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### Brougham's Ghost

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# Brougham's Ghost

MICHAEL ARIENS\*

*In defending Queen Caroline in the House of Lords, Henry Brougham declared, "[a]n advocate, by the sacred duty of his connection with his client, knows, in the discharge of that office, but one person in the world, that client and none other." Brougham's ethic of advocacy has been cited repeatedly as stating the American lawyer's duty of zealous representation of a client. It has often been called the "classic statement" of zealous representation and representing the "traditional view of the lawyer's role."*

*This essay challenges these conclusions. Brougham's rhetoric was neither a classic statement of the duty of loyalty to a client, nor did it represent a traditional view within the American legal profession. It was consciously rejected in nearly all writings of American lawyers for most of American history, and was not explicitly embraced until the 1970s. Reminding lawyers of the duty of zealous representation was promoted in the 1960s in part to solidify the Supreme Court's Constitutional Criminal Procedure revolution, for only zealous lawyers could protect the rights of the criminally accused. Brougham's ethic of advocacy was used to provide a historical justification for a revived zeal in criminal defense practice, an effort to make those lawyers more professional. This justification was transformed in the 1970s by two events: first, the American legal profession became enmeshed in a professionalism crisis as a consequence of the Watergate affair. Second, that professionalism crisis was exacerbated by a fear of diminishing economic prospects for American lawyers.*

*This essay is divided into three parts. First, it offers a full assessment of Brougham's representation of Queen Caroline. Second, it traces the published and negative reaction of American lawyers to Brougham's statement of the duty of zealous representation from the 1840s on. Third, the essay explains why the consistent rejection of Brougham by American lawyers became the "classic statement" of the duty of the advocate beginning in the 1970s.*

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## I. INTRODUCTION

"[A]n advocate, by the sacred duty of his connection with his client, knows, in the discharge of that office, but one person in the world, that client and none other. To save that client by all expedient means—to protect that client at all hazards and costs to all others, and among others to himself—is the highest and most unquestioned of his duties."<sup>1</sup>

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1. III PARLIAMENTARY DEBATES 114 (N. S. London, T. C. Hansard 1821) [hereinafter HANSARD'S PARLIAMENTARY DEBATES]. Hansard recorded Brougham's speech in the first person. Brougham's statement is variously reported in other publications. The most cited version of this speech is from Joseph Nightingale's TRIAL OF QUEEN CAROLINE, which reads: "[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty." 2 THE TRIAL OF QUEEN CAROLINE 8 (Joseph Nightingale ed., London, J. Robins & Co. 1821). See also 2 THE TRIAL OF QUEEN CAROLINE 2-3 (Manchester, J. Gleave 1821). Both are written in the third person. It is slightly amended in Brougham's 1839 OPINIONS, his 1841 SPEECHES and his posthumous 1871 autobiography, most importantly by capitalizing "THAT CLIENT AND NONE OTHER." HENRY BROUGHAM, 1 OPINIONS OF LORD BROUGHAM, ON POLITICS, THEOLOGY, LAW, SCIENCE, EDUCATION, LITERATURE, &C. 143

Henry Brougham's 1820 defense of Queen Caroline in the House of Lords has been cited repeatedly as historically explicating the American lawyer's duty of zealous representation of a client.<sup>2</sup> Brougham's formulation has been called "[t]he classic statement"<sup>3</sup> of zealous representation, as representing the "traditional view of the lawyer's role,"<sup>4</sup> and as encompassing the "basic narrative" of the American legal profession "for over two centuries."<sup>5</sup>

This essay challenges these conclusions.<sup>6</sup> Brougham's rhetoric did not represent a traditional view of the American lawyer's duty of zealous representation, nor did it frame the basic narrative of American lawyering.<sup>7</sup> It was consciously rejected in nearly all writings of American lawyers for most of American history. Brougham's ethic was not explicitly embraced until the late 1960s and early 1970s. Brougham's ethic of advocacy was initially adopted as an important aspect of solidifying the Supreme Court's

(Philadelphia, Lea & Blanchard Co. 1839); HENRY BROUGHAM, 1 SPEECHES OF HENRY LORD BROUGHAM 63 (Philadelphia, Lea & Blanchard Co. 1841) [hereinafter BROUGHAM, SPEECHES]; HENRY LORD BROUGHAM, 2 THE LIFE AND TIMES OF HENRY LORD BROUGHAM, WRITTEN BY HIMSELF 308-09 n.\* (New York, Harper & Brothers 1871).

2. A HeinOnline search of "Brougham and Queen Caroline" in the database "Core U.S. Journals" dated 1887-2013 results in 461 citations. A Westlaw Classic search of "Brougham and Queen pre/2 Caroline" in the database "TP-ALL" results in nearly 300 citations, with the vast majority dated since 1980, given Westlaw's limited historical inclusion of law reviews. Of course, some of these citations are critical.

3. MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 9 (1975). See also Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 446 n.20 (1999).

4. Charles Fried, *The Lawyer as Friend*, 85 YALE L.J. 1060, 1060 n.1 (1976).

5. Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1244 (1991).

6. Thus, while I agree with Professor Michael Hoeflich's conclusion that "the nineteenth century view of legal ethics differed greatly from our own," M. H. Hoeflich, *Legal Ethics in the Nineteenth Century: The "Other Tradition"*, 47 U. KAN. L. REV. 793, 794 (1999), I argue that this was not some "other tradition" of legal ethics.

