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LOST AND FOUND: DAVID HOFFMAN AND THE HISTORY OF AMERICAN LEGAL ETHICS

by

Michael Ariens*

Abstract

David Hoffman was a successful Baltimore lawyer who wrote the first study of American law in 1817 and authored the first maxims of American legal ethics. Yet for more than a century after his death, Hoffman was a forgotten figure to American lawyers. Beginning in the late 1970s, Hoffman was re-discovered, and his writings on legal ethics have been favorably cited.

How and why was Hoffman “lost” to American law for over a century, and why he was “found”? Hoffman was lost to history because his view of ethics was premised on republican virtue, specifically the concept of honor. A lawyer acted honorably if his actions were morally sanctioned. Thus, Hoffman concluded a lawyer should refuse to plead the statute of limitations because, though legal, such action was dishonorable. When Hoffman wrote his maxims of legal ethics, the concept of honor was being displaced by individualism. The test of lawyer behavior became private conscience rather than public honor. This turn was accompanied by a second shift, in which lawyers accepted that legal ethics differed from public morality. Though an “officer of the court,” the lawyer’s foremost duty was to serve his client’s private interests, and the lawyer was not morally accountable to the public for the client’s goals. One consequence of these changes was the profession’s agreement that lawyers owed a duty to their clients to plead all legal claims and defenses. This vision left Hoffman behind.

Hoffman was found in response to a crisis within the modern American legal profession. By the late 1970s, many lawyers feared that the liberal ideal of the lawyer as a morally

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neutral, zealous agent (or “hired-gun”) effectuating a client’s goals ignored the lawyer’s duties to the public. This crisis was exacerbated by two events: Watergate, in which lawyers blindly followed the demands of their client, the President, to society’s detriment, and the ABA’s decision in 1978 to replace its 1969 Code of Professional Responsibility, because the Code embraced the “fiction” that ethical issues were “matters of ethics rather than law.” Because Hoffman concluded a lawyer’s duty to a client was limited by his duties to society, he was used as a relevant, historical example of an ethics of advocacy contrary to the “standard conception” of liberal neutrality. Hoffman was a touchstone justifying an ethics of virtue, of lawyers serving the ends of justice, not merely serving their client’s goals.

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I. INTRODUCTION

David Hoffman (1784-1854) founded the University of Maryland Law School, authored *A Course of Legal Study* (1817), the first methodical introduction to the study of American law, successfully practiced law in Baltimore, and in 1836 wrote the first

maxims of legal ethics, fifty *Resolutions in Regard to Professional Deportment*.¹ Yet when a two-volume history of the Maryland bench and bar was published in 1901, Hoffman was ignored.²

After disappearing for over a century, American lawyers and legal scholars rediscovered Hoffman. Since the late 1970s Hoffman has been regularly and favorably cited as a guide to overcoming ethical woes in the American legal profession.³

How and why was David Hoffman “lost” to American law for over a century, and why he was then “found”? Hoffman was lost because his view of ethics was premised on virtue, specifically the concept of honor, an ideal that was fading even as he wrote. A gentleman was accorded honor by the public based on its perception that his actions were right. Actions falling below the standard of public morality were dishonorable. Thus, “What is morally wrong, cannot be professionally right, however it may be sanctioned by time or custom” (Resolution XXXIII).⁴ Hoffman’s aristocratic belief system was being displaced in an emerging age

¹See David Hoffman, *A COURSE OF LEGAL STUDY* (Baltimore, Coale & Maxwell 1817); [Joseph Story,] *A Course of Legal Study Respectfully Addressed to the Students of Law in the United States*, 6 N. AM. REV. 45 (1817)(praising book); David Hoffman, *A COURSE OF LEGAL STUDY* 744 (2 vols. Baltimore, Joseph Neal 2d ed. 1836)(listing Resolutions).

On David Hoffman, see Maxwell Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 MD. L. REV. 673 (1979); Thomas L. Shaffer, *David Hoffman’s Law School Lectures, 1822-1833*, 32 J. LEGAL EDUC. 127, 127 n.1 (1982)(listing biographical references to Hoffman); Francis S. Philbrick, *Hoffman, David*, 9 DICTIONARY OF AMERICAN BIOGRAPHY 111 (20 vols. Dumas Malone ed. 1932); Bill Sleeman, *David Hoffman: A Biographical Sketch* in *DAVID HOFFMAN: LIFE, LETTERS AND LECTURES AT THE UNIVERSITY OF MARYLAND, 1821-1837*, at 13-55 (Bill Sleeman ed. 2011); Howard Schwerber, *Hoffman, David*, in *YALE BIOG. DICT. OF AMER. LAW* 267 (Roger K. Newman ed. 2009).

²Conway Whittle Sams & Elihu Samuel Riley, *THE BENCH AND BAR OF MARYLAND: A HISTORY, 1634-1901* (2 vols. 1901). Hoffman was also unmentioned in the copious *THE BIOGRAPHICAL CYCLOPEDIA OF REPRESENTATIVE MEN OF MARYLAND AND DISTRICT OF COLUMBIA* (Baltimore, National Biographical Publishing Co. 1879), and is absent from the eight volume 1907-1909 series *GREAT AMERICAN LAWYERS*.

When the ABA adopted its Canons of Professional Ethics in 1908, it noted Hoffman’s contribution but announced that its work was derived not from Hoffman, but from the later work of Pennsylvania Judge George Sharswood. See *Transactions of the Thirty-first Annual Meeting of the American Bar Association*, 33 A.B.A. REP. 3, 56 (1908).

³See Michael Ariens, *American Legal Ethics in an Age of Anxiety*, 40 ST. MARY’S L.J. 343, 350-363 (2008).

⁴Hoffman, *LEGAL STUDY*, at 765.

of individualism, in which public honor was supplanted by private conscience.⁵

In the 1830s Alexis de Tocqueville noted, “[I]n ages of equality, every man finds his beliefs within himself, and ... all his feelings are turned in on himself.”⁶ Ralph Waldo Emerson wrote in his journal in 1827, “It is the age of the first person singular.”⁷ In the age of individualism, private interests were primary. Whether a lawyer behaved ethically became a test of private conscience, not public honor.⁸ This turn was accompanied by a second shift, in which lawyers accepted that legal ethics differed from public morality. The foremost duty of a lawyer was to serve his client’s private interests, and the lawyer was not morally accountable to the public for the client’s goals. As early as the 1840s, these shifts to liberalism began leaving Hoffman behind.⁹ Hoffman was so forgotten that when his *Resolutions* were reprinted in 1953 the legal historian Arthur Sutherland commented that it was “a document which should be more widely known.”¹⁰ Hoffman’s

⁵See Alexis de Tocqueville, *DEMOCRACY IN AMERICA* 506-09 (J. P. Mayer ed. George Lawrence trans. 1969)(1966)(noting rise of “individualism,” coined by Tocqueville, and discussing relation between individualism and democratic society); Lawrence Frederick Kohl, *THE POLITICS OF INDIVIDUALISM* 6-13 (paper ed. 1989)(discussing rise of modern American, the “inner-directed individual”).

⁶Tocqueville, at 506. *See also id.* at 508 (“Each man is forever thrown back on himself alone, and there is danger that he may be shut up in the solitude of his own heart.”).

⁷Daniel Walker Howe, *MAKING THE AMERICAN SELF: JONATHAN EDWARDS TO ABRAHAM LINCOLN* 107 (paper ed. 2009 (1997))(quoting Emerson).

⁸See Timothy Walker, *Ways and Means of Professional Success: Being the Substance of a Valedictory Address to the Graduates of the Law Class, in the Cincinnati College*, 1 W. L.J. 542, 547 (1844)(urging lawyer should act so he is “justified at the bar of my own conscience, whatever others may think of my conduct”); *The Practice of the Bar*, 9 Monthly L. Rep. 241, 241 (1846)(asking “to be delivered from self-styled conscientious lawyers, who will engage for no parties that are not morally right”).

⁹John T. Brooke, *THE LEGAL PROFESSION: ITS MORAL NATURE, AND PRACTICE CONNECTION WITH CIVIL SOCIETY* 15 (Cincinnati, H. W. Derby & Co. 1849)(“The question then is, can a conscientious man, in view of this law of love, bind himself by an oath, to execute, as a judge, a *system* of law, which, although on the whole, wise and good, will *occasionally, incidentally* and *unavoidably*, conflict with the moral rights of individuals?”); George Sharswood, *A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF LAW* (Philadelphia, T. & J. W. Johnson 1854).

¹⁰Arthur E. Sutherland, *Book Review*, 54 COLUM. L. REV. 147, 151 (1954). He was not the only legal historian to ignore Hoffman. In J. Willard Hurst, *THE GROWTH OF THE LAW: THE LAW MAKERS* (1950), the first history of American law, Hurst discusses legal ethics, but never mentions Hoffman. He mentions Sharswood. Hoffman received prominent coverage in Perry Miller, *The Life of the Mind in*

legal ethics weren't widely known because they were contrary to the dominant ethic of lawyer behavior.

Hoffman was found in response to a crisis within the American legal profession. By the late 1970s, many lawyers feared that the liberal ideal of the lawyer as a zealous agent for a client¹¹ ignored the lawyer's duties to society. This crisis was exacerbated by two events: Watergate, in which lawyers blindly followed the demands of their client, the President,¹² to society's detriment, and the ABA's decision in 1978 to replace its 1969 Code of Professional Responsibility, because the Code embraced the "fiction" that ethical issues were "matters of ethics rather than law."¹³

One criticism of the ABA's 1983 Model Rules of Professional Conduct was its emphasis that a lawyer's ethical duty was almost wholly to one's client.¹⁴ Some critics concluded the Model Rules created an ethic of "winning at all costs," and encouraged "Rambo"-style litigation tactics, which many decried by the late 1980s.¹⁵

America from the Revolution to the Civil War ch. 2 (1965), but Miller ignored Hoffman's work on legal ethics.

¹¹The liberal defense of the lawyer as agent of the client is explicated in Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relations*, 85 *Yale L.J.* 1060 (1976) and Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1985 *Am. B. Found. Res. J.* 613.

¹²See David R. Brink, *Who Will Regulate the Bar?*, 61 *A.B.A. J.* 936, 937 (1975) ("[I]f Watergate has not tarnished the image of lawyers, at least it has acutely intensified public consciousness of questions of legal ethics and professional accountability."); Jethro K. Lieberman, *CRISIS AT THE BAR* 35 (1978) ("More than twenty-five lawyers were formally named as defendants or co-conspirators in Watergate and related criminal proceedings."). See generally Kathleen Clark, *Legacy of Watergate for Legal Ethics Instruction*, 51 *HASTINGS L.J.* 673 (2000).

¹³L. Ray Patterson, *Wanted: A New Code of Professional Responsibility*, 63 *A.B.A. J.* 639, 639 (1977).

¹⁴See Michael Ariens, "Playing Chicken": *An Instant History of the Battle Over Exceptions to Client Confidences*, 33 *J. LEGAL PROF.* 239, 253-55 (2009) (detailing history of expansion of protection of client confidences over interests of others).

¹⁵FIRST BLOOD starring Sylvester Stallone as John Rambo was released in 1982. RAMBO: FIRST BLOOD II was released in 1985. The sequel made three times the domestic revenue as the original. Its success led to lawyers calling "winning at all costs" behavior Rambo litigation. See, e.g., Robert N. Sayler, *Rambo Litigation: Why Hardball Tactics Won't Work*, *A.B.A. J.*, Mar. 1988, at 79; John J. Curtin Jr., *Civil Matters: A Message from the President*, *A.B.A. J.*, Aug. 1991, at 8 (discussing Seventh Circuit report on Rambo litigation tactics and noting he had addressed issue seven years earlier when chair of ABA Litigation Section); Judge Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17

An important reaction to this professionalism crisis was to promote an ethic of lawyerly virtue.¹⁶ Because Hoffman concluded a lawyer's duty to a client was limited by his duties to society, he was used from the late 1970s on as an example of an historical ethic contrary to the "standard conception"¹⁷ of liberal neutrality in representing clients.

Part II of this article discusses Hoffman's *Resolutions* in light of the antebellum history of Baltimore and Maryland and Hoffman's professional career and personal fortunes. Part III traces the disappearance of Hoffman in legal ethics debates from the mid-nineteenth century through the first seven decades of the twentieth century. Part IV provides a historical context for the revival of Hoffman's *Resolutions*, particularly the transformation of the American legal profession beginning in the 1970s. Part V offers a brief conclusion.

II. BALTIMORE AND THE HISTORY OF HOFFMAN'S *RESOLUTIONS*

David Hoffman was born in 1784, the youngest of twelve children. By then his father Peter, a German immigrant, had moved the family from Frederick, Maryland to Baltimore and opened a dry goods business.¹⁸ His timing was excellent. The newly-formed United States needed goods to supply its army. Baltimore was not occupied by the British, and its merchants made substantial profits

PEPP. L. REV. 637 (1990)(decrying "unfair tactics and intimidation" and urging effort to discourage "Rambo" attitude). The "hired gun" served as a metaphor for zealous advocacy. See Thomas L. Shaffer & Robert F. Cochran, Jr., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 16-30 (2d ed. 2009); David Luban, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 166 (1988)("[T]he role of legal hired gun is morally untenable.")

¹⁶See *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* (David Luban ed. 1983); Luban, *LAWYERS AND JUSTICE*; William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 *Wis. L. Rev.* 29.

¹⁷See Luban, *LAWYERS AND JUSTICE*, at xx (concluding standard conception allowed a lawyer to exhibit "extreme partisan zeal on behalf of the client" and who bore "no moral responsibility for the client's goals or the means used to attain them"). See generally Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 *NYU L. Rev.* 63 (1980) and David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 *Am. B. Found. Res. J.* 637 (suggesting lawyers should be held morally responsible for the goals of their clients).

¹⁸BALTIMORE: PAST AND PRESENT WITH BIOGRAPHICAL SKETCHES OF ITS REPRESENTATIVE MEN 295-96 (Baltimore, Richardson & Bennett 1871).

during the War of Independence.¹⁹ Peter Hoffman later opened Peter Hoffman and Sons, a trading business with offices in Baltimore and London.²⁰ Though its rise was recent, the Hoffman family was one of leading merchant families of Baltimore.²¹ The Hoffmans were one of “a cluster of families [that] emerged ... as the unchallenged leaders of Baltimore’s aristocracy.”²² David Hoffman was raised as a member of this social and economic elite, which had replaced the traditional Maryland planter aristocracy.

When Hoffman became a member of the bar in the early nineteenth century, he joined a relatively small but rapidly growing (the number of lawyers in Baltimore increased from sixteen to forty-three between 1799 and 1810) body.²³ Baltimore lawyers came from its aristocracy, but this expansion in the number of lawyers did not signify that “any corresponding democratization of personnel or mores took place.”²⁴ Lawyers and merchants constituted a “conservative republicanism,”²⁵ believing that elites were to govern for the benefit of society. Baltimore lawyers were almost always gentlemen,²⁶ due to the stringent Maryland statutory limitations on becoming a lawyer.²⁷ The 1817-18 *Baltimore Directory* listed David Hoffman among a group of just forty

¹⁹Frank A. Cassell, *The Structure of Baltimore’s Politics in the Age of Jefferson, 1795-1812*, in *LAW, SOCIETY, AND POLITICS IN EARLY MARYLAND* 277, 278 (Aubrey C. Land, Lois Green Carr, and Edward C. Papenfuse eds. 1977).

²⁰BALTIMORE: PAST AND PRESENT, at 296.

²¹Gary Lawson Browne, *BALTIMORE IN THE NATION, 1789-1861* at 12 (1980).

²²*Id.* See also Whitman H. Ridgway, *COMMUNITY LEADERSHIP IN MARYLAND, 1790-1840*, at 222 (1979)(noting Peter Hoffman’s influence in Baltimore).

²³Browne, *BALTIMORE IN THE NATION*, at 59.

²⁴Bloomfield, *Republican Legal Culture*, at 677.

²⁵Charles G. Steffen, *THE MECHANICS OF BALTIMORE: WORKERS AND POLITICS IN THE AGE OF REVOLUTION, 1763-1812* at xii (1984).

²⁶A few exceptions existed. See Wilbur Harvey Hunter, *A BALTIMORE LAW FIRM: A BRIEF HISTORY OF HINKLEY AND SINGLEY AND ITS PREDECESSORS, 1817-1967*, at 9 (1967)(noting arrival of Edward Hinkley in Baltimore “about 1815” and his admission to the bar on March 25, 1817, just two years later).

