime-and-social-mobility/>. Many of the law firms that participate in the scheme recruit trainee solicitors from a narrow elite band of U.K. law schools.

and to support the constitutional principle of the rule of law as indicated above. To this end the LSB requires all legal entities to collect and report a wide range of diversity data to allow judgments to be made. It also has the power to intervene in the market if the professions do not deliver a diverse legal profession, but it is unclear what would constitute sufficient diversity.<sup>96</sup> The LSB has supported the extension of more reserved activities to CILEx, the chartered legal executive branch of the profession that has greater heterogeneity of routes to full admission and a much better record on diversity. The CILEx route to professional qualification holds out the promise of professional admission as long as law graduates<sup>97</sup> work in a legal environment undertaking legal work under the supervision of an admitted professional (an apprenticeship model undergirded with degree-level examinations and continuing professional education requirements). A once blocked section of the law graduate population may now have an access route into the profession, even if being a professional may not be once what it was. But this model currently lacks status in the market. The market thrives on division of labor and stratification and, so, the question is not whether there is stratification, but whether that stratification serves the market well. While Milton Friedman contends that the market will pay each individual what she or he is worth, Keynesians caution against this indicating that power imbalances are inherent in any market. The Third Way regulatory principles built into the LSA 2007 provide a mechanism to counterbalance these power relations, but they would have to be recognized as such to trigger a regulatory response.

The business case for diversity is part of the market's mercurial reinvention of itself. As Margaret Thornton indicates, "The movement away from the dissonant language of *in*-equality in favour of diversity serves to depoliticise further a competitive market environment in which inequality is necessarily normative."<sup>98</sup> Legal professionals acting as gatekeepers to training contracts and pupillages continue to be heavily influenced by proxies for excellence that bolster their own status within the field.<sup>99</sup> The market metanarrative that each individual gets what she or he

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96. David Edmonds, *Training the Lawyers of the Future—A Regulator's View*, 45 L. TCHR. 4, 13–14 (2010).

97. It is not necessary to be a law graduate: CILEx offers a range of tiered membership levels and has examinations that mirror much of the law degree curriculum that allow non-graduates to work toward full professional qualification as a Fellow of CILEx too. See *The Cilex Route*, CILEX, [http://www.cilexlawschool.ac.uk/prospective\\_students/qualify\\_as\\_solicitor/the\\_CILEx\\_route](http://www.cilexlawschool.ac.uk/prospective_students/qualify_as_solicitor/the_CILEx_route) (last visited Mar. 25, 2015).

98. Thornton, *supra* note 40, at 12; see also Wendy Bottero & Sarah Irwin, *Locating Difference; Class, "Race" and Gender, and the Shaping of Social Inequalities*, 51 SOC. REV. 463, 479–80 (2003).

99. For a discussion of the proxies used, see generally Louise Ashley & Laura Empson, *Differentiation and Discrimination: Understanding Social Class and Social Exclusion in Leading Law Firms*, 66 HUM. REL. 219 (2013); Louise Ashley, *Making A Difference? The Use (and Abuse) of Diversity Management at the UK's Elite Law Firms*, 24 WORK, EMP. & SOC'Y 711, 717–19 (2010); Andy Cook et al., *London's Legal Elite: Recruitment Through Cultural Capital and the Reproduction of Social Exclusivity in City Professional Service Fields*, 44 ENV'T & PLAN. 1744, 1750–58 (2012); Webley et al., *supra* note 6.

deserves is so instantiated that there is little critical reflection on the proxies that are used, on personal complicity in the division of labor and status, and on the iron grip of the market.<sup>100</sup> Even were the state to return to the politics of social justice, would much of the commercially orientated profession be prepared to reflect on its use of (some) law graduates as human resources to extract surplus value to fuel their profit streams? The “over supply” of law graduates is useful cover for a project that seeks to innovate in its delivery of services, increase productivity through greater work intensification, and reduce the number of highly paid staff.<sup>101</sup> Where possible it will reduce exposure to low profit work and focus on global markets where greater profits are available—it will hire lawyers who appeal to the elites that they serve. But can the market also deliver for everyday consumers, at a price they can afford and at a quality that protects their interests?

CONCLUSIONS: REGULATION, EQUALITY, DIVERSITY,  
AND INCLUSION IN THE LEGAL MARKET

The LSA 2007 produces a series of interesting paradoxes: marketization; greater understanding of reserved and unreserved activities by those outside the profession; the potential to increase access to a legal career for marginalized groups; and the potential for greater access to legal redress at the right price for consumers. A lack of professional body engagement with structural inequality in admission to the profession, and also to an extent in terms of access to justice, has begun to erode its monopoly status as the gatekeeper for all legal professionals. Supermarkets such as the Co-operative are introducing high street law practice to the public and are hiring lawyers of all levels of qualification, admission status, and socioeconomic and university background (including non-graduates), to provide those services. Professional bodies have understandably begun a call to arms to reduce the influx of “unqualified” legal advisers into the market, in part by placing ethics, training, and regulation onto the agenda. Yet, it is in part the established professions’ failure to engage with these issues at an earlier point, the persistent “structured inequality” within the profession, coupled with a lack of a clarion public service ethos, which allowed the state to introduce legislation that removed most of the last vestiges of professional autonomy from once strong organizations. But old status hierarchies persist in some sections of the market as the aura of the old professions and the old hierarchies within them give a prestige that can be leveraged. They will continue to operate gatekeeper-closure measures so as to filter potential members of their professions for as long as they yield value. Over time, CILEx may yet challenge this in high street and everyday

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100. See Stephen Ackroyd & Daniel Muzio, *The Reconstructed Professional Firm: Explaining Change in English Legal Practices*, 28 *ORG. STUD.* 729, 739–41 (2007); Hilary Sommerlad, *The Commercialisation of Law and the Enterprising Legal Practitioner: Continuity and Change*, 18 *INT’L J. LEGAL PROF.* 73, 76–77 (2011).

101. See Clarke, *supra* note 10, at 54–55.

legal contexts, but it is unlikely to dent the corporate sphere to any great degree.

Neoliberalism has diversified the range of options that clients and would-be lawyers have open to them, but individuals are required to make choices and to take responsibility for those choices. Low-income and first-time consumers will struggle without adequate signposting of differences between the regulated and unregulated sector, even if they can find services at a price they can afford. The limited nature of the LeO jurisdiction creates a distortion that means that the market is neither truly free, nor truly regulated, for the benefit of consumers. And would-be admitted professionals can do little to overcome the market distortions of the training contract and pupillage control mechanism unless and until the market provides them with a power base from which to seek change. The ideology of neoliberalism has won through, but the bureaucratic responses have yet to allow the market to function as an inclusive market. The question Stephanie Lee Mudge poses is not the historic “how much state,” but the contemporary “how much market” do we need?<sup>102</sup> How much regulatory intervention is required so as to allow all would-be legal professionals to be judged on the basis of their competence and productivity, rather than their background and status? And how much regulatory intervention is required so as to allow all consumers to be full actors in the market to choose services on the basis of quality and costs to secure their legal rights and access justice?

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102. See Mudge, *supra* note 24, at 724.