7. I conclude the excellent article, Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 2 (2005), errs in declaring, "Within a short time, Brougham's declaration came to stand for the popular conception that an attorney in this country must do everything legally permissible to promote his client's interests and objectives." *Id.* I also conclude Monroe Freedman's rejoinder to Zacharias and Green fails to place Brougham's representation of Caroline in its full context and fails to note the rejection of Brougham in writings in Great Britain and the United States during the nineteenth century. See Monroe H. Freedman, *Henry Lord Brougham and Zeal*, 34 HOFSTRA L. REV. 1319 (2006). See also Monroe H. Freedman, *Henry Lord Brougham, Written by Himself*, 19 GEO. J. LEG. ETHICS 1231 (2006); Fred C. Zacharias & Bruce A. Green, "Anything Rather Than a Deliberate and Well-Considered Opinion"—Henry Lord Brougham, *Written by Himself*, 19 GEO. J. LEG. ETHICS 1221 (2006) (continuing debate on Brougham's understanding of the lawyer's duty of zealous advocacy).

Constitutional Criminal Procedure revolution of the 1960s.<sup>8</sup> Zealous advocacy was urged in the criminal defense bar because much evidence existed of its failures, and recurrent cries in support of zealous advocacy were made in an effort to make more professional the defense of the criminally accused. In the 1970s, Brougham's ethic was used to justify zealous advocacy on a broader scale. This effort resulted from two events: first, the American legal profession was enmeshed in an ideological crisis exacerbated by the Watergate affair, one that led the American legal profession to defend zealous representation of a client on grounds of professionalism while condemning the actions of those lawyers who committed crimes on behalf of the President. Second, the professionalism crisis was exacerbated by a fear of diminishing economic prospects for American lawyers. This fear made it more important for private practice lawyers to claim that the ideal of professionalism required protecting the interests of their paying clients, allowing those lawyers to align their ideological and material interests.

This essay is divided into three parts. First, it offers a full assessment of Brougham's representation of Queen Caroline. Second, it traces the consistently negative published reaction, beginning in the 1840s, of American lawyers to Brougham's declaration that the lawyer knew his client and no other. Third, the essay explains why American lawyers in the late 1960s and early 1970s began citing Brougham positively, and in support of the claim that zealous representation of the client and no other was ethically defensible.

## II. HENRY BROUGHAM AND THE TRIAL OF QUEEN CAROLINE

### A. THE TEMPESTUOUS MARRIAGE OF THE PRINCE AND PRINCESS OF WALES

The 1795 marriage of Caroline and George, Prince of Wales (and future King George IV) was, by all accounts, unhappy.<sup>9</sup> Their marriage was arranged because the Prince of Wales was again an overextended debtor, and marriage would likely lead Parliament to settle his debts and provide

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8. See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 379-444 (2000). See also WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 216-43 (2011).

9. See generally FLORA FRASER, *THE UNRULY QUEEN: THE LIFE OF QUEEN CAROLINE* (1996); CHRISTOPHER HIBBERT, *GEORGE IV: THE REBEL WHO WOULD BE KING* 201-03 (paper ed. 2007); JANE ROBINS, *THE TRIAL OF QUEEN CAROLINE: THE SCANDALOUS AFFAIR THAT NEARLY ENDED A MONARCHY* 18-23 (2006); ROGER FULFORD, *THE TRIAL OF QUEEN CAROLINE* 18 (2001) (1968).

him a larger annual allowance as a married man.<sup>10</sup> His marital options were relatively few, and with his father's consent, he settled on his first cousin, Princess Caroline of Brunswick (now part of Germany). Their first meeting, just three days before they were wed, was a disaster. Both left this meeting desperately unhappy with their betrothed.<sup>11</sup> After the wedding, this state continued. The Prince wrote that he and Caroline engaged in sexual intercourse during their marriage just three times, twice on their wedding night and once the day after.<sup>12</sup> Still, Caroline became pregnant, and gave birth to a daughter, Charlotte, exactly nine months after the wedding day. A little more than a year after their wedding, the Prince wrote to the Princess of Wales: "[N]ature has not made us suitable to each other."<sup>13</sup> They soon led separate lives.

In 1806, King George III agreed to open a secret inquiry known as the Delicate Investigation, an investigation by four Cabinet ministers whether Willy Austin, a young boy adopted by Caroline in 1802, was her biological son.<sup>14</sup> If so, he would take Charlotte's place in the line of succession.<sup>15</sup> The second inquiry about which the Lords Commission heard evidence was whether the Princess of Wales had engaged in other adulterous conduct.<sup>16</sup> The former accusation was decisively refuted: "[T]here is no foundation whatever for believing that the child now with the Princess is the child of her Royal Highness."<sup>17</sup> But the Commission found some basis for the latter accusation. It suggested that allegations of adultery "must be credited until they shall receive some decisive contradiction."<sup>18</sup> If true, this was treason, punishable by death. The Commission had not informed the Princess of the investigation, of which she learned through other sources, and it gave her no opportunity to rebut the charges, or to question her accusers. The Commission then left the matter for the King and the Cabinet. Eventually the

10. See FRASER, *supra* note 9, at 43; FRANCES HAWES, HENRY BROUGHAM 116 (1957).

11. See FULFORD, *supra* note 9, at 18; FRASER, *supra* note 9, at 53-54; HAWES, *supra* note 10, at 119; HIBBERT, *supra* note 9, at 194.