²⁷Ch. XLVIII, § XII, 1 George I, Acts of April 1715, at 128, 132 (requiring admission to the bar to practice law before the courts); Dennis R. Nolan, *The Effect of the Revolution on the Bar: The Maryland Experience*, 62 Va. L. Rev. 969, 993 (1976)(“One other factor that may have helped keep the bar’s reputation intact was Maryland’s continued insistence on three years of law study under the supervision of a practicing attorney and an examination for fitness prior to admission to the bar.”); 2 Anton-Hermann Chroust, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 37 (2 vols. 1965). See Sams & Riley, at 245 (noting 1831 statutory changes to eligibility for admission to the bar).

attorneys.²⁸ Five years later, he was one of fifty-six.²⁹ This was a small, elite group for the third largest city in the nation, numbering over 62,000 people by 1820.

Hoffman's *Resolutions* was published in the second edition of *A Course of Legal Study* in 1836. They are in part a response to the end of conservative republicanism in Maryland. As discussed in section II.E., Hoffman's published diatribes against Andrew Jackson reflect his rearguard action to reclaim the place of the gentleman aristocrat. Initial attacks on aristocratic rule in Maryland helped precipitate the transformative 1812 Baltimore riot.³⁰ By the early 1830s, Hoffman concluded his position at the University of Maryland Law School was untenable. Soon thereafter, he suffered great personal loss when his only son died.³¹ In 1835, Baltimore went through its wrenching Bank Riot, which confirmed Hoffman's dark view of the baleful consequences of Jacksonian democracy.³² Hoffman's legal practice apparently also entered a steep decline after 1830. These personal and professional circumstances all influenced Hoffman's *Resolutions*.

A. Baltimore, 1790-1812

Baltimore was a small provincial town when the United States declared independence. In part because it was unoccupied during the War of Independence, its merchants "made immense profits fulfilling government contracts" for military provisions.³³ The first census in 1790 listed 13,503 persons in Baltimore City,

²⁸THE BALTIMORE DIRECTORY, FOR 1817-18 passim & 91 (Baltimore, James Kennedy printer 1817). Thanks to Brian Detweiler for compiling the list of attorneys from the *Directory*.

²⁹C. KEENAN'S BALTIMORE DIRECTORY, FOR 1822-23 (Baltimore, R. J. Matchett 1822).

³⁰See Paul A. Gilje, *The Baltimore Riots and the Breakdown of the Anglo-American Mob Tradition*, 13 J. SOC. HIST. 547 (1980) and Paul A. Gilje, RIOTING IN AMERICA 60-63 (1996)(both noting change in rioting); Paul A. Gilje, 'Le Menu Peuple' in America: *Identifying the Mob in the Baltimore Riots of 1812*, 81 MD. HIST. MAG. 50 (1986); Frank A. Cassell, *The Great Baltimore Riot of 1812*, 70 MD. HIST. MAG. 241 (1975); Steffen, *MECHANICS OF BALTIMORE*, at 243-50.

³¹DAVID HOFFMAN: LIFE, LETTERS AND LECTURES, at 13-55; see Philbrick, *Hoffman*, at 111.

³²Robert E. Shalhope, *THE BALTIMORE BANK RIOT: POLITICAL UPHEAVAL IN ANTEBELLUM MARYLAND* (2009). See generally Michael Feldberg, *THE TURBULENT ERA: RIOT AND DISORDER IN JACKSONIAN AMERICA* (1980) and Leonard L. Richards, "GENTLEMEN OF PROPERTY AND STANDING": ANTI-ABOLITION MOBS IN JACKSONIAN AMERICA (1970).

³³Cassell, *Structure of Baltimore's Politics*, at 278; Nolan, *Effect*, at 990.

which doubled to 26,514 in 1800 and increased to 46,555 in 1810.³⁴ Baltimore embraced a variety of peoples creating a society “new, raw, and constantly in flux.”³⁵ Divisions in society were apparent early, and made more prominent by the rise of a two-party system in Baltimore City by the end of the eighteenth century, the ascendant Jeffersonian Republicans and the aristocratic Federalists.

In 1796, the Maryland legislature granted corporate status to Baltimore City, which gave to the City for the first time some powers of self-governance.³⁶ Though this act would eventually redound to the benefit of “mechanics,” skilled workingmen and small manufacturers, the legal shift accorded Baltimore City was not accompanied by a social shift. Instead, “society was the status elite,” an exclusive group that controlled (at least initially) the politics of the City. The status elite largely consisted of merchants and lawyers. The composition of the political elite changed over the first decade of the City’s corporate existence as the social status of the representatives in the city council changed. Jeffersonian Republicans eventually dominated the municipal administration, and those Republicans were more often tradesmen and mechanics than merchants or lawyers. Republican representatives “used democratic rhetoric to gain support for their own goals,”³⁷ which mercantile and professional elites found anathema. But even as political representation changed, merchants, lawyers and other professionals remained the occupational groups with the largest wealth in Baltimore City during the first two decades of the nineteenth century. They also continued to possess significant social authority.³⁸

In mid-1807, a British warship attacked the frigate *Chesapeake* off Norfolk, Virginia, impressed four sailors from the *Chesapeake*, and hobbled the ship. About the same time Aaron Burr was indicted in Virginia for treason by a grand jury, and news

³⁴POPULATION OF MARYLAND: BALTIMORE CITY AND COUNTIES, 1790-1949, at 29 (Maryland Planning Commission 1949).

³⁵Cassell, *Structure of Baltimore’s Politics*, at 278.

³⁶Browne, BALTIMORE IN THE NATION, at 34.

³⁷*Id.* at 43. See generally Cassell, *Structure of Baltimore’s Politics*.

³⁸Steffen, MECHANICS OF BALTIMORE, at 16 (Table 4, listing mean wealth in 1804 and 1815); see also Ridgway, COMMUNITY LEADERSHIP, at 71-95.

of both events reached Baltimore on the same day.³⁹ In Republican Baltimore City, the attack on the Chesapeake confirmed the majority's allegiance to President Jefferson and Republicans. In the fall, lawyer Luther Martin returned to Baltimore, having successfully defended Burr in his treason trial.⁴⁰ Part of Martin's defense of Burr included steady invective against Thomas Jefferson, who Martin earlier accused of acting like the hated King George III.⁴¹ Upon his return, Martin immediately renewed his attack on Jefferson. He also defended the conduct of Chief Justice (and Federalist) John Marshall in a notice in the Federalist press. Martin declared, "We have proved that in America there are lawyers who cannot be intimidated by fear of presidential vengeance, nor by the phrenzy of a deceived, misguided people. From securing even to those destined to be the victims of power, those rights for the enjoyment of which the constitution is and ought to be their sacred honor and inviolate pledge."⁴² Martin's statements were accurately perceived by Baltimore Republicans as directly attacking Jefferson. The result was a riot, similar to a 1794 Baltimore riot.

Disputes between Federalists and Jeffersonian Republicans in Baltimore City intensified. By 1808, journeymen mechanics, often propertyless, became more militant. Federalists were aghast at the tarring and feathering of an Anglophile shop foreman named Robert Beatty by several members of a shoemakers' society, and the next year members of the Union Society of Journeymen Cordwainers were indicted for conspiracy.⁴³ Republicans criticized the violence, but generally sympathized with the shoemakers.⁴⁴ An essay by "A Journeyman Cordwainer" analogized the action

³⁹Cassell, *Structure of Baltimore's Politics*. Two years earlier, Martin had successfully represented Supreme Court Justice Samuel Chase, a Federalist, in his Senate impeachment trial. See William H. Rehnquist, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JACKSON 23 (1992).

On Martin, see Edward S. Delaplaine, *Martin, Luther*, 12 DICTIONARY OF AMERICAN BIOGRAPHY at 343; Gregory A. Stiverson, *Martin, Luther*, in YALE BIOG. DICT. OF AMER. LAW at 364. See generally Bill Kauffman, FORGOTTEN FOUNDER, DRUNKEN PROPHET: THE LIFE OF LUTHER MARTIN (2008).

⁴⁰See generally R. Kent Newmyer, THE TREASON TRIAL OF AARON BURR (2012); Peter Charles Hoffer, THE TREASON TRIALS OF AARON BURR (2008).

⁴¹Newmyer, TREASON TRIAL, at 149.

⁴²Steffen, MECHANICS OF BALTIMORE, at 232 (quoting Martin).

⁴³*Id.* at 209.

⁴⁴*Id.* at 220.

against Beatty with the tarring and feathering of Tories during the Revolution. He argued that on occasion “the people could not permit justice to be stymied in the courts; they had to take matters into their own hands.” A Journeyman Cordwainer concluded: “I am serious. I think the discretionary law of tarring, &c. is a happy general supplement to particular law, providing for heinous offences which would otherwise escape punishment.”⁴⁵ Though the defendants were found guilty of assault in January 1809, the governor pardoned them after three days in jail. Beatty was then tried for perjury but acquitted.⁴⁶

In June 1809, the Union cordwainers struck two shoemakers, James Sloan and Angello Atkinson, who employed journeymen who did not belong to the Union. Sloan was a well known Federalist, and Republicans continued to support the strikers. One of the non-Union journeymen, John Davidson, claimed a criminal conspiracy by the Union to prevent him from obtaining a job, and the Baltimore County Criminal Court issued thirty-seven indictments against Union members.⁴⁷ The Union hired Luther Martin to represent them, and though only one journeyman was tried, the conviction of Union President George Powly apparently led to its demise.⁴⁸

B. The Baltimore Riots of 1812

In 1808, Alexander Contee Hanson Jr. founded the *Federal Republican*, “an extreme Federalist journal on almost every count.”⁴⁹ Hanson was a member of Baltimore and Maryland’s aristocratic elite, and the *Federal Republican* delighted in skewering Republicans and their supporters, often designated “THE RABBLE,” and attacked radical “democracy.”⁵⁰ The *Federal Republican* was also committed to promoting British interests. Hoffman and Hanson were strong political allies and likely friends. They apparently attended St. John’s College in

⁴⁵*Id.* On the various labor conspiracy cases in the early federal period, see Christopher L. Tomlins, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* 128-79 (1993).

⁴⁶Steffen, *MECHANICS OF BALTIMORE*, at 221.

⁴⁷*Id.* at 222.

⁴⁸Steffen, *MECHANICS OF BALTIMORE*, at 223.

⁴⁹Jeffrey L. Pasley, “THE TYRANNY OF PRINTERS”: NEWSPAPER POLITICS IN THE EARLY AMERICAN REPUBLIC 241 (2001).

⁵⁰*Id.*

Annapolis at the same time, both were Federalists, both were lawyers and both were from aristocratic families. And both believed in governance by the elite, not the masses.⁵¹

On June 18, 1812, President James Madison declared war against Great Britain. Republican Baltimore strongly supported war, but Hanson raged against it: “We are avowedly hostile to the administration of James Madison, and we never will breathe under the dominion, direct or derivative, of Bonaparte, let it be acknowledged when it may.”⁵² On June 22, between thirty and forty men demolished the paper’s printing office, and Hanson escaped to the District of Columbia, where he again began printing.⁵³ At this point, the riot was channeled within its traditional limits, for the mob focused on the destruction of property rather than people.⁵⁴

Instead of disbanding, the mob gathered most nights for a month in search of various targets, property selected by factions of the mob. Then, on July 26, Hanson and other Federalists returned to Baltimore, and the next day they distributed an edition of the *Federal Republican* that appeared to be printed on Charles Street in Baltimore. (It was actually published in Georgetown.) Hanson and his supporters then barricaded themselves in the Charles Street building, and waited to see if the mob would respond. It did.⁵⁵

By daybreak on July 28, Thaddeus Gale and John Williams had been shot to death by defenders of the *Federal Republican*, and Hanson and his supporters had agreed to surrender. Some of Hanson’s supporters successfully fled the Charles Street building, but others were captured by the mob and beaten. Some members of the mob demanded death for “every ‘monarchist’ and ‘aristocrat’ it could lay its hands on.”⁵⁶ Twenty-seven year old David Hoffman was one of those escapees whom the mob caught and nearly hanged.⁵⁷ Hanson and about two dozen others were taken to jail.

⁵¹Bloomfield, *Republican Legal Culture*, at 676.

⁵²Pasley, TYRANNY OF PRINTERS, at 246.

⁵³Cassell, *Great Baltimore Riot*, at 244-45; Gilje, *Baltimore Riots of 1812*, at 548-49.

⁵⁴*Id.* at 549-50.

⁵⁵*Id.* at 552; Cassell, *Great Baltimore Riot*, at 247.

⁵⁶Robert J. Brugger, MARYLAND: A MIDDLE TEMPERAMENT, 1634-1980, at 178 (1988).

⁵⁷John Neal, WANDERING RECOLLECTIONS OF A SOMEWHAT BUSY LIFE 206 (Boston, Roberts Bros. 1869)(noting the riot “where Professor Hoffman would have been strung up, without judge or jury, on a tree-branch, yet overhanging Jones’s Falls,

That night, the mob entered the jail and beat to death James Maccuban Lingan, a general in the Revolutionary War. Members of the mob also severely beat Light Horse Harry Lee, another, more famous Revolutionary War general (and the father of Robert E. Lee), as well as other Federalists, including Hanson.⁵⁸

After the riots were finally quelled in early August, the recriminations began. Federalists used Lingan's death to win a majority in the Maryland House of Delegates,⁵⁹ and the lessons of the riots for Federalists were that all extralegal violence must be rejected and that only force was sufficient to halt mob violence. The first lesson was a lesson about the primacy of law over custom. When the mob began demolishing the *Federal Republican's* initial printing house in June, the Republican mayor, Edward Johnson, urged the mob to stop. In reply, one man said, echoing A Journeyman Cordwainer, "Mr. Johnson, I know you very well, no body wants to hurt you; but the laws of the land must sleep, and the laws of nature and reason prevail."⁶⁰ This echo of earlier statements reflected a view abhorrent to Federalists. The mob deferred neither to the elite, nor to a common idea of law, but asserted an authority to govern and to govern beyond the common law.⁶¹ The title of a report of the Committee of Grievances and Courts of Justice of the Maryland House of Delegates condemning the riot captured the view of aristocratic republican elites: *A Portrait of the Evils of Democracy, Submitted to the Consideration of the People of Maryland*.⁶²

C. Hoffman and Professional Department, 1810-1837

but for the providential interference of a stranger, who satisfied the murderers that they had got hold of the wrong man." See also Brugger, MIDDLE TEMPERAMENT, at 178 (noting Hoffman and others joined Hanson, and many, including Hoffman, barely escaped death).

⁵⁸Gilje, *Baltimore Riots of 1812*, at 555; Cassell, *Great Baltimore Riot*, at 256. The riot was noted by Alexis de Tocqueville in his *Democracy in America* as an "example of the excesses to which despotism of the majority may lead." See Tocqueville, DEMOCRACY IN AMERICA at 252 n.4 .

⁵⁹Gilje, *Baltimore Riots of 1812*, at 556; Cassell, *Great Baltimore Riot*, at 259.

⁶⁰Gilje, *Baltimore Riots of 1812*, at 549.

⁶¹This is suggested indirectly in Daniel J. Hulsebosch, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664-1830, at 229 (2005)(noting Federalists hoped the Constitution would "create neither a government of men nor one of law but rather one of men governed by a common understanding of law").

⁶²A PORTRAIT OF THE EVILS OF DEMOCRACY, SUBMITTED TO THE CONSIDERATION OF THE PEOPLE OF MARYLAND (Baltimore, n.p. 1816).

When *A Course of Legal Study* was published in 1817, Hoffman had been married for over a year, and his wife, Mary McKean, from a prominent Philadelphia family, had given birth to their first child, a son. In a letter from the mid-1820s, Hoffman claimed that he earned \$9,000 per year from 1818 through 1823, which if true made him one of Baltimore's wealthiest lawyers.⁶³ Though he had not yet lectured there, in 1814 Hoffman was appointed Professor of Law at the new University of Maryland.⁶⁴ *A Course of Legal Study* was immediately and lavishly praised for its learnedness, most importantly in the *North American Review* in an unsigned review by Supreme Court Justice Joseph Story.⁶⁵

Hoffman's only reference to professional deportment in the first edition of *A Course of Legal Study* came in the last "Auxiliary Subject." This Auxiliary Subject began with a short introduction from Hoffman, which spoke in optimistic terms concerning the legal profession.⁶⁶ A lawyer undertook proper conduct when he acquired "liberal knowledge," for such knowledge was equated with "honourable views."⁶⁷

Four years later, Hoffman published his *Syllabus of a Course of Lectures*. The last lecture (the 301st) was intended to be devoted to the topic of professional deportment.⁶⁸ Although several lectures included some detail, this lecture included just its title. In late 1822, Hoffman began his course of lectures at the University of Maryland. His introductory lecture to his course of legal study was published a year later,⁶⁹ and two additional lectures and an address to law students were published between 1824 and 1826.⁷⁰ Between 1822 and 1832 he also represented

⁶³Bloomfield, *Republican Legal Culture*, at 678.