12. ROBINS, *supra* note 9, at 18 (quoting letter to Lord Malmesbury). Local gossip was that they had sexual intercourse but once. See FULFORD, *supra* note 9, at 18.

13. ROBINS, *supra* note 9, at 22; FRASER, *supra* note 9, at 83. This became known as the "letter of licence," for the entire sentence quoted above was, "Our inclinations are not in our power, nor should either of us be held answerable to the other because nature has not made us suitable to each other." FRASER, *supra* note 9, at 83. Caroline may have (unwisely) viewed the sentence as granting her some sexual license.

14. See FRASER, *supra* note 9, at 155; ROBINS, *supra* note 9, at 29.

15. See FRASER, *supra* note 9, at 152.

16. *Id.* at 164.

17. ROBINS, *supra* note 9, at 31; FRASER, *supra* note 9, at 171. Fraser concludes Caroline engaged in adulterous affairs with several men during this time. See FRASER, *supra* note 9, at 138-39, 146-65.

18. FRASER, *supra* note 9, at 172.

Prince and Princess received copies of the report, which the Princess vigorously attacked. At the end of the year, the full Cabinet largely washed its hands of the mess: “[T]he facts of the case do not warrant their advising that any further steps should be taken in the business by your Majesty’s Government, or any proceedings instituted upon it.”<sup>19</sup> The Prince was indignant.

In January 1813, Caroline wrote her husband, now the Prince Regent after George III’s descent into mental illness, a letter protesting the Delicate Investigation.<sup>20</sup> She wrote at the behest of her new advisor, Henry Brougham, a lawyer and Whig Party politician who fervently opposed Prince George.<sup>21</sup> George did not respond, and in February the letter was leaked to a sympathetic newspaper. The Prince Regent now publicly responded, as Brougham predicted. George leaked statements made to the Delicate Investigation commissioners by those accusing Caroline of adultery.<sup>22</sup> Newspapers chose sides, and those which championed Caroline saw their circulation rise substantially.

The next year Caroline voluntarily departed England for the European continent. In the half-decade before the death of her uncle and father-in-law, King George III, she spent most of her time in Italy, though she also traveled. One member of her inner circle was Bartolomeo Pergami (also known as Bergami), whom she met in Milan in 1814 and who originally served as her courier. Pergami was quickly promoted and was handsomely rewarded by Caroline.<sup>23</sup> It appears he also became Caroline’s lover.<sup>24</sup> The Prince Regent employed spies to gain evidence of Caroline’s adultery, which would allow him to obtain a divorce. Though the Cabinet refused to initiate an investigation based on the hearsay evidence presented to it, in 1818 it permitted the Prince Regent to send his own Commissioners, known as the Milan Commission, to investigate Caroline’s conduct.<sup>25</sup>

Late that year, the Milan Commission took depositions of persons who may have possessed evidence of Caroline’s adultery, but who also had a great interest in the scandal. A total of eighty-two witnesses gave testimony, “and more were instantly sent back home as being of bad character.”<sup>26</sup>

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19. *Id.* at 185.

20. *See* ROBINS, *supra* note 9, at 40-41.

21. *See id.* at 37-40; HAWES, *supra* note 10, at 123, 130. Caroline and Brougham met in 1809. *See* ROBERT STEWART, HENRY BROUGHAM, 1776-1868: HIS PUBLIC CAREER 140 (1986).

22. ROBINS, *supra* note 9, at 42.

23. *See* FRASER, *supra* note 9, at 256.

24. *See* ROBINS, *supra* note 9, at 67 (quoting letters from 1815 that convinced Brougham and others “Caroline and Pergami were enjoying an active sex life”); FRASER, *supra* note 9, at 266 (noting suspicions in late 1814).

25. FRASER, *supra* note 9, at 303-04.

26. *Id.* at 311.

One star witness was Louise Demont, who had served as Princess Caroline's lady's maid from 1814 until her dismissal in 1817 for conspiring to steal from the Princess. The commissioners spent twenty-two days deposing her, "to allow her time for recollection and not to fatigue her by too long attendance at one sitting[.]"<sup>27</sup> Caroline was well aware of the actions of the Commission, and began a counteroffensive in March 1819.

Caroline was visited then by James Brougham, Henry's brother. James wrote Henry that he believed Caroline was engaged in an adulterous relationship with Pergami.<sup>28</sup> Caroline suggested to James a willingness to agree to a divorce if she was well settled financially, but Henry Brougham rejected the idea on the ground that only an admission of adultery would permit a divorce.<sup>29</sup> Henry Brougham then appeared to broker an agreement in mid-1819 with the government, in which Caroline would agree to a formal separation, renounce her claim to be crowned as Queen, and receive her allowance for life.<sup>30</sup>

Brougham told Caroline nothing about the proposed settlement.<sup>31</sup> Brougham's inexcusable inaction may have been a consequence of his wish to serve himself by serving "the Regent secretly,"<sup>32</sup> or because he "liked to be in a strong bargaining position with the government, and adored being at the centre of the political stage."<sup>33</sup> He "was beginning to play his client false."<sup>34</sup> An early Brougham biographer concluded, "The tortuousness of his conduct gave rise to what was probably a well-founded suspicion in the minds both of friends and foes, that he was willing to betray the cause of the injured Princess for his own personal advancement."<sup>35</sup>

From mid-1819 through late spring 1820, Brougham was intent on serving only his own interests. Brougham attempted to curry favor with the Prince Regent, writing Baron John Hutchinson, who was friendly with both,<sup>36</sup> that he wished the Prince Regent to know "that I [represent Caroline] involuntarily and after having done all I could to avoid it, and that whatever consequences follow are imputable to others and not to myself."<sup>37</sup> He went further. Brougham sought the high honor of appointment as King's

27. *Id.* at 300, 316; ROBINS, *supra* note 9, at 79.