⁶⁴*Id.*

⁶⁵[Story,] *A Course of Legal Study*. One anonymous review published in the Baltimore-based *Portico* was highly critical. 3 *THE PORTICO* 192 (1817).

⁶⁶Hoffman, *LEGAL STUDY*, at 324-34.

⁶⁷*Id.* at 327.

⁶⁸David Hoffman, *SYLLABUS OF A COURSE OF LECTURES ON LAW*, reprinted in *DAVID HOFFMAN: LIFE, LETTERS AND LECTURES* 61, 156.

⁶⁹David Hoffman, *A LECTURE, INTRODUCTORY TO A COURSE OF LECTURES, NOW DELIVERING IN THE UNIVERSITY OF MARYLAND*, reprinted in *id.* at 157.

⁷⁰David Hoffman, *A LECTURE BEING THE SECOND OF A SERIES OF LECTURES, INTRODUCTORY TO A COURSE OF LECTURES NOW DELIVERING IN THE UNIVERSITY OF MARYLAND*, reprinted in *id.* at 249; David Hoffman, *A LECTURE BEING THE THIRD OF A SERIES OF LECTURES, INTRODUCTORY TO A COURSE OF LECTURES NOW DELIVERING IN*

clients in five separate cases in the Supreme Court of the United States, as well as other clients in the Maryland Court of Appeals.⁷¹ This decade represented Hoffman's peak as a lawyer and legal educator.

Beginning in 1833, personal and professional events buffeted Hoffman. His only son died that year. Although he remained listed as an attorney in the *Baltimore Directory*, his last recorded appearance before any appellate court was in 1832.⁷² He gave his last University of Maryland law lecture in 1833, and then became engaged in a long and serious legal and financial dispute with the University. More generally, the status of and honor bestowed on lawyers was regularly questioned.

One remarkable example of the venom directed at lawyers at this time was *A Letter to the Hon. Rufus Choate*, written in June, 1831, and published as a pamphlet in 1832.⁷³ Choate, a brilliant Massachusetts lawyer and Whig,⁷⁴ was attacked by Democrat and labor leader Frederick Robinson for using the cabal of the "brotherhood of the bar" to prevent Robinson from representing another in court. Robinson made a long and artful argument in favor of opening the bar to all, for limiting its membership was "anti-republican," emblematic of associations whose object is "to settle down society into casts [sic], and render the barriers between

THE UNIVERSITY OF MARYLAND, *reprinted in id.* at 299; David Hoffman, AN ADDRESS TO STUDENTS OF LAW IN THE UNITED STATES, *reprinted in id.* at 249.

⁷¹DAVID HOFFMAN: LIFE, LETTERS AND LECTURES, at 53.

⁷²*Id.* at 26, 29. Hoffman was listed in the MATCHETT'S BALTIMORE DIRECTOR for 1833, 1835, and 1837. See MATCHETT'S BALTIMORE DIRECTOR 92 (Baltimore, 1833); MATCHETT'S BALTIMORE DIRECTOR 123 (Baltimore 1835); MATCHETT'S BALTIMORE DIRECTOR 168 (Baltimore, 1837). His name was listed in the 1842 MATCHETT'S BALTIMORE DIRECTOR, *see id.* at 207, and he is listed as a counsellor in another directory. See CRAIG'S BUSINESS DIRECTORY AND BALTIMORE ALMANAC 105 (Baltimore, J. Robinson 1842). He is not listed in the BALTIMORE DIRECTORY FOR 1845 (Baltimore, John Murphy 1845), when he was living in Philadelphia.

⁷³Frederick Robinson, A LETTER TO THE HON. RUFUS CHOATE, CONTAINING A BRIEF EXPOSURE OF LAW CRAFT, AND SOME OF THE ENCROACHMENTS OF THE BAR UPON THE RIGHTS AND LIBERTIES OF THE PEOPLE (1832).

⁷⁴See Claude M. Fuess, *Choate, Rufus*, in 4 DICTIONARY OF AMERICAN BIOGRAPHY 86 (Dumas Malone ed. 20 vols. 1932); Jean V. Matthews, *Choate, Rufus*, in YALE BIOG. DICT. OF AMER. LAW at 105; Joseph Hodges Choate, *Rufus Choate*, in 3 GREAT AMERICAN LAWYERS 531 (William Draper Lewis ed. 8 vols. 1907); Daniel Walker Howe, THE POLITICAL CULTURE OF THE AMERICAN WHIGS 225-35 (paperback ed. 1979); Claude M. Fuess, RUFUS CHOATE: THE WIZARD OF THE LAW (1928); Jean V. Matthews, RUFUS CHOATE: THE LAW AND CIVIC VIRTUE (1980).

them impassable; to form society into aristocratic, subordinate gradations, and ‘order,’ and to fix insuperable boundaries between them. But the basis of our community is equality, and not subordination.”⁷⁵ The bar was a part of a powerful aristocracy that “saps the liberties of the people,” and whose members “exalt themselves and [] degrade and debase the rest of our species,” to “distinguish themselves, from what they call ‘the common herd, the mob, the vulgar, the rabble, &c.’”⁷⁶ Robinson took a similar tone in an 1834 oration to trade union members, in which he attacked the monopoly of the bar, and claimed “the judiciary in this State [Massachusetts], and in every State where judges hold their office during life, is the headquarters of the aristocracy.”⁷⁷ Robinson’s excoriation of Choate and the legal profession was a paradigmatic example of Jacksonian democracy, of the rejection of rule by an aristocratic elite in favor of a body based on “equality, and not subordination.” It served also as an example of everything David Hoffman opposed.

Law addresses across the nation also changed. Pennsylvania lawyer Job Tyson spoke to the Law Academy of the Philadelphia bar in 1839, opening with, “It is natural to feel a deep solicitude for the repute of a profession, which we have chosen as the business of our lives.”⁷⁸ He began this way because it was true that “[m]any bad men, wearing the panoply of the profession, have been enabled to perpetrate their deeds under its sanction.”⁷⁹ It was crucial that lawyers, “at the darkest period of our political history, when tyranny wore the guise of a necessary tax for the public

⁷⁵Robinson, *A Letter*, at 15.

⁷⁶*Id.* at 16 and n.*.

⁷⁷Frederick Robinson, *A Program for Labor*, reprinted in *SOCIAL THEORIES OF JACKSONIAN DEMOCRACY: REPRESENTATIVE WRITINGS OF THE PERIOD 1825-1850*, at 320, 328 (Joseph L. Blau ed. 1947)(reprinting in part *An Oration delivered before the Trades’ Union of Boston and Vicinity, July 4, 1834* (Boston, 1834)). See also Tomlins, at 191-92 (noting speech and response by Peter Oxenbridge Thacher) and Arthur M. Schlesinger, Jr., *THE AGE OF JACKSON 167-68* (1948)(same). A brief biography of Robinson is found in *SOCIAL THEORIES*, at 374.

⁷⁸Job Tyson, *THE INTEGRITY OF THE LEGAL CHARACTER* 5 (Philadelphia, John C. Clark 1839).

⁷⁹*Id.* at 6. See also John M. Scott, *AN ADDRESS DELIVERED TO THE LAW ACADEMY OF PHILADELPHIA, AT THE OPENING OF THE SESSION, IN SEPTEMBER 1830*, at 7 (Philadelphia, Mifflin & Parry 1830)(“Our profession has suffered deeply from the unworthiness of individuals who have worn its garb without adopting its principles.”). See also Maxwell Bloomfield, *Law vs. Politics: The Self-Image of the American Bar (1830-1860)*, 12 *AM. J. LEG. HIST.* 306 (1968).

good,” cultivate an “elevated honour.”⁸⁰ In 1831 Massachusetts lawyer Emory Washburn spoke to the Worcester Lyceum. He rejected the Jacksonian claim that “rights and privileges are unequally distributed and enjoyed.”⁸¹ Massachusetts lawyer (and later judge) Peter Oxenbridge Thacher defended the law on the ground that it “constitutes the ligament of society,” binding all classes, from merchant and mechanic to lawyer and farmer, and worked as “that great leveller of human arrogance, and equalizer of social right and duty.”⁸² Leveling did not interest Hoffman.

Democratization of the legal profession worked together with political democratization. In 1831, the Maryland legislature reduced the required time of legal apprenticeships to two years.⁸³ The aristocratic argument against relaxing bar admission standards was made by Washburn, who concluded states had a choice between “an enlightened, educated, independent body of men, or a host of self-constituted, noisy and narrow-minded pettifoggers.”⁸⁴ One goal of Hoffman’s was to protect the elevated status of the lawyer in society. But this proved difficult. Writing in 1846, Hoffman declared his “deep conviction that the high tone of the Bar has suffered some impairment.”⁸⁵ His conviction existed in 1837, when Hoffman’s *Miscellaneous Thoughts on Men, Manners, and Things* was published:

The *phobia caudicorum* [fear of lawyers], so prevalent among the lower orders in this and other

⁸⁰Tyson, INTEGRITY at 9, 29.

⁸¹Emory Washburn, A LECTURE, READ BEFORE THE WORCESTER LYCEUM, MARCH 30TH, 1831, at 3 (Worcester, Dorr & Howland 1831). On Washburn, see Robert M. Spector, *Emory Washburn: Conservator of the New England Legal Heritage*, 22 AM. J. LEGAL HIST. 118 (1978); Robert M. Spector, *Washburn, Emory*, in YALE BIOG. DICT. OF AMER. LAW at 574.

⁸²Peter Oxenbridge Thacher, AN ADDRESS, PRONOUNCED ON THE FIRST TUESDAY OF MARCH, 1831, at 17 (Boston, Hilliard, Gray, Little and Wilkins 1831). In late 1834, Thacher, then a judge, responded to Robinson’s July 4 speech by instructing the grand jury that “[e]mployers may not combine against their workmen to depress, by unfair means, their wages; nor may workmen combine against employers, unjustly, to raise them. This is even handed justice, and is as good for the laborer as for the employer.” Tomlins, LAW, LABOR, AND IDEOLOGY, at 193.

⁸³Ch. 268, § 2, Laws of Maryland – 1831, at 1032.

⁸⁴Emory Washburn, *On the Legal Profession in New England*, 19 AM. JURIST & L. MAG. 49, 52 (1838). Although “pettifogger” had been used for decades in the United States, Hoffman never used it in any writing.

⁸⁵David Hoffman, HINTS ON THE PROFESSIONAL DEPARTMENT OF LAWYERS 3 (Philadelphia, Thomas, Cowperthwait & Co. 1846).

countries, seems to me to be often more in words than in substance; for though lawyers are the constant subjects of the popular jeers, of the railing of the multitude, and of the ridicule even of the drama; and though the people have habitually leagued them with the devil, and love to tell many disparaging tales of them, yet lawyers still remain the most entrusted, the most honoured, and withal, the most efficient proportion to their number of any in the community; and, if there be still remaining among us any elements that can be called aristocratic, they will be found no where so certainly, as among gentlemen of the legal profession.⁸⁶

D. Baltimore Bank Riot of 1835

Two other outside events may have influenced the more pessimistic tone of the second edition of Hoffman's *A Course of Legal Study*. First, the re-election of Andrew Jackson in 1832 was anathema to Hoffman. Jackson revived the party system and emphasized ideological differences among the people, which Hoffman and other Whigs believed divided society against itself. By the 1836 presidential election, the idea of party itself “became a partisan issue.”⁸⁷ Second, Baltimore, known as “mobtown” since the 1812 riots, exploded in riots in August 1835.⁸⁸ The Baltimore Bank Riot was just one of many riots in the United States that year. *Niles' Weekly Register*, a national newspaper printed in Baltimore, listed fifty-three riots in the United States in 1835 alone.⁸⁹ The

⁸⁶Anthony Grumbler [David Hoffman], MISCELLANEOUS THOUGHTS ON MEN, MANNERS, AND THINGS 323-24 (2d ed. Baltimore, Plaskitt & Gule 1841)(1837). This is also found in Hoffman, HINTS, at 60-61.

⁸⁷Daniel Walker Howe, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848, at 485 (2007). Another annoyance may have been the decision of the Democratic Party to meet in Baltimore in 1835 for its national convention. *Id.* Hoffman's concern may have been ameliorated by the election of James Thomas, an anti-Jacksonian, as governor of Maryland. Brugger, MIDDLE TEMPERAMENT, at 806 (chronology of Maryland). See also MISCELLANEOUS THOUGHTS, at 194 (attacking the “miserable logic, and worse morals, of very many partisans”).

⁸⁸Gilje, *Baltimore Riots*, at 556.

⁸⁹See Richards, “GENTLEMEN OF PROPERTY AND STANDING”, at 12 (listing number of riots in United States from 1830-1838 as compiled in *Niles' Register*, which did not include all riots); see also Ashraf H. A. Rushdy, AMERICAN LYNCHING 32

Baltimore riot, caused in major part due to the collapse of the Bank of Maryland, reflected continuing deep class and social differences in Baltimore City.

After Andrew Jackson vetoed the re-charter of the Second Bank of the United States in 1832,⁹⁰ he began to destroy the “Monster” by depositing all federal funds in selected state banks (which his adversaries called “pet” banks), and withdrawing funds from the Second Bank as needed for pay federal expenses. Both actions were intended to bleed the Second Bank dry, and Jackson succeeded.⁹¹ The pet banks were usually “friendly” to Democratic views, and one such bank was the Baltimore-based Union Bank, operated by the upright Thomas Ellicott.

In 1831, Evan Poultney purchased a controlling interest in the Bank of Maryland. He appointed two young Baltimore lawyers, John Glenn and Reverdy Johnson, the latter of whom was well-known and well-connected, as members of the board of directors. The directors needed to attract capital to the Bank of Maryland, and so offered to pay a munificent five percent on all deposits, which encouraged ordinary Baltimoreans to place their savings there. These three men, with two others, formed a secret “Club” to enrich themselves through the Bank. In spring 1833, these three correctly predicted that secretary of the treasury Roger Brooke Taney, a Maryland lawyer, would name the Union Bank one of the government’s “pet” banks. They resolved to purchase, through the illicit beneficence of the Bank of Maryland, as much stock in the Union Bank as possible. A year later, the Bank of Maryland closed, but not before Johnson engaged in several frauds designed to hide his involvement in its dissolution. The closing of the Bank of Maryland was followed by pamphlets from the principals accusing each other of duplicity and fraud. By early August 1835, the people of Baltimore, many of whom had lost their savings and were now at the mercy of the equity chancellor in charge of the matter, were anxious and angry. And they looked to take out their anger on someone.⁹²

(2012)(“The year 1835 saw at least 147 riots, 109 of which occurred in the summer.”).

⁹⁰Robert V. Remini, *ANDREW JACKSON AND THE BANK WAR* 80-84 (paperback ed. 1967).

⁹¹*Id.* at 125.

⁹²The material in this paragraph is taken from Shalhope, *BANK RIOT*, at 32-44.

Samuel Harker operated the *Baltimore Republican* newspaper, the only one of the five Baltimore papers to support Andrew Jackson's Democratic Republicans.⁹³ Harker was a determined Jacksonian, and "pitted the bank and the 'aristocracy' against Andrew Jackson and 'the people.'"⁹⁴ Jacksonians uniformly opposed aristocracy in favor of "the people." Banks, through their control of money, were a likely source of aristocratic rule.⁹⁵

Like A Journeyman Cordwainer and others before him, Harker also approved of the people's authority to take the law into their hands when the law failed to meet the people's needs. Thus, if the law was impotent, it would "sometimes be proper for the populace to punish certain offences which can be reached by no other means."⁹⁶ The ultimate power of the people was found in Judge Lynch, or lynching, the authority of the people to take the law into their own hands when necessary.⁹⁷ "Lynching" was first widely used in the aftermath of the Vicksburg, Mississippi, hangings of gamblers on July 6, 1835.⁹⁸ Anti-Jacksonians viewed many of Andrew Jackson's actions as lawless,⁹⁹ and some "saw Jackson as a kind of Judge Lynch, the inventor, in his way, of lynching."¹⁰⁰

⁹³*Id.* at 21.

⁹⁴*Id.* at 23. *See also id.* at 24 (quoting Harker that "an organized aristocracy is leagued in concert against the *rights of the poor, and the liberties of the country.*"). On the origins of the sovereignty of "the people," see the brilliant book by Edmund S. Morgan, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* (paperback ed. 1989).

⁹⁵*See, e.g.,* Shalhope, *BALTIMORE BANK RIOT*, at 29 (quoting Harker that aristocrats planned "to rule the country by means of their money" and, should they succeed, "to destroy the freedom of thought, the liberty of speech, and the rights of action, which the constitution of our country has guaranteed to the poor man as well as the man of wealth.").

⁹⁶*Id.* at 31 (quoting Harker, *Baltimore American*, August 5, 1835).