28. FRASER, *supra* note 9, at 319; ROBINS, *supra* note 9, at 79.

29. ROBINS, *supra* note 9, at 79-80; FRASER, *supra* note 9, at 320-25.

30. ROBINS, *supra* note 9, at 80; FRASER, *supra* note 9, at 324-25.

31. ROBINS, *supra* note 9, at 81; FRASER, *supra* note 9, at 325.

32. FRASER, *supra* note 9, at 325.

33. ROBINS, *supra* note 9, at 81. *See also* HAWES, *supra* note 10, at 148-49.

34. STEWART, *supra* note 21, at 145.

35. ARTHUR ASPINALL, LORD BROUGHAM AND THE WHIG PARTY 103 (1927). *See also* STEWART, *supra* note 21, at 146 (suggesting Brougham was either willing to abandon Caroline to benefit himself or was acting in a role of patriot hoping to avoid a crisis).

36. AUSTIN MITCHELL, THE WHIGS IN OPPOSITION, 1815-1830 at 145 (1967).

37. FRASER, *supra* note 9, at 353.



Counsel, which, "giving him precedence at the Bar, would ensure his permanent success as a circuit lawyer, and would add many thousands to his yearly income."<sup>38</sup> Upon receiving his silk gown as King's Counsel, he would have renounced Caroline as a client.<sup>39</sup> This effort failed, but not for Brougham's lack of trying.<sup>40</sup> Shortly before the 1820 trial of Caroline, Brougham wittily and wickedly undermined her in polite society. He was heard to say at a dinner party that Caroline was "pure in-no-sense."<sup>41</sup>

The Milan Commission presented the government its findings declaring Caroline an adulterer in July 1819, evidence which the Cabinet found insufficient, in part because it came from "foreigners, most of them not above the rank of menial servants."<sup>42</sup>

Both the government and Caroline waited for the next move of the other. Caroline traveled briefly to Lyon, France to await a visit from Brougham, which never occurred as a result of political events in England. Then, on January 29, 1820, King George III died, making her husband King and herself Queen. This forced events to a head.

In February 1820, Caroline appointed Brougham her Attorney General, though for good reason she little trusted him.<sup>43</sup> In mid-April, Brougham formally presented the government with his warrant as Caroline's counsel. Brougham's double-dealing continued, as he played both sides on whether, and if so, when, Caroline would return to England.<sup>44</sup> Ignoring Brougham, she landed in Dover on June 5.

The next day, Brougham, who "seemed to have gambled with every party and interest, and lost," defended Caroline in the House of Commons,

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38. ASPINALL, *supra* note 35, at 106.

39. *Id.* at 107 (quoting letter from Lord Canning to Prime Minister Lord Liverpool); see also STEWART, *supra* note 21, at 147 (stating Brougham "now let Canning know that the award of a silk gown might induce him to take the government's part").

40. See FRASER, *supra* note 9, at 352. Fraser calls Brougham's conduct "traitorous." Brougham's offer failed in large part because Lord Eldon, the Lord Chancellor who controlled such appointments, hated Brougham and refused to offer him the silk gown given all King's Counsel. *Id.* Brougham biographer Frances Hawes is less condemnatory than Fraser, rejecting the conclusion that Brougham "sold the Queen." But she accepts the view that Brougham "would have abandoned her had he by so doing been able to bring the Whigs into office." HAWES, *supra* note 10, at 146.

41. See FRASER, *supra* note 9, at 406; HIBBERT, *supra* note 9, at 561.

42. ROBINS, *supra* note 9, at 81; see also FRASER, *supra* note 9, at 325. Brougham made xenophobia a part of his defense, accusing Italians of being experts in perjury, ROBINS, *supra* note 9, at 248-49, and his colleague Thomas Denman argued that an oath by a Roman Catholic was not binding unless "taken within a certain time after confession and after receiving the sacrament." *Id.* at 200. Denman was overruled, but his objection offered a reminder that most of the witnesses against the Queen were considered untrustworthy because they were Catholic.

43. ROBINS, *supra* note 9, at 109-10; FRASER, *supra* note 9, at 342; ASPINALL, *supra* note 35, at 110.

44. See FRASER, *supra* note 9, at 356-60, 363.

“probably [because it was] now in his best interests to exert himself to the utmost on behalf of his client.”<sup>45</sup> Caroline, with knowledge of some but not all of Brougham’s perfidy, kept him as her Attorney General.

## B. THE TRIAL OF QUEEN CAROLINE

On June 7, the House of Lords appointed a secret committee to assess the evidence from both the Delicate Investigation and the Milan Commission.<sup>46</sup> In the House of Commons, Brougham gave a strong, theatrical speech defending Caroline and attacking those who attempted to stain her honor.

Threatened by the King, the government decided in early July to pursue a Bill of Pains and Penalties. This was a rarely used procedure that substituted for an uncertain impeachment or criminal case.<sup>47</sup> The purpose of the bill was declared in its opening: “[A]n Act to deprive her Majesty Caroline Amelia Elizabeth of the Title, Prerogatives, Rights, Privileges and Exemptions of the Queen Consort of this Realm, and to dissolve the Marriage between his Majesty and the said Caroline Amelia Elizabeth.”<sup>48</sup> A Bill of Pains and Penalties became law only if adopted by a majority in both the House of Lords and the House of Commons. A majority was specifically required to accept the allegation that Caroline had engaged in “licentious, disgraceful and adulterous intercourse” with Pergami.<sup>49</sup> Proof of that allegation required witnesses, which meant an adversarial proceeding in which counsel gave speeches and examined witnesses, making consideration of the Bill akin to a trial.<sup>50</sup>

In addition to allowing divorce without any threat of a charge of treason (and thus, the death penalty), the Bill also possessed another aspect appealing to the King. Evidence that the King had engaged in adulterous behavior, known as recrimination evidence, was no longer relevant.<sup>51</sup> Divorce was rare, but was certainly unavailable to either party if both engaged

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45. *Id.* at 371.

46. *See id.* at 379.

47. *See id.* at 399-400. One great difficulty with charging the Queen with treason was that she was accused of adultery with Pergami, an Italian. The Queen engaged in treason only indirectly, through the act of the man with whom she engaged in sexual intercourse. Because Pergami was Italian, it was not treason for him to have sexual relations with the wife of the heir to the British throne. And if Pergami’s actions were not treasonous, neither were Caroline’s. *See id.* at 340, 378-79.

48. FRASER, *supra* note 9, at 400; ROBINS, *supra* note 9, at 142.

49. FRASER, *supra* note 9, at 400; ROBINS, *supra* note 9, at 143.

50. FRASER, *supra* note 9, at 401; ROBINS, *supra* note 9, at 143. The witnesses against the Queen were unknown to her counsel before they were called.

51. *See* FRASER, *supra* note 9, at 399.

in adultery.<sup>52</sup> Eliminating any public references to the King's numerous mistresses over the years was important to the government. And it was crucial that the trial eliminate any references to the King's 1785 "marriage" to a twice-widowed Roman Catholic, Mrs. Maria Fitzherbert.<sup>53</sup>

As a young man, the Prince of Wales fell in love with the widowed Mrs. Fitzherbert. On December 15, 1785, she and the Prince were married by an Anglican priest in the presence of her brother and uncle. For several years, they traveled together and attended the same public events, though they formally lived in separate houses.<sup>54</sup> And though he eventually grew tired of her, shortly after Caroline gave birth to their daughter Charlotte in 1796, he wrote a will leaving "All my worldly property of every description to my Maria Fitzherbert,"<sup>55</sup> "my wife, the wife of my heart and soul."<sup>56</sup>

It was politically irrelevant that the marriage with Mrs. Fitzherbert was unlawful under the Royal Marriages Act of 1772. The Prince's actions were evidence of his recklessness (marrying a Roman Catholic would exclude him from serving as King under the 1689 Bill of Rights and the 1700 Act of Settlement).<sup>57</sup> This was also evidence of his insensitivity to the general public, which remained quite prejudiced against Catholics, who suffered many civil disabilities.<sup>58</sup>

The "marriage" between George and Mrs. Fitzherbert was much speculated upon. A cartoon drawn by James Gillray was published in 1786, and titled *The Morning After Marriage*. It depicted what appeared to be the Prince of Wales and Mrs. Fitzherbert leaving a bed.<sup>59</sup> Other social elites gossiped about the marriage. On August 17, 1820, when the first speeches regarding the Bill of Pains and Penalties were made in the House of Lords, Gillray's *Morning After* cartoon was republished.<sup>60</sup>

Brougham's opening speech to the House of Lords on August 17, made the first of his two statements on the extent of the duty of the advocate: "[A]n advocate knows but one duty, and, cost what it may, he must discharge it. Be the consequences what they may, to any other persons, powers, principalities, dominions or nations, an advocate is bound to do his duty" to his client.<sup>61</sup> This was an implicit threat by Brougham to disclose

52. See ROBINS, *supra* note 9, at 143 (quoting *The Times (London)*). This was also the rule in the United States in 1820.

53. See FRASER, *supra* note 9, at 35-36.

54. See *id.* at 34-36.

55. See *id.* at 75.

56. ROBINS, *supra* note 9, at 20.

57. See FRASER, *supra* note 9, at 34.

58. This largely ended with the adoption by Parliament of the Catholic Relief Act, 1829, 10 Geo. 4 c. 7.

59. FRASER, *supra* note 9, at 36; ROBINS, *supra* note 9, at 14.

60. See FRASER, *supra* note 9, at 409.

61. STEWART, *supra* note 21, at 154. See also FRASER, *supra* note 9, at 420.

publicly the King's unlawful marriage to Mrs. Fitzherbert. Brougham also threatened to bring forward other recrimination evidence, even as he disclaimed any intention of doing so: "I put out of view at present the question of recrimination" at Caroline's request.<sup>62</sup> But Brougham also indicated that, if necessary, "I should act directly in the teeth of the instructions of this illustrious woman. I should disobey her solemn commands if I again used even the word recrimination without being driven to it by an absolute and overruling compulsion."<sup>63</sup>

Over the next three weeks, the government offered evidence from a number of witnesses who provided circumstantial evidence of adultery between Caroline and Pergami. This evidence was brought into question by scorching cross-examinations by Brougham and other barristers representing Caroline.<sup>64</sup> The defense was granted a three-week continuance, and the case re-opened on October 3.