⁹⁷*Id.* *See also* Christopher Waldrep, *THE MANY FACES OF JUDGE LYNCH: EXTRALEGAL VIOLENCE AND PUNISHMENT IN AMERICA* 27-38 (2002); Rushdy, *AMERICAN LYNCHING*, at 28-38.

⁹⁸Waldrep, *MANY FACES*, at 37; Rushdy, *AMERICAN LYNCHING*, at 32. *See The Vicksburg Tragedy, Niles' Register*, Aug. 1, 1835, at 391-92 (reprinting article on lynching).

⁹⁹Howe, *WHAT HATH GOD WROUGHT*, at 411 (Jackson "did not manifest a general respect for the authority of the law when it got in the way of the policies he chose to pursue.").

¹⁰⁰Waldrep, *MANY FACES*, at 36.

On Wednesday, August 5, 1835, several hundred persons milled about with the apparent common view that the lawyers John Glenn and Reverdy Johnson “had mismanaged the trust and abused the confidence reposed in them.”¹⁰¹ Though several boys threw stones at Johnson’s house, others stopped them in the hope that the equity chancellor would assist those who had lost their savings when the Bank of Maryland closed. The next night Johnson’s house received more damage, and the Mayor attempted to halt destruction of property by urging the crowd to follow the rule of law.¹⁰² On Saturday night the riot began. Although the attack on Johnson’s house failed, rioters successfully destroyed John Glenn’s home after carrying off his wine collection.¹⁰³ On Sunday, the rioters finally entered Johnson’s home, and finding that some furniture had been removed, obliterated his library, including “rare books of the law.”¹⁰⁴ They then burned the house. The riot finally petered out on Tuesday, August 11.

At least five died and twenty others were seriously wounded.¹⁰⁵ The criminal trials of those charged with participating in the riot were fairly tried; some were convicted, and others acquitted. Reverdy Johnson continued his efforts to conceal his involvement in the fraud, filing civil suits against Evan Poultney and others, and having a protégé, assistant attorney general Richard Gill, obtain indictments against several persons on whom Johnson wished to place blame for the collapse of the Bank of Maryland.¹⁰⁶ Johnson’s actions were occasionally successful as a legal matter, but unconvincing as a public matter.

E. A Course of Legal Study (2d ed. 1836) and the Unrepentant Aristocrat

¹⁰¹Shalhope, BALTIMORE BANK RIOT, at 46 (quoting “a gentleman” present). See also *Narrative of Events, Niles’ Register*, Aug. 15, 1835, at 412-16 (detailing Baltimore riot).

¹⁰²Shalhope, BALTIMORE BANK RIOT, at 46-49.

¹⁰³*Id.* at 56-57.

¹⁰⁴*Id.* at 60.

¹⁰⁵*Id.* at 1.

¹⁰⁶See generally *id.* at 70-105. Johnson’s biographer exonerates him from any responsibility, a conclusion Shalhope conclusively disproves. See Bernard C. Steiner, LIFE OF REVERDY JOHNSON 12 (1914) (“Johnson was conclusively cleared from any wrong-doing in connection with the bank.”). On Johnson, see Bernard Christian Steiner, *Reverdy Johnson*, in 4 GREAT AMERICAN LAWYERS 407; William L. Barney, *Johnson, Reverdy*, in YALE BIOG DICT. OF AMER. LAW at 300.

One of the criticisms of Hoffman's 1817 *A Course of Legal Study* was its length.¹⁰⁷ The second edition was more than double the size of the first, comprising 876 pages in two volumes. One of the additions made by Hoffman was to his discussion of professional department. Instead of listing eleven disparate readings to acquaint the reader with professional department, Hoffman provided a syllabus of twenty-one readings, including four from the Bible, followed by an essay and fifty *Resolutions in Regard to Professional Department*.¹⁰⁸

By the time the second edition went to press, all of the criminal trials concerning the 1835 riot had been completed, as well as many of the "bank trials" in which Johnson worked assiduously to demonstrate he was a wronged man. Hoffman left no record of his thoughts of either the riot or the collapse of the Bank of Maryland. As a general matter, the riot would have confirmed his view of the dangers of Jacksonian democracy, and Johnson's actions would have struck Hoffman as dishonorable and venal.

The purpose of Hoffman's exposition on professional department is found in his introductory essay. Even though the science of the law "furnishes the heart with the purest principles of action," the "*practice* of our profession is peculiarly calculated to suppress their influence."¹⁰⁹ The depravity of man often tempted lawyers to seek fame, money, or power. This temptation was joined by the fact that "disputes and controversies" in which lawyers were necessarily involved "are frequently founded on bad, if not the worst of passions."¹¹⁰ Thus, young lawyers needed to be on guard to avoid professional calamity through seduction by passion. The lawyer avoided this fate through "careful study of the moral sciences," and just as importantly, by understanding that law could instill "the principles of an elevated honour."¹¹¹ Honor demonstrated one's virtue, which was the antidote to the temptation of the passions. Further, a young lawyer's departure from "the most honourable and refined moral department" "excites more than ordinary distrust," for the lawyer's trustworthiness is

¹⁰⁷3 THE PORTICO 192, 199 (1817).

¹⁰⁸Hoffman, 2 LEGAL STUDY, at 720-75 (2d ed. 1836).

¹⁰⁹*Id.* at 745.

¹¹⁰*Id.*

¹¹¹*Id.* at 747.

essential to his success.¹¹² Hoffman uses the words “honour,” “honourable” or “honourably” thirteen times in his seven-and-one-half page essay on professional deportment.

Although honor consisted both of “genteel” and “primal” pathways,¹¹³ it was comprised of three aspects: first, a belief in one’s worthiness; second, publishing to the public one’s claim of self-worth; and third, “assessment of that claim by the public, a judgment based upon the behavior of the claimant.”¹¹⁴

Hoffman’s emphasis on honor reflected his understanding of the world, a world disappearing in Baltimore and most of Jacksonian America.¹¹⁵ A gentleman acted not to receive the praise of others, or as a matter of pride, but in order to demonstrate his understanding of his elevated role in society. He acted honorably to demonstrate his virtuous reputation. Writing at this time, Tocqueville noted, “Honor, in times of the zenith of its power directs men’s wills more than their beliefs.”¹¹⁶ Gordon S. Wood, discussing the late eighteenth century American gentleman, wrote, “Honor was exclusive, heroic, and aristocratic, and presumed a hierarchical world,” a world then dissolving.¹¹⁷

In 1837, Hoffman tried his hand at literature, publishing *Miscellaneous Thoughts on Men, Manners and Things*, using the not-well-hidden pseudonym Anthony Grumbler. Hoffman rejected the Jacksonian “Numerical Principle of Government” (“equality”) as “jacobinical,” a “suicidal” act. He contrasted the “two great and distinct classes of people”: “the one selfish, crude, and mainly unprincipled, the other patriotic, enlightened, and mainly

¹¹²*Id.*

¹¹³Bertram Wyatt-Brown, *SOUTHERN HONOR: ETHICS & BEHAVIOR IN THE OLD SOUTH* xvi-xvii (paper 25th anniversary ed. 2007)(1982).

¹¹⁴*Id.* at 14. This “public” assessment was not made by all the people, but by an “honor group,” a “society of equals who have the power to judge our behavior.” James Bowman, *HONOR: A HISTORY* 4 (paper ed. 2006).

¹¹⁵See George Wilson Pierson, *TOCQUEVILLE IN AMERICA* 494-96 (paper ed. 1996)(1938)(discussing late 1831 conversation between Tocqueville and Baltimore lawyer John Latrobe noting aristocratic “spirit” of Baltimore and Maryland and its displacement by democratic views).

¹¹⁶Tocqueville, *DEMOCRACY IN AMERICA*, at 616.

¹¹⁷Gordon S. Wood, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815*, at 159 (2009). See also Bertram Wyatt-Brown, *Honor*, in *A COMPANION TO AMERICAN THOUGHT* 310 (Richard Wightman Fox & James T. Kloppenberg eds. (1995))(discussing importance of concept in American history).

virtuous.” The former group was “the *earthy*, or *democratic* party.” The latter was “the *intellectual* or *aristocratic* party.”¹¹⁸ For Hoffman, aristocrat is a term of honor, and aristocracy is favorably contrasted with the “ultraism of democracy.”¹¹⁹ Hoffman was raised in a place in which different classes of people *naturally* undertook different roles in society. While some opposed these hierarchies, they were common to Baltimore and Maryland in the late eighteenth and early nineteenth centuries, and indeed class conflict was one of the reasons for the riot of 1812. Class-based grievances and resentment also helped trigger the 1835 bank riot.

Hoffman’s emphasis on honor allowed him to perceive conflicts of interest between lawyer and client with a keen eye. For example, Hoffman explained clearly why a lawyer should not be permitted to purchase an interest in a client’s cause.¹²⁰ Hoffman initially distinguished between contingent fee arrangements, to which he did not object, and the purchasing of causes, which interfered with the “absolute purity” of the lawyer-client relationship.¹²¹ A contingent fee contract was an “independent contract,” in which the lawyer exerted no “influence” on the client, and when the client was poor, to ban such arrangements was to make the client unable to prosecute his claim or to defend against another’s claim. On the other hand, the purchase of the client’s cause ordinarily occurred after the lawyer and client had established a relationship, and “after the strength of his case has become known to me.”¹²²

With regard to other aspects of the fee, a lawyer was to charge only a fee for “what my judgment and conscience inform

¹¹⁸MISCELLANEOUS THOUGHTS, at 233-34. For the contrary view, see William Leggett, *The Division of Parties*, N.Y. EVENING POST, Nov. 4, 1834, reprinted in SOCIAL THEORIES OF JACKSONIAN DEMOCRACY 66, 67 (“The one party is for a popular government; the other for an aristocracy. The one party is composed, in a great measure, of the farmers, mechanics, laborers, and other producers of the middling and lower classes, according to the common gradation by the scale of wealth, and the other of the consumers, the rich, the proud, the privileged, of those who, if our Government were converted into an aristocracy, would become our dukes, lords, marquises, and baronets.”).

¹¹⁹MISCELLANEOUS THOUGHTS, at 36. Tocqueville concluded that “hidden at the bottom of a lawyer’s soul one finds some of the tastes and habits of an aristocracy.” Tocqueville, DEMOCRACY IN AMERICA, at 264.

¹²⁰Hoffman, A COURSE, at 760-62 (Resolution XXIV).

¹²¹*Id.* at 760.

¹²²*Id.* at 762.

me is my due” (*Resolution XXVII*). Additionally, an honorable lawyer refused to succumb to the baser aspects of the marketplace. A lawyer should avoid “half fees,” a discounted amount based on the dishonorable action of “*underbidding* of my professional brethren.”¹²³ Hoffman warned lawyers against commingling their money with client funds (*XXVI*), stressed the duty to return client funds promptly (*XXV*), urged lawyers to refuse to act as a witness when also serving as counsel (*XXXV*) or to switch sides (*VIII*), and reminded lawyers that they needed to preserve and return all papers to the client (*XXX*). Additionally, the lawyer acted respectfully and courteously at all times toward the judge, officers of the court and opposing counsel, no matter the other’s “character and deportment” (*Resolutions III, IV, V and VI*).

The idea of honor played a prominent in several other resolutions. When a client’s reputation was at stake, no compromise was possible, and the matter necessarily had to go to a verdict. Hoffman made clear that this should occur even when the opposing party possessed an “elevated standing,” for the “great and wealthy” were required to make amends publicly and openly to the “poor and ignoble” (*XXII*). This public exoneration of one’s reputation was necessary because public honor comprised much of a person’s reputation. Hoffman’s understanding of honor also affected his definition of the lawyer’s duty to his clients. The lawyer was “zealous and industrious” in his representation of his clients (*XVIII*). But the meaning of “zealous and industrious” representation was framed in light of the lawyer’s honor. Hoffman sensibly urged lawyers to refuse to make “frivolous and vexatious defences” (*X*), but also then suggested lawyers refuse to make any claim or defense that “ought not, to be sustained,” for aiding a client then “would be lending myself to a dishonourable use of legal means” (*XI*).

Honor also led Hoffman to include resolutions declining to plead the statute of limitations (*XII*) or the defense of infancy as the sole defense against an honest demand (*XIII*), even though he was aware that the law permitted those defenses: “*I shall claim to be the sole judge* (the pleas not being compulsory) of the occasions proper for their use.”¹²⁴ Further, Hoffman urged that a lawyer not

¹²³*Id.* at 763.

¹²⁴*Id.* at 755. See also *The Good Advocate*, 1 J.L. 58, 58 (1830): “The good advocate is one who will not plead the cause wherein his tongue must be confuted by his

“use my endeavours to arrest, or to impede the course of justice, by special resorts to ingenuity” those charged with crimes, the evidence of which left “no just doubt of their guilt” (XV). To defend one of “atrocious character,” one who had “violated the laws of God and man,” left him “entitled to no such special exertions from any member of our pure and honourable profession.” The most one could undertake for such a man was “a fair and dispassionate investigation of the *facts* of their cause.”¹²⁵

The understanding of the lawyer’s duty of zealous representation was undergoing a transition in the 1830s. A Philadelphia lawyer named David Paul Brown wrote in his 1856 memoir, “A lawyer is not morally responsible for the act or motive of a party, in maintaining an unjust cause, ... [but] he *is* morally responsible, if he does it knowingly, however he may ‘plate sin with gold.’”¹²⁶ Brown was a zealous advocate whose career spanned the shift from an ethic of honor to an ethic of conscience. In his *Golden Rules for the Examination of Witnesses*, he wrote regarding cross-examination: “[In] all this, never be unmindful of your own dignity. Bring to bear all the powers of your mind—not that *you* may shine, but that *virtue* may triumph and your *cause* may prosper.”¹²⁷ In 1832, he represented Lucretia Chapman, accused of murdering her husband by poisoning him. Brown represented Chapman with such zeal that the prosecutor believed he had “overstepped the bounds of courtroom propriety.”¹²⁸ And he obtained a not guilty verdict. Brown and others, including George Sharswood, hid behind the word “knowingly,” and the phrase “maintaining an unjust cause.” If the lawyer did not know the cause was unjust, he could continue to act in behalf of the

conscience.” The *Journal of Law* was based in Philadelphia. For a sensitive and clear-eyed assessment of the views of lawyers from Hoffman’s time to the present on this question, see Thomas L. Shaffer & Robert F. Cochran, Jr., “Technical” Defenses: *Ethics, Morals, and the Lawyer as Friend*, 14 *Clin. L. Rev.* 337 (2007).

¹²⁵Hoffman, *LEGAL STUDY*, at 756. Hoffman was involved in one well-known criminal case, but his practice was largely a civil practice. See Sleeman, *David Hoffman*, in *DAVID HOFFMAN: LIFE, LETTERS, AND LECTURES*, at 25.

¹²⁶David Paul Brown, 2 *THE FORUM; OR, FORTY YEARS FULL PRACTICE AT THE PHILADELPHIA BAR* 30 (2 vols. Philadelphia, Robert H. Small 1856).

¹²⁷David Paul Brown, *Golden Rules for the Examination of Witnesses*, in James Ram, *A TREATISE ON FACTS AS SUBJECTS OF INQUIRY BY A JURY* 311 (1st Amer. ed. John Townshend ed. New York, Baker, Voorhis & Co. 1870).

¹²⁸Linda Wolfe, *THE MURDER OF DR. CHAPMAN: THE LEGENDARY TRIALS OF LUCRETIA CHAPMAN AND HER LOVER* 198 (2004).

client, allowing the law to shape the verdict. In defending one accused of a crime (rather than aiding a plaintiff or defendant in maintaining an unjust cause), lawyers writing in the 1840s and 1850s required defense counsel to exercise zeal even when the defendant had confessed his guilt to the lawyers.¹²⁹ This specific issue arose in the infamous *Courvoisier* case in London in 1840.¹³⁰

Courvoisier, a servant, killed his master. Before the second day of a three-day trial, he confessed his guilt to his barrister, Charles Phillips, but refused to plead guilty.¹³¹ After informing trial judge Baron Parke of *Courvoisier's* confession, Phillips was told to continue to defend *Courvoisier*, using “all fair arguments arising on the evidence.”¹³² *Courvoisier* was found guilty and sentenced to die. During the very short period before he was hanged, he publicly confessed his guilt, again and again. On at least one occasion *Courvoisier* included in his public confession the fact that before his conviction he had told Phillips he committed murder. Although one early newspaper praised Phillips for defending *Courvoisier* with “honourable zeal,”¹³³ a letter to the *Times* (London), published five days after the trial ended, stated that “he who defends the guilty, knowing him to be so, forgets alike honour and honesty.”¹³⁴ A decade later, Phillips’s actions were the subject of extensive commentary in *Littell’s Living Age*, a general American weekly, and the *Monthly Law Reporter*, a practical American legal publication.¹³⁵ The propriety of Phillips’s actions was again addressed, and American and British lawyers generally agreed they owed a duty to defend the factually guilty client with honorable zeal, contrary to the letter to the *Times*.