Brougham's famous statement of the duty of the advocate, to which he had already adverted in his August 17 speech, was given at the beginning of his two-day speech proclaiming Caroline's innocence. He again informed the Lords that evidence of recrimination was unneeded due to the paucity of evidence against Caroline. However, "but for this conviction, my lips would not at this time be closed."<sup>65</sup> With that implied threat, Brougham then expanded on his August 17 speech on the duties of an advocate to his client, as published in Hansard's *Parliamentary Debates*:

And let it not be thought, my lords, that if either now I did conceive, or if hereafter I should so far be disappointed in my estimate of the failure of the Case against me, as to feel it necessary to exercise that right—let no man vainly suppose, that not only I, but that any, the youngest member of the profession would hesitate one moment in the fearless discharge of that duty. I once before took leave to remind your lordships—which was unnecessary, but there are many whom it may be needful to remind—that an advocate, by the sacred duty of his connection with his client, knows, in the discharge

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62. ROBINS, *supra* note 9, at 172. Acting in such a way today would, of course, violate Rule 1.2 of the Model Rules of Professional Conduct.

63. *Id.* at 172-73.

64. *See id.* at 197-200; FRASER, *supra* note 9, at 424-25 (noting the cross-examination by Brougham of government witness Teodoro Majocchi, during which Majocchi repeatedly stated, "Non mi ricordo," "I don't remember," which was used to show Majocchi's selective memory regarding Caroline's adultery with Pergami).

65. 2 TRIAL OF QUEEN CAROLINE, *supra* note 1, at 8.

of that office, but one person in the world, that client and none other. To save that client by all expedient means—to protect that client at all hazards and costs to all others, and among others to himself—is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other; nay, separating even the duties of a patriot from those of an advocate, he must go on reckless of the consequences, if his fate it should unhappily be, to involve his country in confusion for his client.<sup>66</sup>

Though a majority of the House of Lords adopted the Bill, it did so by a very slight margin. It then voted to postpone consideration of the Bill for six months, effectively killing it.<sup>67</sup> Within nine months, the Queen was dead.<sup>68</sup>

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66. HANSARD'S PARLIAMENTARY DEBATES, *supra* note 1, at 114. The language differed slightly in each published report. The *New York Evening-Post* printed this portion of Brougham's speech as:

And let it be remembered, that if hereafter I should find the case I rely upon fail me, I shall not scruple to avail myself of the means which at present I decline using: and let no man think, under such circumstances, that I, or the youngest member of the profession to which I belong, would hesitate to resort to enter upon the discharge of the painful duty. I have stated on a former occasion, but to your Lordships it was unnecessary, that an advocate, in the discharge of his duty, knows but one person in all the world—his client, and no other. To save that client by all expedient means, is his duty: and that all risks, inconveniences, and costs to other persons, and to himself among them; and he is not to regard the alarm, the tortures or the destruction which the discharge of his office may bring down upon others, but he must boldly go on, reckless of consequences, even though it should be his unhappy fate to throw his country into confusion for a season.

N.Y. EVENING-POST, Oct. 31, 1820, at 1 (copy on file with author). This was found at the New York Public Library on microfilm. The most commonly cited edition of the trial, Joseph Nightingale's TRIAL OF QUEEN CAROLINE (1821), is written in the third person, and also slightly differs from either of these two reports. See 2 TRIAL OF QUEEN CAROLINE, *supra* note 1, at 8. The report from *The Times (London)*, differs slightly from this quoted version, and is also written in the third person. See *The Times (London)*, Oct. 4, 1820, at 1 (copy on file with author).

67. FRASER, *supra* note 9, at 443; ROBINS, *supra* note 9, at 285-87. As occasionally happens in a conventional trial, whether the Queen had committed adultery, the only issue formally relevant to the Lords, faded as some Lords (and the public, through the papers)

The “one direct consequence” of Brougham’s representation of Caroline was his improved economic standing at the bar.<sup>69</sup> Though he hadn’t obtained his silk gown, his law practice “increased fivefold,” and his income rose accordingly.<sup>70</sup> He also became a favorite of trial spectators, who arrived early to ensure a courtroom seat to listen to him.

Brougham lived a long and influential life, outliving by decades not only Queen Caroline, but also George IV.<sup>71</sup> He slightly edited and published his October 3 speech (and not its predecessor from August 17) in several books. In the 1841 American edition (from the 1838 British publication) of his *Speeches* it read:

And let it not be thought, my lords, that if either now I did conceive, or if hereafter I should so far be disappointed in my expectation that the case against me will fail, as to feel it necessary to exercise that right—let no man vainly suppose, that not only I, but that any, the youngest member of the profession would hesitate one moment in the fearless discharge of his paramount duty. I once before took leave to remind your lordships—which was unnecessary, but there are many whom it may be needful to remind—that an advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world, THAT CLIENT AND NONE OTHER. To save that client by all expedient means—to protect that client at all hazards and costs to all others, and among others to himself—is the highest and most unquestioned of his duties; and he must not regard the alarm—the suffering—the torment—the destruction—which he may bring upon any other. Nay, separating even the duties of a patriot from those of an advocate, and casting them, if need be, to the wind, he must go on reckless of the consequences, if his fate it

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reacted in disgust at the government’s behavior in obtaining its evidence. Other members of the public were angry because they rejected the British form of constitutional monarchy.

68. FRASER, *supra* note 9, at 461; ROBINS, *supra* note 9, at 313.

69. STEWART, *supra* note 21, at 160.

70. *Id.* (indicating Brougham’s annual income was “probably in excess of £8,000, a handsome sum for those days”).

71. He was 89 when he died in Cannes, France, on May 7, 1868. See HAWES, *supra* note 10, at 296.

should unhappily be, to involve his country in confusion for his client's protection!<sup>72</sup>

This 1838 version of Brougham's October 3, 1820 speech offers a more heroic tone than the original. Brougham speaks of the "fearless discharge of his *paramount* duty" rather than "the fearless discharge of that duty," and he uses small capitalization to emphasize the advocate's duty to "THAT CLIENT AND NONE OTHER."<sup>73</sup> He also ends by noting that his country's "confusion" is a consequence of ensuring his "client's protection." This tone may have further burnished Brougham's reputation. But it failed to convince lawyers in Great Britain or the United States that the advocate knew "THAT CLIENT AND NONE OTHER."

### III. REJECTING BROUGHAM

#### A. THE INITIAL RESPONSE IN GREAT BRITAIN AND THE UNITED STATES, 1820-1840

References in British and American publications to Brougham's ethic of advocacy in Queen Caroline's case were relatively few from 1820 through 1840.<sup>74</sup> This was so even though in Great Britain, and to a lesser but significant extent in the United States, the issue of the lawyer's duty of loyalty to a client was the subject of much comment.<sup>75</sup>

In England, the issue of lawyer conduct was intimately tied to the issue of legal representation of felony defendants.<sup>76</sup> For historical reasons, Englishmen charged with misdemeanors or with treason were given full legal representation by 1800. But persons charged in 1800 with a felony, usually punishable by death, were allowed to use a barrister to (1) argue questions of law, and (2) examine and cross-examine witnesses. The barrister was not

72. BROUGHAM, *SPEECHES*, *supra* note 1, at 63.

73. Brougham's 1838 revision also suggested a greater loyalty to his client than the version printed in HANSARD'S *PARLIAMENTARY DEBATES*, for in the former the advocate now "owes" a sacred duty to his client, and must even cast the duties of the patriot "to the wind" to meet the needs of his client.

74. See DAVID J.A. CAIRNS, *ADVOCACY AND THE MAKING OF THE ADVERSARIAL CRIMINAL TRIAL 1800-1865* at 137 (1998) (noting little in British publications). See also ALLYSON N. MAY, *THE BAR AND THE OLD BAILEY, 1750-1850* at 204 (2003) (noting "Brougham's words, in particular the doctrine of all expedient means, were immediately controversial and would subsequently attract sustained criticism."). I checked *Niles' Weekly Register* and the *North American Review* and existing American legal publications. Although Brougham was often mentioned, none of those American publications discussed his ethic of advocacy, and I have not found any other such reference.

75. See *The Legal Profession in England*, 42 N. AM. REV. 513 (1836).

76. This paragraph is largely taken from CAIRNS, *supra* note 74, at 25-55.

allowed to speak directly to the jury. That task was undertaken by the prisoner, who gave an unsworn statement to the jury. This changed only upon the adoption in 1836 by Parliament of the Prisoners' Counsel Act.<sup>77</sup> The debate on full representation began shortly after the cessation of the Trial of Queen Caroline, and concerned the role defense counsel would play in a trial. Would the barrister for the prisoner aid or detract from the search for the truth at trial if allowed to speak to the jury instead of the prisoner? Both sides of this debate agreed that the trial would become more adversarial if full representation was allowed. But they disagreed on the relation between full representation and the truth-seeking goal of the criminal trial. Although reformers eventually prevailed, the issue of the bounds of lawyerly zeal was widely discussed during and after this debate.<sup>78</sup>

The 1838 British publication of Brougham's *Speeches*, which included the amended version of his 1820 speech in the House of Lords on the duty of the advocate, reminded other lawyers of Brougham's view of the advocate's duty.<sup>79</sup> In the late 1830s the Englishman and Tory (Conservative) politician Benjamin Disraeli was sued for libel by Charles Austin, a lawyer. In court, Austin accused Disraeli of bribery.<sup>80</sup> Disraeli responded in a letter published in a newspaper, rejecting the privilege from libel charges lawyers received for statements made in court. This legal privilege allowed lawyers to "circulat[e] falsehoods," and was wrongly justified as "doing your duty towards your client."<sup>81</sup> While defending himself in the libel suit, Disraeli retracted his statement but again criticized the "licence" granted counsel, and quoted the amended version of Lord Brougham's defense of Queen Caroline.<sup>82</sup>

American newspapers avidly and fully followed the 1820 trial of Caroline, even with a three- to four-week delay in receiving the news from England. The *New York Daily Advertiser* reported news on the case several times in August, and began publishing stories about the trial nearly daily (the paper was ordinarily published Monday through Friday) from late September through the middle of October. The *New York Evening-Post* was even more fixated on the trial, publishing daily some report from the middle of August through October. The Queen's August 1820 *Letter from the*

77. The Prisoners' Counsel Act is reprinted in pertinent part in CAIRNS, *supra* note 74, at 181-83. On the transformation of the criminal trial before adoption of the Prisoners' Counsel Act, see generally JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* (2003).