Hoffman knew his resolutions that a lawyer refuse to defend on the grounds of infancy or the statute of limitations were not accepted lawyer behavior. First, Hoffman himself had been

¹²⁹See Sharswood, COMPEND OF LECTURES, at 31-33.

¹³⁰See David Mellinkoff, THE CONSCIENCE OF A LAWYER (1973); see also Ariens, *Age of Anxiety*, at 375-80.

¹³¹*Courvoisier* was apparently able to use expensive and well-known counsel through the beneficence of Sir George Beaumont, who employed as his butler *Courvoisier's* uncle. See Judith Flanders, THE INVENTION OF MURDER: HOW THE VICTORIANS REVELLED IN DEATH AND DETECTION AND CREATED MODERN CRIME 202 n.* (2013).

¹³²Mellinkoff, CONSCIENCE, at 139-40.

¹³³*Id.* at 141 (quoting *License of Counsel*, CHRONICLE (London), June 22, 1840).

¹³⁴*Id.* at 142 (quoting TIMES (London), June 25, 1840).

¹³⁵See Ariens, *Age of Anxiety*, at 379-80 (discussing published articles).

involved in a case in 1830 in which the opposing party successfully pled the statute of limitations.¹³⁶ Second, attorneys had successfully pled the statute of limitations in Maryland since 1808.¹³⁷ A statute of limitations defense was acknowledged in the Maryland Court of Appeals at least twenty-three times between 1808 and 1835. Third, Maryland lawyers successfully made an infancy defense as early as 1820,¹³⁸ and a classic infancy case was decided in 1833 by the Court of Appeals, which heard the case after a decision by the equity chancellor holding the infancy defense properly invoked.¹³⁹ Hoffman was well aware his *Resolutions* instructed a lawyer not to make on his client's behalf a permissive but dishonorable legal argument. The lawyer decided how far to go in representing a client, and defending a client on the sole ground of the statute of limitations was dishonorable, an act of knavery. A lawyer was never a mere agent of a client, and he acted to meet the standards of honor, not the more practical (or possibly venal) interests of his client. Consequently, that a lawyer could defend on grounds of the statute of limitations or infancy did not make those actions honorable. And a lawyer who valued his honor would not make such pleas.

Thus, the mortar that bound Hoffman's *Resolutions* was the concept of honor. Honor required a lawyer to decline to make legal claims that "ought not, to be sustained."¹⁴⁰ The ethic of honor joined private and public morality, for a gentleman's identity was dependent on his public reputation. Hoffman and other Maryland lawyers of this time were gentlemen, and their reputation rested on their public actions. A lawyer both exercised "honourable zeal" in representing a client and acted to obtain "substantial justice to all parties."¹⁴¹ In addition to using "honor" and its cognates thirteen times in his introductory essay, Hoffman used "honourable" or its opposite, "dishonourable," eleven times in the *Resolutions*.

¹³⁶*State, to Use of Mayor and City Council of Baltimore v. Boyd*, 2 G. & J. 365, 1830 WL 1662 (Md. 1830).

¹³⁷*Ratrie v. Sanders*, 2 H. & J. 327 (Md. 1808)(upholding statute of limitations claim in replevin suit). The court considered and rejected the limitations defense in another 1808 case, see *Poe v. Conway Adm'r*, 2 H. & J. 307 (Md. 1808).

¹³⁸*Davis v. Jacquin*, 5 H. & J. 100 (Md. 1820).

¹³⁹*Clagett v. Salmon*, 5 G. & J. 314 (Md. 1833).

¹⁴⁰Hoffman, *LEGAL STUDY*, at 754.

¹⁴¹See Bloomfield, *Republican Legal Culture*, at 684-85.

Hoffman's views quickly faded. In American law journals of the 1840s, lawyers discussed the propriety of lawyer actions in terms of conscience.¹⁴² In a speech to the 1844 law class of Cincinnati College, Timothy Walker defended a lawyer's representation of "a bad cause" on rule of law grounds, and stated that as long as a lawyer took "no dishonorable advantage, I stand justified at the bar of my own conscience, whatever others may think of my conduct."¹⁴³ The *Monthly Law Reporter* asked in 1846 "to be delivered from self-styled *conscientious lawyers*, who will engage for no parties that are not morally right."¹⁴⁴ George Sharswood's 1854 *A Compend of Lectures* discussed how to "assist the [lawyer's] mind in coming to a safe conclusion *in foro conscientiae*, in the discharge of his professional duty" representing a client.¹⁴⁵

Once the lawyer agreed to represent a client, he did so with "warm zeal."¹⁴⁶ Sharswood used *Courvoisier* as a paradigmatic example of a lawyer acting ethically because he represented to the best of his abilities a client who had privately confessed his guilt.¹⁴⁷ An 1858 review of David Paul Brown's *The Forum* in the *Southern Literary Messenger* echoed this view.¹⁴⁸ The unnamed author wrote a bit about Brown but largely tackled the larger issue of "the ethics of the legal profession." He made several points that suggested Hoffman's ethical precepts spoke to a past ideal. First, although the article positively cites Hoffman's "excellent treatise on a course of legal study," it does so only to quote Hoffman's view that law students should be acquainted with the Bible, not to discuss Hoffman's *Resolutions*.¹⁴⁹ Second, the article distinguishes between the legal ethics of undertaking an "unjust cause" (bad) with the "extreme case" that "even the guilty man should be defended" (good).¹⁵⁰ The latter is a right action not only because it

¹⁴² See Field, *Study and Practice*, at 340 (noting actions that may affect the lawyer's "conscience"); *The Lawyer, His Character, &c.*, 2 Penn L.J. 185, 187 (1843)(reprinting Irish book review on lawyer behavior and noting "principle of conscience" in lawyers).

¹⁴³ Walker, *Ways and Means*, at 547. .

¹⁴⁴ *The Practice of the Bar*, 9 Monthly L. Rep. 241, 241 (1846).

¹⁴⁵ Sharswood, *A COMPEND*, at 30. *In foro conscientiae*, "in the tribunal of conscience," BLACK'S LAW DICTIONARY 701 (5th ed. 1979).

¹⁴⁶ *Id.* at 24.

¹⁴⁷ Sharswood, *COMPEND OF LECTURES*, at 40-43.

¹⁴⁸ *Christianity in the Legal Profession*, 27 SO. LIT. MESSENGER 66 (July 1858).

¹⁴⁹ *Id.* at 68.

¹⁵⁰ *Id.* at 70-72.

is a Christian action but also because defending the guilty client by the law acts to repel the perfidy of lynch law. Third, while rejecting Lord Brougham's view that a lawyer is loyal to his client even if such action would "involve his country in confusion for his client's protection,"¹⁵¹ the author generally defends the practice of law, including criminal law, as "a high and honourable and Christian calling."¹⁵² Fourth, the author notes that the "extreme case" of the guilty client is "usually put to the lawyer as a test of conscience."¹⁵³ In each of these examples, conscience is an inner test of one's identity, based on the individual's own standards, not society's. Hoffman uses the word "conscience" just three times in his writing on professional deportment, compared with twenty-four uses of "honor" or a variant. As Bertram Wyatt-Brown notes about the end of the ideal of honor in the mid-nineteenth century, "[i]n moral terms, conscience replaced honor, guilt replaced shame, that is, inner self-controls rather than public opinion were supposed to govern how one acted."¹⁵⁴ This change made Hoffman of some slight continuing interest to practicing lawyers (his view on the importance of avoiding lawyer-client conflicts of interest remains valuable today), but of little use when lawyers considered the bounds of the ethics of advocacy.

Hoffman was fifty-one when the second edition of *A Course of Legal Study* was published. His last law lecture had been given over three years earlier, and although listed as a lawyer in the annual *Baltimore Directory*, his law practice was moribund.

¹⁵¹*Id.* at 71. As prince and before his arranged marriage to Queen Caroline, George IV had secretly and unlawfully married a Catholic widow, Mrs. Fitzherbert. If publicly learned, George forfeited his crown. In defending Queen Caroline against George's petition for a divorce on the ground of adultery, Brougham implicitly threatened exposure of that fact by stating in part, "an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client." See 2 TRIAL OF QUEEN CAROLINE 8 (New York, James Cockcroft & Co. 1874). Brougham's views were largely rejected until the development of the modern American legal profession in the 1960s. See generally Michael Ariens, *Brougham's Ghost* (forthcoming). Geoffrey Hazard's claim that Brougham's statement represented "the basic narrative" of the American legal profession "for over two centuries" is wrong. See Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1244 (1991).

¹⁵²*Christianity in the Legal Profession*, at 71.

¹⁵³*Id.* at 72. See also Brooke, THE LEGAL PROFESSION, at 14 ("[T]he question is, whether, in such cases, a lawyer can, with a good conscience, prosecute the legal claim, directly against the moral right.").

¹⁵⁴Wyatt-Brown, *Honor*, in AMERICAN THOUGHT, at 311.

What was worse for Hoffman's reputation was the evanescent reaction to the second edition. Just two reviews were published:¹⁵⁵ The Boston-based *American Jurist and Law Magazine* published a lengthy (twenty pages) review of the second edition, but spent merely the final paragraph on Hoffman's *Resolutions*.¹⁵⁶ The second significant review was in the *Biblical Repertory and Princeton Review*.¹⁵⁷ Much of that review was an extended digression on the value of study for ministers in training. The remainder praised Hoffman's rules of professional deportment, but instead of analyzing them, merely quoted many *Resolutions* favorably, including those in which Hoffman refused to make a statute of limitations defense, an infancy defense, or in using the "artifices of eloquence" to aid those of "atrocious character."

Hoffman's *Miscellaneous Thoughts* was published the next year. The *North American Review* ostensibly reviewed it, but spent the bulk of its review praising the second edition of *A Course of Legal Study*.¹⁵⁸ The review did not, however, discuss Hoffman's fifty *Resolutions*. The second edition was little else reviewed. Hoffman's excuse was that the 1836 edition "was only very partially published."¹⁵⁹

A Course of Legal Study was reprinted in 1846. The same year his book *Hints on the Professional Deportment of Lawyers* was published, which reprinted Hoffman's previous material on legal ethics. By then, legal and literary publishing had changed dramatically. Neither the *American Jurist and Law Magazine* nor the Philadelphia-based *American Law Magazine* existed. The

¹⁵⁵All Hoffman received from the *North American Review* (which had published Joseph Story's thirty-three page review of the first edition) was a simple notice of publication alongside other books See *Quarterly List of New Publications*, 43 N. AM. REV. 283, 285 (1836). Unsurprisingly, the *United States Magazine and Democratic Review* did not review the second edition.

¹⁵⁶See F.J.T., *Hoffman's Course of Legal Study*, 15 AM. JURIST & L. MAG. 321 (1836). That paragraph indicated its delight with the resolutions and noted that "[u]pon a future occasion we design to make this division the test for a separate article." *Id.* at 341. No such article was ever published.

¹⁵⁷Charles Hodge, *Review*, 9 BIBLICAL REPERTORY AND PRINCETON REV. 509 (1837).

¹⁵⁸*Grumbler's Miscellaneous Thoughts*, 45 N. AM. REV. 482, 482 (1837).

¹⁵⁹David Hoffman, *LEGAL STUDY*, at iii (2d ed. Philadelphia, Thomas, Cowperthwait & Co. 1846). He made the same claim in David Hoffman, *HINTS ON THE PROFESSIONAL DEPORTMENT OF LAWYERS* 3 (Philadelphia, Thomas, Cowperthwait & Co. 1846).

Monthly Law Reporter, published in Boston, the *Pennsylvania Law Journal* and the *Legal Intelligencer*, both published in Philadelphia, the Cincinnati-based *Western Law Journal*, and the *New York Legal Observer* were the only published law journals. All were written to provide practical advice to practicing lawyers. None printed articles on broad jurisprudential topics. And Whig-oriented publications such as the *North American Review* and the *American Whig Review* took no notice of the reprinted *A Course of Legal Study* or *Hints*. At the back of *Miscellaneous Thoughts* the publisher listed reviews of the 1836 edition of *A Course of Legal Study*.¹⁶⁰ After listing several positive French and English reviews, the publisher wrote, “The American notices of this second edition are equally numerous and laudatory.”¹⁶¹ But these “numerous” reviews consisted of merely of mentions of the reviews listed above, a brief review by the *National Gazette*, a reprinting in the *Baltimore American* of the *North American Review*’s final paragraph, and a letter to the editor of the *Baltimore American* commending readers to the *London Law Review*’s assessment. In fine, it was a slender selection.

Michael Hoeflich has traced the price of *A Course of Legal Study* from the 1840s through 1860.¹⁶² He found its price slightly declining over time, even in more remote parts of the nation. One reason for this decline was its “lost popularity.”¹⁶³

In 1835, a British lawyer named Samuel Warren published *A Popular and Practical Introduction to Law Studies*.¹⁶⁴ The second edition was published in 1845 and the third in 1863 in England.¹⁶⁵ The first American edition of Warren’s book was published in Philadelphia in 1836.¹⁶⁶ Warren’s emphasis on the “popular” and the “practical” was a world away from Hoffman’s intellectually wide-ranging *A Course of Legal Study*. Warren’s

¹⁶⁰See *Notices of the Legal Study*, at 7-11. The identical notice is also found in *Notices at the end of David Hoffman, VIATOR; OR, A PEEP INTO MY NOTE BOOK* (Boston, Charles C. Little & James Brown 1841)(Notices, at 7-11.).

¹⁶¹*Id.* at 8 in both *MISCELLANEOUS THOUGHTS* and *VIATOR*.

¹⁶²M. H. Hoeflich, *LEGAL PUBLISHING IN ANTEBELLUM AMERICA* 66-67 (2010).

¹⁶³*Id.* at 67.

¹⁶⁴Samuel Warren, *A POPULAR AND PRACTICAL INTRODUCTION TO LAW STUDIES* (London, A. Maxwell 1835).

¹⁶⁵C. R. B. Dunlop, *Samuel Warren: A Victorian Law and Literature Practitioner*, 12 *CARDOZO STUD. L. & LITERATURE* 265, 271 (2000).

¹⁶⁶Samuel Warren, *A POPULAR AND PRACTICAL INTRODUCTION TO LAW STUDIES* (Philadelphia, John S. Littell 1836).

Introduction became popular in the United States, eclipsing *A Course of Legal Study*.¹⁶⁷ And in 1848 Warren's book *The Moral, Social, and Professional Duties of Attornies [sic] and Solicitors*¹⁶⁸ was published. Hoffman was ignored by popular magazines and professionally displaced by Warren.

As for *Hints*, it had no impact whatsoever. It was neither reviewed in any law publications nor in any of the usual literary magazines. It just disappeared. In 1847, Hoffman moved to England. He returned to the United States in 1854, the year in which he died.

III. LOST

A. Forgotten

Hoffman's influence waned because his views of professional deportment represented the past.¹⁶⁹ By the 1850s, most lawyers who wrote about legal ethics rejected the centrality of honor in favor of conscience, and conscience allowed the lawyer to bond more tightly (though not exclusively) with the interests of his client. Lawyers sometimes justified this change by citing Sharswood, as Sharswood's views echoed those of most other lawyers writing on the subject. American lawyers implicitly concluded Hoffman's *Resolutions* ill-fit the times.

Sharswood was a life-long Philadelphian. He was appointed an associate judge of the district court in 1845, and three years later was named its president judge.¹⁷⁰ In October 1850, he

¹⁶⁷Hoeflich, *LEGAL PUBLISHING*, at 67; Edwin C. Surrency, *A HISTORY OF AMERICAN LAW PUBLISHING* 158 (1990).

¹⁶⁸Samuel Warren, *THE MORAL, SOCIAL, AND PROFESSIONAL DUTIES OF ATTORNIES AND SOLICITORS* (Edinburgh and London, William Blackwood and Sons 1848).

¹⁶⁹Steve Sheppard thoughtfully suggested to me that Hoffman also faded because his books lacked a proper institutional platform as well as that his approach to law and legal study was anachronistic.

¹⁷⁰On the Philadelphia bar of this time, see Gary B. Nash, *The Philadelphia Bench and Bar: 1800-1861*, 7 *COMP. STUD. SOC'Y & HIST.* 203 (1965); Sidney George Fisher, *The Diary of Sidney George Fisher Covering the Years 1834-1871*, in *A PHILADELPHIA PERSPECTIVE* 402 (Nicholas B. Wainwright ed. 1967). See generally Robert R. Bell, *THE PHILADELPHIA LAWYER: A HISTORY, 1735-1945*, at 106-56 (1992).

On Sharswood, see Samuel Dickson, *George Sharswood*, in 6 *GREAT AMERICAN LAWYERS* at 121, 132; Samuel Dickson, *George Sharswood--Teacher and Friend*, 55 *AM. L. REG. O.S.* 401 (1907); Francis S. Philbrick, *Sharswood, George*, in

gave his first lecture as Professor at the newly reinstated Department of Law at the University of Pennsylvania.¹⁷¹

In 1854, Sharswood began his law school lectures with a focus on legal ethics.¹⁷² This lecture became part of *A Compend of Lectures on the Aims and Duties of the Profession of Law*, published late in the year. In addition to informing students, “High moral principle is [the young lawyer’s] only safe guide,”¹⁷³ he concluded by cautioning the listener to beware that “these objects of ambition, wealth, learning, honor, and influence, worthy though they be, [are of but] factitious importance.”¹⁷⁴

Sharswood accepted the position that the lawyer “is not merely the agent of the party; he is an officer of the court.”¹⁷⁵ Even so, the lawyer was “not morally responsible for the act of the party in maintaining an unjust cause,” for the lawyer’s role was to assist the court and jury in reaching its decision. “The lawyer, who refuses his professional assistance because in his judgment the case is unjust and indefensible, usurps the function of both judge and jury.”¹⁷⁶ These conclusions were all contrary to Hoffman.

Sharswood believed it was the duty of the lawyer to plead the statute of limitations on behalf of the client, even when the client “knows that he honestly owes the debt sued for and that the delay has been caused by indulgence or confidence on the part of his creditor.”¹⁷⁷ Though the client “ought not to plead the statute,” if he wished to do so, the lawyer should plead it, and the case was decided on the law.¹⁷⁸ He also accepted the duty of the lawyer to represent the guilty client, for such a person should be convicted only upon “legal evidence.”¹⁷⁹ The limits of the defense lawyer’s

17 DICTONARY OF AMERICAN BIOGRAPHY 28 (Dumas Malone ed. 1943); Joel Fishman, *Sharswood, George*, in YALE BIOG. DICT. OF AMER. LAW at 491.

¹⁷¹George Sharswood, LECTURES INTRODUCTORY TO THE STUDY OF THE LAW 37 (Philadelphia, T. & J.W. Johnson & Co. 1870).

¹⁷²George Sharswood, COMPEND OF LECTURES, at I; see also Edwin R. Keedy, *George Sharswood—Professor of Law*, 98 U. PA. L. REV. 685, 692 (1950)(describing lecture and noting its publication history).

¹⁷³Sharswood, COMPEND OF LECTURES, at 9.

¹⁷⁴*Id.* at 106.

¹⁷⁵*Id.* at 26.

¹⁷⁶*Id.*

¹⁷⁷*Id.* at 25-26.

¹⁷⁸ *Id.* at 26.

¹⁷⁹ *Id.* at 31.

representation were as expressed in *Courvoisier*: “It is his duty, however, as an advocate merely, as Baron Parke has well expressed it, to use ALL FAIR ARGUMENTS ARISING ON THE EVIDENCE.”¹⁸⁰

Sharswood avoided canons, resolutions, rules, and the like. His statement of high moral principle in the practice of law remained in essay form. His acceptance of a greater though not exclusive focus on the lawyer’s duty of zealous representation of his client fit the times, and went well beyond Hoffman’s honor-based interpretation of the lawyer’s duty to a client.¹⁸¹ The second edition, titled an *Essay on Professional Ethics*, was published in 1860, and the fifth edition was published in 1884, a year after Sharswood died. During the thirty years between the first through the fifth edition, Sharswood’s *Essay* was the dominant source for understanding legal ethics.

B. Other Voices

A number of legal ethics essays, lectures, and printed speeches from 1854 through the end of the nineteenth century used Sharswood’s *Essay* as their guide. Those that didn’t largely echoed Sharswood’s views that (1) a lawyer representing a client in a civil matter owed a duty to a client to use any proper legal claim or defense, such as the statute of limitations or the defense of infancy, and (2) a lawyer representing a person in a criminal matter owed him the duty of zealous representation, for no man should be convicted except upon legal evidence, and the lawyer was “to suggest all those reasonable doubts which may arise from the evidence as to his guilt, and to see that if he is convicted, it is according to law.”¹⁸² This latter duty, while breaking from Hoffman, did not extend as far as Lord Brougham’s view of zeal.¹⁸³ When legal authors and speakers looked for an ethical

¹⁸⁰*Id.* at 44.

¹⁸¹See Ariens, *Age of Anxiety*, at 375-94. An appeal couched in very similar terms is found in John D. Works, *Open Letters*, 37 THE CENTURY 475, 475-76 (Jan. 1889) (“But the distinction between *legal* and *moral* right should not be overlooked.... For example, a debt may be barred by the statute of limitations. The defendant who is sued is in a moral sense still liable, as the debt is unpaid; but the statute of limitations having run, he has a legal defense which his attorney is bound, as a matter of duty, to interpose for him.”).

¹⁸²Sharswood, *COMPEND OF LECTURES*, at 25-27, 31.

¹⁸³*Id.* at 29 (quoting and criticizing Brougham). See also William P. Wells, *THE CONDITIONS OF THE LAWYER’S USEFULNESS* 10 (Ann Arbor, John Moore

counterpoint with which they disagreed, most used Brougham's speech in *Queen Caroline's* case. None mentioned Hoffman's less ambitious understanding of honorable zeal, and only a few urged that position without naming Hoffman.

For example, William Allen Butler's February 1871 talk to a New York audience,¹⁸⁴ published later that year as *Lawyer and Client: Their Relations, Rights, and Duties*, stated the view adopted by most lawyers of Brougham's speech: "This was a high and somewhat rapid flight of oratory, far beyond any justifiable limit of duty or privilege. ... It is rarely quoted, except to be condemned."¹⁸⁵ Other postbellum writers echoed Butler's view. Henry Sedgwick urged lawyers to "[f]orget the fallacious eloquence of Brougham."¹⁸⁶ And Theodore Bacon summarized the consensus view in 1888: "I do not deem it important here to controvert the extraordinary proposition enunciated by Lord Brougham upon the trial of Queen Caroline.... [I]t has seldom since been approvingly cited, unless by some advocate maintaining an unconscionable cause by reprehensible methods."¹⁸⁷

1875)(rejecting view that lawyer is solely an agent of client). The extent of the shift in understanding of the lawyer's duty of loyalty to client in the late nineteenth century is contestable. Compare Ariens, *Age of Anxiety*, at 394-407 with Mark DeWolfe Howe, *Book Review*, 60 Harv. L. Rev. 838, 840-41 (1947).

¹⁸⁴See *Local Miscellany*, NEW YORK HERALD TRIBUNE, Feb. 4, 1871, at 8 (noting delivery of third in series of lectures by Butler on "relations arising between lawyer and client" and adopting view that lawyer does not know the cause is bad until decided by a Judge, but rejecting Brougham's approach).

¹⁸⁵William Allen Butler, *LAWYER AND CLIENT: THEIR RELATION, RIGHTS, AND DUTIES* 41-42 (New York, D. Appleton and Co. 1871).

¹⁸⁶Henry D. Sedgwick, *THE RELATION AND DUTY OF THE LAWYER TO THE STATE*, LECTURE BEFORE THE LAW SCHOOL OF THE UNIVERSITY OF THE CITY OF NEW YORK, FEBRUARY 9TH, 1872 at 16 (New York, Baker & Godwin 1872).

¹⁸⁷Theodore Bacon, *Professional Ethics*, 17 J. SOC. SCI. 37, 41 (1883). Other similar statements from the late nineteenth century are found in Hon. Dorman B. Eaton, *THE PUBLIC RELATIONS AND DUTIES OF THE LEGAL PROFESSION: AN ADDRESS DELIVERED BEFORE THE ALUMNI AND GRADUATING CLASSES OF THE YALE LAW SCHOOL, AT ITS FIFTY-EIGHTH ANNIVERSARY, JUNE 27TH, 1882* at 22-23 (New Haven, Hodgson & Robinson 1882)("No language can too strongly reprobate so detestable and barbarous a code of professional ethics, more becoming a band of pirates or brigands than a Christian officer of justice."); Hon. Edward M. Paxson, *THE ROAD TO SUCCESS, OR PRACTICAL HINTS TO THE JUNIOR BAR: AN ADDRESS DELIVERED BEFORE THE LAW ACADEMY OF PHILADELPHIA* 9 (Philadelphia, Law Academy 1888)(rejecting Brougham); Richard Harris, *HINTS ON ADVOCACY IN CIVIL AND CRIMINAL COURTS* 162-63 (3d Amer. ed. from 6th Eng. ed. William L. Murfree, Sr., rev'r., St. Louis, William H. Stevenson 1884)("Lord Brougham's authority, however, on this point is very generally controverted"); Henry Wade Rogers, *ADDRESS TO THE LAW CLASS OF MICHIGAN UNIVERSITY, JUNE 17, 1886* at 24

Late nineteenth century lawyers implicitly and explicitly followed Sharswood in supporting zealous representation on “rule of law” grounds. Joseph Cox concluded that a lawyer who believes his client is guilty of the crime charged maintains a duty to represent the client to effectuate the end that “[o]ur government is one of law.”¹⁸⁸ This argument was echoed the following year by Joseph Works in a long letter to the editors of *The Century*:

Very few thoughtful men, whether lawyers or not, will at the present day contend that a lawyer violates any rules of professional ethics or commits any wrong to society by defending a criminal whom he knows to be guilty. To be tried and defended by counsel, in open court, is a constitutional right expressly guaranteed to every person charged with a criminal offense. No one, whether his attorney or not, has a right to assume his guilt. The law presumes his innocence. If he is unable to employ an attorney, the court must appoint one to conduct his defense. The attorney has no legal or moral right to refuse to defend him on the ground that *he* knows him to be guilty, whether he is employed by the defendant or appointed by the court to appear for him. This duty requires him to make the defense for him fairly and justly, in the interest of society as well as of the prisoner.¹⁸⁹

(n.p. 1886) (“I think that both the judgment and the conscience of the profession reject the extreme opinion which was expressed by Lord Brougham in Queen Caroline’s case.”).

A few late nineteenth century writers considered the context of Brougham’s speech, as did Sharswood. Noting that Brougham was defending Queen Caroline in a divorce demanded by King George IV, the editors of the *Southern Law Review* wrote, “[W]e imagine that [Brougham’s] motive for advancing so extreme a theory was to palliate, in the eyes of the King, the vehemence of his advocacy against the King, by making it appear that he felt himself compelled thereto by his conceptions of an advocate’s duty.” *About the Profession and Practice of the Law*, 1 SO. L. REV. O.S. 249, 279 (1872).

¹⁸⁸Joseph Cox, *Legal Ethics*, 8 OHIO ST. B. ASS’N REP. 95, 105-06 (1888).

¹⁸⁹Works, *Open Letters*, at 476. See also D. H. Chamberlain, SOME OF THE PRESENT NEEDS AND DUTIES OF OUR PROFESSION 12, 14 (New York, G. P. Putnam’s Sons 1888)(same). The “rule of law” view was contrasted by those who facilitated the rise of lynching in the postbellum period. See generally Michael J. Pfeifer, ROUGH JUSTICE: LYNCHING AND AMERICAN SOCIETY, 1874-1947 at 94-121 (2004).

Butler's *Lawyer and Client* exemplified the shift between public honor and private conscience in thinking about "how far the lawyer is amenable for the conduct of his client's case." Butler noted that the lawyer was required to act in accordance with any rules of the court, and that he was subject to praise or condemnation by the public as long as it avoided a decision based on mere passion and properly understood the case. "But the lawyer is amenable, first of all, last of all, and most of all, to his own conscience."¹⁹⁰ Henry Wade Rogers urged the 1886 University of Michigan law class to avoid any professional behavior that would "shock an enlightened conscience,"¹⁹¹ and cited Rufus Choate on the view that no lawyer possessed a "duty to go into court, and contrary to his convictions assert what he did not believe to be true."¹⁹² In discussing the distrust of lawyers among the public, including "highly intelligent men," Richard Harris noted the argument was "that several practices usual at the bar are contrary to good conscience."¹⁹³ This shift, however, was not unanimous. In an 1882 speech, Theodore Bacon, after rejecting Brougham, rejects Sharswood on the grounds of honor. Sharswood believed a lawyer remained duty-bound to represent a client if, after taking on the matter, the lawyer found "his ardor chilled by dishonoring disclosures" of the client. In such a case, Bacon concluded Sharswood's belief that the lawyer was required to continue representing the client was wrong. In Bacon's view, "I cannot, therefore, distinguish between a case which honorable counsel ought not to undertake with a knowledge of its character, and a case which, once undertaken, turns out to be of such a character." And if a "lawyer of good repute" withdrew in such a case, any adverse consequence properly fell on the client, not the lawyer.¹⁹⁴ But Bacon's use of honor was a minority view.

¹⁹⁰*Local Miscellany*, NEW YORK HERALD TRIBUNE, Feb. 4, 1871, at 8; Butler, *LAWYER AND CLIENT*, at 64. See also Bacon, *Professional Ethics*, at 39 (worrying that "if a lawyer's conscience or a lawyer's honesty comes to be a current jest" then the legal profession's "moral debasement" will contaminate "the whole body of society"). Cf. Senator Wm. E. Chandler, ADDRESS BEFORE THE GRAFTON AND COOS BAR ASSOCIATION, JANUARY 6, 1888 at 13 (Concord, Republican Press Ass'n 1888)(citing Butler on duty to "win victory ... by all means which stop short of personal and professional dishonor").

¹⁹¹Rogers, ADDRESS, at 23 (quoting uncited statement).

¹⁹²*Id.* at 24.

¹⁹³Harris, HINTS ON ADVOCACY, at 157.

¹⁹⁴Bacon, *Professional Ethics*, at 43-44. A similar view is expressed in Eaton, *Public Relations*, at 23 (quoting without citing Chief Justice John Bannister Gibson in *Rush v. Cavanaugh*, 2 Pa. 187, 189 (1845): "The high and honorable office of

The editors of the *Southern Law Review* favorably quoted Sharswood on why a lawyer's understanding of duty was not contrary to the public's interest: "'The lawyer,' says Judge Sharswood, 'is not merely the agent of the party: he is an officer of the court.'"¹⁹⁵ Publicly, nearly all lawyers by 1900 agreed that a lawyer zealously represented his client, but never acted solely as the client's agent.¹⁹⁶ The "hired gun" model was never promoted, and was regularly denounced by the elite bar, even as lawyers recognized that "pettifoggers" and "shysters" might be willing to do most anything for a client.¹⁹⁷

In all of the printed speeches and written articles concerning the American legal profession from the 1860s through 1900, including its standing and standards, none mentioned David Hoffman or his *Resolutions*. He was simply not a part of any debate on American legal ethics.

Counsel would be degraded to that of a mercenary, were he compelled to do the biddings of his client against the dictates of his conscience."). *See also* Hon. George W. McCrary, *THE TRUE LAWYER* 10 (Kansas City, H. N. Farey & Co. 1886)(following implicitly approach of Sharswood, and declaring it took a trial to determine which side was right and which was wrong, but also speaking repeatedly in terms of honor).

¹⁹⁵*About the Profession*, 1 *SO. L. REV.* at 279.

¹⁹⁶But this message was lost to some. *See* John Dos Passos, *THE AMERICAN LAWYER* 142 (1907)(rejecting Brougham's doctrine, but concluding "yet it has been relied on over and over again by lawyers, to cover all kinds of dishonest practices and defenses.").

¹⁹⁷*See* Charles Edwards, *PLEASANTRIES ABOUT COURTS AND LAWYERS OF THE STATE OF NEW YORK* 128 (New York, Richardson and Co. 1867)(noting judge, jury, witnesses and spectators were not "displeased that the old greasy pettifogger had the worst of it"); Henry Warren Williams, *LEGAL ETHICS AND SUGGESTIONS FOR YOUNG COUNSEL* 206 (1906)("The needs of one's client can never relieve against crime. Such offences as perjury, the corruption of jurors, of witnesses, and the abstraction of papers from the files, which are too frequently committed and which are sometimes connived at by a certain class of practitioners, cannot be defended on such grounds, either before the law or in morals."). Published in 1906, Williams wrote in the late nineteenth century. *See also* Cait Murphy, *SCOUNDRELS IN LAW: THE TRIALS OF HOWE AND HUMMEL, LAWYERS TO THE GANGSTERS, COPS, STARLETS, AND RAKES WHO MADE THE GILDED AGE* (2010)(discussing the law firm of Howe and Hummel and its use of the methods noted by Williams); Richard H. Rovere, *HOWE & HUMMEL: THEIR TRUE AND SCANDALOUS HISTORY* (1947)(same). *See also* John A. Farrell, *CLARENCE DARROW: ATTORNEY FOR THE DAMNED* 141 (2011)(noting Darrow's defense of lawyers charged with bribing jurors in 1906 and comment by former law partner that in some personal injury cases in which Darrow represented plaintiffs, "It was bribery all around.").

C. *Treatises on Ethics*

The first treatise on legal ethics was written by Edward Weeks and published in 1878.¹⁹⁸ Although a lengthy 698 pages, one reviewer noted, “We do not find much information as to what things may be done by attorney [sic], and what not, in criminal cases.”¹⁹⁹ Weeks’s *Treatise* cited Sharswood once, and Hoffman not at all. It followed their general view that the lawyer was not merely an agent of the client: “But a client has no right to control his attorney in the due and orderly conduct of a suit; and it is his duty to do what the court would order to be done, though his client instruct him otherwise.”²⁰⁰ A second edition published in 1892 also ignored both Hoffman and the issue of “what things may be done” by a criminal defense attorney.²⁰¹

George Warvelle’s 1902 treatise on legal ethics looked closely at the duties owed by a lawyer to client, court, opposing parties, and to society.²⁰² In general, a lawyer’s duty was based on the interiority of conscience, not honor accorded by others. Ethical behavior “should be guided in a general way by recognized usages, the prevailing moral sentiment, and the suggestions of his own conscience.”²⁰³ Warvelle specifically addressed the problem of the lawyer’s knowledge of the “prisoner’s guilt,” accepted the consensus view, and concluded with the statement approved of in *Courvoisier*.²⁰⁴ Similarly, Warvelle rejected Hoffman and followed Sharswood and convention (without mentioning either) on using the defense of the statute of limitations: The lawyer “is under a duty to urge it in a suit brought to recover the debt.”²⁰⁵ Finally, Warvelle included in his *Appendix* a favorable summary of the actions of Phillips in *Courvoisier*.²⁰⁶ Hoffman was unmentioned.

¹⁹⁸Edward P. Weeks, *TREATISE ON ATTORNEYS AND COUNSELLORS AT LAW* (San Francisco, Sumner Whitney & Co. 1878).

¹⁹⁹*Book Notices*, 13 AM. L. REV. 358, 359 (1879).

²⁰⁰Weeks, *TREATISE*, at 50.

²⁰¹Charles Theodore Boone, *TREATISE ON ATTORNEYS AND COUNSELLORS AT LAW* (rev. 2d ed. San Francisco, Bancroft-Whitney & Co. 1892).

²⁰²George P. Warvelle, *ESSAYS IN LEGAL ETHICS* (1902).

²⁰³*Id.* at 35.

²⁰⁴The lawyer may “use all fair arguments that may arise from the trial.” *Id.* at 136.

²⁰⁵*Id.* at 160.

²⁰⁶*Id.* at 211-16.

Hoffman's *Resolutions* was reprinted several times in the first two decades of the twentieth century, initially by the American Bar Association in 1907, and subsequently in a few treatises and casebooks.²⁰⁷ But none looked critically at the substance of Hoffman's *Resolutions*. The *Resolutions* was simply published without comment.

And in general, that's about all one heard about Hoffman during the first seven-plus decades of the twentieth century.²⁰⁸

IV. FOUND

A. The Code of Professional Responsibility and Crisis in the American Legal Profession

In just three years after its 1969 adoption by the ABA, the Code of Professional Responsibility was adopted as law by forty-three states and the District of Columbia. Four other state bar associations made the Code applicable to its members. Just three states rejected it.²⁰⁹ Canon 7, one of the nine Canons comprising the Code, declared, "A Lawyer Should Represent a Client Zealous Within the Bounds of the Law." This conclusion was justified on standard rule of law grounds. Any other approach would allow the public to determine whether an unpopular cause or client would find representation, and only full representation of the parties allowed the case to be decided on informed and dispassionate grounds.²¹⁰ Despite its extraordinary popularity, the Code was

²⁰⁷*Report of the Comm. on Code of Prof. Ethics*, 31 A.B.A. REP. 676, 717-35 (1907)(App. H); *Hoffman's Fifty Resolutions in Regard to Professional Deportment*, 2 AM. L. SCH. REV. 230 (1908); Gleason L. Archer, ETHICAL OBLIGATIONS OF THE LAWYER 317 (1910); George Purcell Costigan, CASES AND OTHER AUTHORITIES ON LEGAL ETHICS 555 (1917). Although chapter II of Orrin N. Carter, ETHICS OF THE LEGAL PROFESSION (1915) is titled "Historical," neither Hoffman nor Sharswood is mentioned.

²⁰⁸A Westlaw search found five mentions of Hoffman in law reviews from 1900-1965: Gleason L. Archer's *Ethics Obligations of the Lawyer*, 24 HARV. L. REV. 413 (1911); Charles Fairman, *The Education of a Justice: Justice Bradley and Some of His Colleagues*, 1 STAN. L. REV. 217 (1949); Sutherland, *Conduct of Judges and Lawyers*; John F. Sutton, Jr., *Guidelines to Professional Responsibility*, 39 TEX. L. REV. 391 (1961); and Note, *Modern Trends in Legal Education*, 64 COLUM. L. REV. 170 (1964). Only three noted the *Resolutions*, and each did so in cursory fashion.

²⁰⁹*Report of the Special Committee to Secure Adoption of the Code of Professional Responsibility*, 97 A.B.A. REP. 740, 741 (1972).

²¹⁰See *Report of the Special Committee on Evaluation of Ethical Standards*, 94 A.B.A. REP. 729, 774 (1969).

attacked early and often. An *ABA Journal* essay revealingly titled *The Myth of Legal Ethics*, stated, “The Code of Professional Responsibility, as the Canons of Professional Ethics before it, is a treasure trove of moral platitudes.”²¹¹ Even a sympathetic reader found the Code “repeatedly biased in the ordering of its priorities.”²¹² These criticisms were a part of a larger crisis within the American legal profession.

In the *Preface* to *Unequal Justice* (1976), Jerold Auerbach wrote that the period between 1968 and 1974 were “terrible years.”²¹³ Auerbach noted this period was a “coming apart,” “as legitimate authority was stripped from one institution after another—from university, government, presidency, military, police, prisons, courts, law.”²¹⁴

By early 1973, over two dozen lawyers were enmeshed in the Watergate scandal.²¹⁵ In 1974, the Department of Justice filed an antitrust suit against the ABA concerning several provisions of the Code,²¹⁶ and the next year the Supreme Court held unconstitutional minimum fee schedules.²¹⁷ Shortly thereafter, the Department of Justice filed an antitrust lawsuit against the ABA because the Code wholly banned lawyer advertising,²¹⁸ and in 1977, the Court held Arizona’s ban on all lawyer advertising

²¹¹Eric Schnapper, *The Myth of Legal Ethics*, 64 A.B.A. J. 202, 203 (1978).

²¹²Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 704 (1977).

²¹³Jerold S. Auerbach, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* xii (paperback ed. 1977)(1976).

²¹⁴*Id.* Auerbach is referencing William L. O’Neill, *COMING APART: AN INFORMAL HISTORY OF AMERICA IN THE 1960S* (paper ed. 1971).

²¹⁵See generally John J. Sirica, *TO SET THE RECORD STRAIGHT: THE BREAK-IN, THE TAPES, THE CONSPIRATORS, THE PARDON* (1979); Ken Gormley, *ARCHIBALD COX: CONSCIENCE OF A NATION* 227-392 (paper ed. 1997). For contemporary critical statements, see Brink, *Who Will Regulate the Bar?*, 61 A.B.A. J. at 937 (“[I]f Watergate has not tarnished the image of lawyers, at least it has acutely intensified public consciousness of questions of legal ethics and professional accountability.”); Lieberman, *CRISIS AT THE BAR* at 35 (“More than twenty-five lawyers were formally named as defendants or co-conspirators in Watergate and related criminal proceedings.”).

²¹⁶See *Justice Department and Other Views on Prepaid Legal Services Plans Get an Airing Before the Tunney Subcommittee*, 60 A.B.A. J. 791, 792-93 (1974); *Justice Department Continues Its Contentions That the Houston Amendments Raise Serious Antitrust Problems*, 60 A.B.A. J. 1410, 1410-14 (1974).

²¹⁷*Goldfarb v. Va. State Bar*, 421 U.S. 773, 784 (1975).

²¹⁸See Lawrence Walsh, *The Annual Report of the President of the American Bar Association*, 62 A.B.A. J. 1119, 1120 (1976).

violated the First Amendment.²¹⁹ Lawyers also suffered economically in the 1970s.²²⁰

The special committee drafting the Code pursued two paths: “The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor.”²²¹ For the “aspiring” the Code offered Ethical Considerations. For the possible “transgressor” it provided Disciplinary Rules. Both Ethical Considerations and Disciplinary Rules were subordinate to the Code’s nine “axiomatic” Canons. By mid-1977, the decision to include both Ethical Considerations and Disciplinary Rules was directly attacked. L. Ray Patterson, then Dean of Emory University Law School, wrote in the *ABA Journal*, “The time has come to renounce completely the fiction that ethical problems for lawyers are matters of ethics rather than law. The fiction pervades the Code of Professional Responsibility and is its major shortcoming.”²²²

B. The Model Rules of Professional Conduct

The ABA created a Special Committee on the Code of Professional Responsibility in 1977.²²³ Although asked merely to assess the Code, the Special Committee became the following year the Commission on Evaluation of Professional Standards, known as the Kutak Commission after its chair, Robert Kutak.²²⁴ The Kutak Commission began working on Model Rules of Professional Conduct, which eliminated aspiring Ethical Considerations in favor of the view of ethics problems as problems of law. As Kutak wrote in 1983, “What lawyers ... have failed to appreciate is that ethics is not what the Model Rules concern; the Model Rules are about the law of lawyering.”²²⁵

²¹⁹*Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977).

²²⁰See Richard A. Posner, *OVERCOMING LAW* 67 (1995)(noting “the price of legal services fell (in real, that is, inflation-adjusted terms), rather than ... rose [] between 1970 and 1985.”).

²²¹*Report of the Special Committee on Evaluation of Ethical Standards, Preamble to Code of Professional Responsibility*, 94 A.B.A. REP. 729,731 (1969).

²²²Patterson, *Wanted*, at 639.

²²³See *Annual Meeting Board of Governors*, 103 A.B.A. REP. 581 (1977).

²²⁴See *Annual Meeting Board of Governors*, 104 A.B.A. REP. 646 (1978).

²²⁵Kutak, *Law of Lawyering*, at 413.

In the three years between the publication of the Discussion Draft and the ABA's adoption of the Model Rules, a strenuous debate ensued concerning the extent of the lawyer's duty to a client. This particularly arose in the context of the lawyer's duty to disclose client information. The Discussion Draft, dated January 30, 1980, indicated in Rule 1.7 two instances in which a lawyer "shall" disclose information, and four cases in which the lawyer might disclose information about a client.²²⁶

This provision in the Discussion Draft was attacked by varied critics.²²⁷ The Proposed Final Draft of the Kutak Commission, released in May 1981, re-wrote the provision on the lawyer's duty to keep a client's confidences. Moved to Rule 1.6, the Kutak Commission eliminated any rule that required a lawyer to disclose a client confidence.²²⁸ This provision was only slightly modified in the Proposed Final Draft.²²⁹

The Model Rules displaced the view that ethical rules were "matters of personal conscience"²³⁰ by generating a "law of lawyering," legal ethics understood as positive law. The Model Rules generally favored a lawyer's duty of loyalty to a client against the lawyer's duty as an "officer of the court."²³¹ Hoffman

²²⁶MODEL RULES OF PROF'L CONDUCT R. 1.7 (Discussion Draft 1980).

²²⁷ It was attacked in an editorial in the Wall Street Journal, see W. William Hodes, *The Code of Professional Responsibility, the Kutak Rules, and the Trial Lawyer's Code: Surprisingly, Three Peas in a Pod*, 35 U. MIAMI L. REV. 739, 746 (1981) (citing Editorial, *A License to Squeal?*, WALL ST. J., Feb. 11, 1980, at 20), and the Roscoe-Pound-American Trial Lawyers Foundation offered an alternate code proposing more stringent limits on disclosing client confidences. See Commission on Professional Responsibility of The Roscoe Pound-American Trial Lawyer's Foundation, *The American Lawyer's Code of Conduct Public Discussion Draft-June 1980*, TRIAL, Aug. 1980, at 44, 50.

²²⁸MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (Proposed Final Draft 1981).

²²⁹See *Report of the Commission on Evaluation of Professional Standards*, 107 A.B.A. REP. 828, 833 (1982)(reprinting Proposed Final Draft as Exhibit A).

²³⁰ Kalish, *David Hoffman's Essay*, at 57.

²³¹*Cf.* MODEL R. PROF'L COND. R. 3.3 cmt.[2](noting "the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.").

became a source for those attacking the liberal “role morality” of lawyers, found in both the Code and the Rules, by reviving an ethics of virtue, which such critics equated with Hoffman.

C. The Revival of David Hoffman

Beginning in the late 1970s, as the ABA moved to supplant the Code with its Model Rules, Hoffman’s legal ethics became the subject of law review articles,²³² particularly on the duty of lawyer to society as well as client. Professor Stephen Kalish’s commentary on the proposed Model Rules examined Hoffman’s *Resolutions* to argue in support a stronger “officer of the court” concept. L. Ray Patterson’s 1980 *Legal Ethics* article used Hoffman and Sharswood to argue for a lawyer-client relationship that went beyond an agency relationship, to what Patterson called a “reciprocal agency model,” which accepted the concept that the lawyer’s duty of loyalty to a client did not preclude the lawyer’s duty as an officer of the court to others.²³³

Another important contributor to the revival of David Hoffman was Notre Dame law professor Thomas Shaffer. Shaffer first discusses Hoffman’s legal ethics in his book *On Being a Christian and a Lawyer* (1981).²³⁴ *On Being a Christian* was published in the midst of the ABA’s tortuous debate on the Model Rules, and was a corrective intended in part to refute the idea that legal ethics was merely a type of law. The book’s overarching purpose is to assess the issue of “role” in the behavior of lawyers and clients, and the relationship between role and morality. As Shaffer and Robert Cochran wrote elsewhere, “Our purposes ... are to seek out and examine the moral standards clients and their lawyers bring to the law office, to hold those standards up as better than the minimum lawyer standards, and to identify a way that lawyers and clients can talk about and apply their standards in the law office on ordinary Wednesday afternoons.”²³⁵ Shaffer’s evaluation of Hoffman was neither to venerate nor to argue for Hoffman’s ethical views, but to examine critically Hoffman’s ideas in light of the dominant view that lawyers represented clients.

²³²Bloomfield, *Republican Legal Culture*; L. Ray Patterson, *Legal Ethics and the Lawyer’s Duty of Loyalty*, 29 *Emory L.J.* 909 (1980); Kalish, *David Hoffman’s Essay*.

²³³ Patterson, *Legal Ethics*, at 927, 965.

²³⁴Shaffer, *ON BEING A CHRISTIAN*. He does so particularly in Chapter Six, titled *The Problem of Representing the Guilty*. See also Shaffer, *Atticus Finch*.

²³⁵Shaffer & Cochran, *LAWYERS*, at viii (Preface to First Edition).

Shaffer accurately perceived Hoffman as ignoring any role of client conscience in the practice of law. In contrast, modern adversary ethics largely ignored any moral claims made by lawyers in representing clients. The legal profession was thus stuck between the radically incomplete views that the role of lawyer was solely as “agent” of or “godfather”²³⁶ to the client. Shaffer provides an incisive assessment of both Hoffman and Sharswood, and concludes, “It is fair to say that modern standards would not admit of Sharswood’s distinctions or Hoffman’s reservations” in defending a guilty client.²³⁷ Shaffer accepts the modern approach to defending the guilty. He rejects its justifications.

After writing about Hoffman’s legal lectures in 1982,²³⁸ Shaffer published an essay titled *The Gentleman in Professional Ethics* in 1984.²³⁹ Though Hoffman is referred to only tangentially, Shaffer’s essay is a deeply knowledgeable study of the fatal flaws of the ethic of the gentleman, of whom Hoffman was the paradigmatic example. Shaffer’s assessment of Hoffman culminated in his textbook *American Legal Ethics* (1985), which included throughout Hoffman’s *Resolutions*. This textbook was intended to nudge students to think about the everyday moral work of lawyers rather than the boundaries of law enacted in the Model Rules.

Yale law professor Geoffrey Hazard was the co-author of *The Law of Lawyering* (1985).²⁴⁰ He had reported the critical comments of large firm lawyers that the Code was an outdated relic in a 1978 book.²⁴¹ Hazard was also the Reporter for the Model Rules. In a 1981 article defending the drafting process of the Model Rules, Hazard explained the Commission’s rejection of the tripartite structure of the Code in favor of rules, called the Code “anachronistic,”²⁴² and concluded that Hoffman and Sharswood’s “ethical guidance consisted of Victorian moralizing at its

²³⁶Shaffer and Cochran delineated four approaches to moral issues in representing clients: lawyer as godfather, lawyer as hired gun, lawyer as guru, and lawyer as friend. *See id.* (Table of Contents).

²³⁷Shaffer, ON BEING A CHRISTIAN, at 68.

²³⁸Shaffer, *David Hoffman’s Law School Lectures*.

²³⁹Thomas L. Shaffer, *The Gentleman in Professional Ethics*, 10 QUEEN’S L.J. 1 (1984-1985).

²⁴⁰Geoffrey C. Hazard, Jr. & W. William Hodes, *THE LAW OF LAWYERING* (1985).

²⁴¹Geoffrey C. Hazard, Jr., *ETHICS IN THE PRACTICE OF LAW* 7 (1978).

²⁴²Geoffrey C. Hazard, Jr., *Rules of Legal Ethics: The Drafting Task*, 36 RECORD B. ASS’N CITY OF N.Y. 77, 82 (1981).

worst.”²⁴³ He explained that the “beginning point for the Kutak Commission has been that adversarial representation of clients is in the public interest.”²⁴⁴ This last assertion was irrelevant. All earlier legal ethics writers promoted adversarial representation as in the public interest. That’s why nearly all nineteenth century lawyers used the word “zeal” and justified defending the guilty client on rule of law/anti-lynching grounds. The relevant question was, when, if ever, does a lawyer’s duty as an “officer of the court” or to others override the lawyer’s duty to zealously represent the client? The answer in the Model Rules was, rarely.

Hazard distilled the recent historical movement in legal ethics in a 1991 *Yale Law Journal* article. Legal ethics “norms have become ‘legalized.’ The rules of ethics have ceased to be internal to the profession; they have instead become a code of public law enforced by formal adjudicative disciplinary process.”²⁴⁵

D. The Professionalism Crisis

Hazard was right. Legal ethics were a matter of law, and lawyers began seeking its boundaries. By 1980, “[t]he prevailing notion among lawyers seems to be that the lawyer’s duty of loyalty to the client is the first, the foremost, and, on occasion, the only

²⁴³*Id.* at 81. Hazard wrongly dates Hoffman’s “ethical precepts” as from 1817. Even if he correctly used 1836, this still predates Queen Victoria reign. And even allowing for some chronological leeway, Hazard is simply wrong to declare Hoffman’s or Sharswood’s views “Victorian,” unless the only meanings he attributes to it are “old-fashioned” or “views I disagree with.”

²⁴⁴*Id.* at 93.

²⁴⁵Hazard, *Future*, at 1241. See also Geoffrey C. Hazard, Jr., *Law, Morals, and Ethics*, 19 SO. ILL. U.L.J. 447, 453 (1995) (“‘Law’ and ‘morals’ are thus at opposite ends of the normative spectrum in terms of form, mutual intelligibility, and as mechanisms of personal and social action. In between law and morals are ‘ethics.’”); Geoffrey C. Hazard, Jr., *Foreword*, 67 FORDHAM L. REV. 239, 244 (1998) (noting “traditional understanding” of legal profession that lawyer conduct norms were rules of ethics rather than law). But see Geoffrey C. Hazard, Jr. & Douglas W. Pinto, Jr., MORAL FOUNDATIONS OF AMERICAN LAW 179 (2013) (concluding, “We yearn for latter-day Jethros: ‘Able people such as fear God, people of truth, hating covetousness.’”). For a thorough study, see Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics-I. Origins*, 8 U. CHI. L. SCH. ROUNDTABLE 469 (2001); Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics-II The Modern Era*, 15 GEO. J. LEGAL ETHICS 205 (2002).

duty of the lawyer.”²⁴⁶ Several critics urged that lawyers seek an ethic of justice, one that differed from “a professional vision based only on client service and the bottom line.”²⁴⁷ The liberal conception was that an autonomous client selected her legal goals, which the lawyer worked to effectuate. In this liberal view, lawyers were thus not accountable to the public for the goals of their clients, a view accepted in both Canon 7 of the Code and in the Model Rules. Those promoting an ethics of virtue found the moral nonaccountability of lawyers a fatally flawed understanding of legal ethics.²⁴⁸ Hoffman *Resolutions* was a contrary view of legal ethics, founded in virtue.

In the last half of the 1980s, the problem of the “moral nonaccountability” of lawyers became acute, as some in the profession reacted to perceived adversarial excesses. Just a year after the adoption of the Model Rules, the ABA created a Commission on Professionalism to combat the possibility that “the Bar might be moving away from the principles of professionalism and that it was so perceived by the public.”²⁴⁹ In 1986, the Commission issued a report discussing the extensive changes to the legal profession since 1960. The creation of more formal disciplinary processes resulted in lawyers taking “the rules more seriously” than before.²⁵⁰ But the move from the Code to the Rules also resulted in a tendency of lawyers “to look at nothing but the rules.”²⁵¹ The House of Delegates resolved to distribute this Report to law schools, judges, and state and local bar associations.

And the “professionalism” crusade began.²⁵² Two years later, the ABA House of Delegates resolved that it recommend to state and local bar associations that they adopt a lawyers’ creed of

²⁴⁶Patterson, *Legal Ethics*, at 918.

²⁴⁷Luban, *LAWYERS AND JUSTICE*, at xvii-xviii.

²⁴⁸See, e.g., Luban, *LAWYERS AND JUSTICE*, at xx.

²⁴⁹*Report of the Commission on Professionalism to the Board of Governors and the House of Delegates of the American Bar Association*, 111(2) A.B.A. REP. 369, 373 (1986). See also ABA Comm’n on Professionalism, “... *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*,” 112 F.R.D. 243 (1986)(reprinting report).

²⁵⁰*Id.* at 259. See also Vincent R. Johnson, *Justice Tom C. Clark’s Legacy in the Field of Legal Ethics*, 29 J. LEGAL PROF. 33 (2004-2005)(discussing history of reform of lawyer disciplinary processes beginning with ABA’s 1970 Clark Report).

²⁵¹“*In the Spirit*”, at 259.

²⁵²For a critical review, see Rob Atkinson, *A Dissenter’s Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259 (1995).

professionalism to battle “abuses” “fostered by an excessive zeal, a ‘win at any cost’ mentality, ‘scorched earth’ tactics and the apotheosizing of ‘playing hard ball.’”²⁵³ When it so resolved, the House of Delegates added a second resolution: “That nothing contained in such a creed shall be deemed to supersede or in any way amend the Model Rules of Professional Conduct or other disciplinary rules, alter existing standards of conduct against which lawyer negligence might be judged or become a basis for the imposition of civil liability of any kind.”²⁵⁴ The second resolution ensured that the lawyer’s creed of professionalism was not an admonition to lawyers to “behave, or else.” Instead, it was aspirational, just as the rejected Ethical Considerations of the 1969 Code were aspirational. That the ABA was reviving an approach (disciplinary rules and ethical considerations) it had killed less than a decade earlier did not appear confounding to it. The rules remained the rules. Like other creeds, the lawyer’s creed was made for believers, and was a matter of no concern to unbelievers. Unlike other creeds, it was difficult to discern how lawyers could use it to proselytize their fellow sisters and brothers of the bar.

Some states tried to avoid the problem of faith by making professionalism a rule. In 2008, Arizona defined as “unprofessional conduct” any “substantial or repeated violations of the Oath of Admission to the Bar or the Lawyer’s Creed of Professionalism of the State Bar of Arizona,”²⁵⁵ which made such conduct subject to discipline. In 2013, the Florida Supreme Court adopted a *Code for Resolving Professionalism Complaints*, and followed Arizona in defining as “unprofessional conduct” as “substantial or repeated violations of the *Oath of Admission to The Florida Bar, The Florida Bar Creed of Professionalism, The Florida Bar Ideals and Goals of Professionalism, The Rules Regulating The Florida Bar*, or the decision of The Florida

²⁵³Report No. 2 of the Section of Tort and Insurance Practice, 113(2) A.B.A. REP. 589, 589 (1988). See *id.* at 25 (adopting resolution).

²⁵⁴Proceedings of the 1988 Annual Meeting of the House of Delegates, 113(2) A.B.A. REP. 4, 25 (1988).

²⁵⁵Regulation of the Practice of Law, Rule 31(a)2.E., Rules of the Supreme Court of Arizona, 17A Ariz. Rev. Stats., Supreme Ct. Rules (2013). See Amelia Craig Cramer, Linda Drake & Mariam Digging, *Civility for Arizona Lawyer: Essential, Endangered, Enforceable*, 6 Phoenix L. Rev. 465, 482-83 (2013)(noting history of amendment).

Supreme Court.”²⁵⁶ Thus, in those states the law of lawyering now encompassed the Professionalism Creed.

A 1983 amendment to Federal Rule of Civil Procedure 11, intended “to deal with the abuses that undermined civility and professionalism,” instead “may have contributed to further undermining the public’s confidence in the profession as well.”²⁵⁷ The goal of amended Rule 11 was to inculcate civility in civil litigation. Its unintended consequence was “a deleterious effect on lawyer relations.”²⁵⁸ Concomitantly, the 1980s also saw a rise in efforts to disqualify opposing counsel on conflict of interest grounds. In his 1985 treatise *Modern Legal Ethics*, Charles Wolfram wrote, “The motion for a judicial order disqualifying a lawyer in pending litigation because of conflict is a traditional remedy that has come into prominence in recent years.”²⁵⁹ In Texas, for example, appellate decisions on orders disqualifying counsel on conflict of interest grounds were first issued in the late 1980s.²⁶⁰ By the end of the 1980s lawyers began to write ruefully about the deleterious consequences of “Rambo”-style litigation tactics to the profession of law. While some such tactics might violate enforceable rules, others simply made litigation even more onerous and expensive, heightening the professionalism crisis.²⁶¹

In 1988, the Section on Professional Responsibility of the Association of American Law Schools organized its annual

²⁵⁶ *In re Code for Resolving Professionalism Complaints*, 116 So. 3d 280, 282 (Fla. 2013)(Exhibit A Code for Resolving Professionalism Complaints).

²⁵⁷Georgene Vairo, *Rule 11 and the Profession*, 67 *FORDHAM L. REV.* 589, 590 (1998). See generally Carol Rice Andrews, *Ethical Limits on Civil Litigation Advocacy: A Historical Perspective*, 63 *CASE WESTERN RES. L. REV.* 381 (2012).

²⁵⁸Vairo, *Rule 11*, at 627 (citing studies).

²⁵⁹Charles W. Wolfram, *MODERN LEGAL ETHICS* § 7.1.7 at 329 (2d ed. 1985). See Charles W. Wolfram, *Former-Client Conflicts*, 10 *GEO. J. LEG. ETHICS* 677 (1997)(citing cases largely dating from the 1980s or later). See also William Freivogel, *A Short History of Conflicts of Interest. The Future*, 20:2 *PROF. LAWYER* 3, 3 (2010)(“Twenty years is a good window, however, because most of the relevant activity has taken place during that period.”).

²⁶⁰See *Petroleum Wholesale, Inc. v. Marshall*, 751 S.W.2d 295 (Tex. 1988); *NCNB Tex. Nat’l Bank v. Coker*, 765 S.W.2d 398 (Tex. 1989).

²⁶¹Sayler, *Rambo Litigation*; Paul Marcotte, *Reining in Rambo*, *A.B.A. J.*, Nov. 1989, at 43; Bradley W. Foster, Comment, *Playing Hardball in Federal Court; Judicial Attempts to Referee Unsportsmanlike Conduct*, 55 *J. AIR L. & COM.* 223 (1989); Reavley, *Rambo Litigators*; Curtin, *Civil Matters* (ABA President lamenting “Rambo” litigation tactics); Thomas J. Paprocki, *Ethics in the Everyday Practice of Law*, 35 *CATH. LAW.* 169 (1991).

program around professionalism,²⁶² and the American Bar Foundation held a Conference on Professionalism.²⁶³ Courts and bar associations also focused on professionalism.²⁶⁴ The professionalism crisis resulted in a flood of books²⁶⁵ and articles²⁶⁶ alternately regretting or fearing the shift of law from a profession to a business.²⁶⁷ And at least 140 state or local bar association adopted some professionalism creed between 1986 and 2007.²⁶⁸

In this maelstrom David Hoffman has served a purpose. He is a reminder of a past in which ethics and morality were intertwined, and both served the idea of law as a profession. He also represented a past ideal of virtue ethics, in contrast to the role morality of modern liberal legal ethics. Hoffman's ethos was of less interest to legal scholars than the fact that Hoffman served as a symbol of a worthy tradition. Legal scholars often referred to his *Resolutions* from the 1980s on, but ordinarily to support an argument about a smaller or larger aspect of unprofessional lawyer behavior, or about the moral qualities to be fostered in American lawyers. Hoffman was used instrumentally by those who often argued on non-instrumental grounds for a return to a past moral "golden age." On these grounds, the law of lawyering won both the battle and the war.

²⁶²See Atkinson, *A Dissenter's Commentary*, at 261 n.4.

²⁶³Robert L. Nelson, *et al.*, *Preface*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* ix (1992). This book was the result of the September 1988 Conference.

²⁶⁴Special Comm. on Professionalism, Illinois St. B. Ass'n, *The Bar, the Bench and Professionalism in Illinois*, 76 ILL. B.J. 441 (1988); Order of the Supreme Court of Texas and the Court of Criminal Appeals, *The Texas Lawyer's Creed-A Mandate for Professionalism*, adopted Nov. 7, 1989, reprinted in Reavley, *Rambo Litigators*, at 657-62.

²⁶⁵See, e.g., Sol M. Linowitz & Martin Mayer, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994); Mary Ann Glendon, *A NATION UNDER LAWYERS* (1994); Anthony T. Kronman, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

²⁶⁶See, e.g., *Professionalism in the Practice of Law: A Symposium on Civility and Judicial Ethics in the 1990s*, 28 VAL. U.L. REV. 513 *et seq.* (1994); *Conference on the Commercialization of the Legal Profession*, 45 S.C. L. REV. 883 *et seq.* (1994); *Symposium: Book Review*, 7 GEO. J. LEGAL ETHICS 987 *et seq.* (1994).

²⁶⁷Carl T. Bogus, *The Death of an Honorable Profession*, 71 IND. L.J. 911, 911 (1996) ("The legal profession is dead or dying. It is rotting away into an occupation.").

²⁶⁸Donald E. Campbell, *Raise Your Right Hand and Swear to be Civil: Defining Civility as an Obligation of Professional Responsibility*, 47 Gonzaga L. Rev. 99, 142 (2011).

V. CONCLUSION

The debate on the Model Code continues, though the ABA, through its Ethics 2000 Commission and later efforts, has largely nibbled around the corners.²⁶⁹ Inculcating virtuous conduct within the American legal profession also continues, but again only in small incremental fashion. The professionalism debate is never-ending, though it is now considered in light of the impact of the Great Recession on the American legal profession. A profession constantly in crisis²⁷⁰ faces another: what is it, and what is it to be? (Or, what *are* lawyers to be, for the future may be several discrete professions, a pluralistic society of lawyers.)

One possibly surprising lesson to take from Hoffman's life is to reject "declinist" thought. Hoffman's fear of the rabble and Jacksonian democracy (as well as personal loss) led him from the legal profession. That fear may also have led to his insistence on arguing in some of his *Resolutions* for a lawyering tradition that never was, based on a professional exclusivity that was quickly disappearing. Changes in the modern American legal profession may result in decline, but such a result is not fated.²⁷¹

It may be that "[t]hings fall apart; the centre cannot hold."²⁷² Transformations of the legal profession have been taking place for more than four decades,²⁷³ and predictions of "major transformations" "within the next decade or so"²⁷⁴ are simply a reminder that instability is a constant for lawyers.

²⁶⁹See Ariens, "Playing Chicken", at 295-300 (listing in Appendix a Timeline from 1997-2008).

²⁷⁰See Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES* at 144.

²⁷¹See generally Thomas D. Morgan, *THE VANISHING AMERICAN LAWYER* (2010).

²⁷²William Butler Yeats, *The Second Coming*, in *THE COLLECTED POEMS OF W.B. YEATS* 184, 184 (1959). See also John Leubsdorf, *Legal Ethics Falls Apart*, 57 *BUFF. L. REV.* 959 (2009).

²⁷³See Ariens, *Age of Anxiety*, at 444-51 (discussing end of "golden age" and rise of professional anxiety since 1970).

²⁷⁴Morgan, *VANISHING AMERICAN LAWYER*, at 217.