78. For a discussion of this dispute, see MAY, *supra* note 74, at 183-94.

79. *Id.* at 137.

80. *Id.* at 127. This is also recounted in *Lord Beaconsfield and the Bar*, 17 GREEN BAG 90 (1905).

81. CAIRNS, *supra* note 74, at 127.

82. See *The Practice of Advocacy*, 17 LEG. OBSERVER, OR J. JURIS. 130, 131 (1838).



*Queen to the King* was also published in the United States.<sup>83</sup> The interest in the trial may be shown in the manner of the coverage both papers gave the trial. As the trial continued, both papers, published as four-page broadsheets, gave over more and more coverage to it. And though both papers almost universally printed only advertisements on page one and left news information to page two, on several occasions the front page consisted of news of the trial. Most importantly, both papers printed Brougham's October 3 speech in defense of Queen Caroline on page one.<sup>84</sup> The coverage differed, and only the *Evening-Post* included Brougham's statement that the advocate "knows but one person in the world—his client, and no other."<sup>85</sup> Despite the extensive coverage of the trial of Queen Caroline, no particular attention was paid to the issue that entranced future lawyers, the extent of the lawyer's duty of loyalty in zealously representing a client.

One possible exception was a brief reference to Brougham's early July speech on his duty to his client, in the August 26, 1820 issue of *Niles' Weekly Register*.<sup>86</sup> Hezekiah Niles,<sup>87</sup> using "extracts from London papers of the 9th of July,"<sup>88</sup> discussed the issue of a lack of notice of the witnesses who would testify against Caroline. After Brougham was allowed to speak, he was "checked" by the Lord Chancellor. He responded: "[N]o power under Heaven should prevent him from attempting to do his duty to his illustrious client, but he might be put down—there was no resisting power—yet he knew their lordships were wont to be just."<sup>89</sup> Niles revisited the case in several subsequent issues, most notably in the November 4, 1820 issue, which specifically discussed Brougham's defense of Queen Caroline.<sup>90</sup> Niles described the powerful impact of Brougham's defense of Queen Caroline. Quoting the *London Courier* (a paper supporting King George IV), Niles reported that Brougham said "that it might be his unhappy lot, in the discharge of his duty, to make charges of a nature as serious as it is possible for any individual to stand impeached with," though the specifics of such charges would be held for later.<sup>91</sup> This is the closest

83. *Letter from the Queen to the King*, N.Y. DAILY ADVERTISER, Sept. 27, 1820, at 2 (copy on file with author). William Cobbett, an English pamphleteer and former American resident, claimed a half million copies of the *Letter* were published in the United States. See ROBINS, *supra* note 9, at 164.

84. See *The Trial of the Queen*, N.Y. DAILY ADVERTISER, Oct. 31, 1820, at 1; N.Y. EVENING-POST, Oct. 31, 1820, at 1 (copies on file with author).

85. N.Y. EVENING-POST, Oct. 31, 1820, at 1.

86. NILES' WKLY. REG., Aug. 26, 1820, at 461.

87. See Broadus Mitchell, *Niles, Hezekiah*, in 8 DICTIONARY OF AMERICAN BIOGRAPHY 521 (Dumas Malone ed., 1933).

88. NILES' WKLY. REG., Aug. 26, 1820, at 449.

89. *Id.* at 461.

90. NILES' WKLY. REG., Nov. 4, 1820, at 145, 148.

91. *Id.* at 148.

*Niles' Weekly Register* comes to quoting Brougham's "an advocate knows but one person in the world" language.

None of the several British publications of *The Trial of Queen Caroline* were re-published in the United States until 1874.<sup>92</sup> But Americans enjoyed delayed access to the London newspapers awash in coverage of the trial, as well as access to a number of British magazines, including the *Edinburgh Review*, which Brougham co-founded and for which he wrote many reviews and articles.<sup>93</sup> The general tenor of the American news articles regarding the trial concerned the myriad political consequences of the trial, including the possibility of "riot, INSURRECTION, REVOLUTION,"<sup>94</sup> and not the detail of an advocate's duty to his client.

One relatively full American assessment of Brougham's representation of Caroline was offered in the July 1831 issue of the *North American Review*.<sup>95</sup> By this time Brougham was known in the United States at least as much for his 1828 speech urging law reform<sup>96</sup> as for his representation of Caroline. The article presents an invigorating defense of Caroline and of Brougham's advocacy. It commends Brougham for the exercise of "the most untiring zeal,"<sup>97</sup> and notes Brougham's opening speech in Caroline's defense. But it never speaks of Brougham's expansive definition of zeal, mentioning only that Brougham "entreated [the House of Lords] to save the country and themselves."<sup>98</sup>

American law publications between 1820 and 1840 were few.<sup>99</sup> None published anything that spoke of Brougham's 1820 speech, and only one

92. See THE TRIAL OF QUEEN CAROLINE (New York, James Cockroft & Co. 1874). By 1835, the Library Company of Philadelphia possessed a copy of THE LEGISLATORIAL TRIAL OF HER MAJESTY (1820), but neither Harvard University nor the Library of Congress owned a copy then. Thanks to Brian Detweiler for this information.

93. TROWBRIDGE H. FORD, HENRY BROUGHAM AND HIS WORLD: A BIOGRAPHY 28 (1995).

94. NILES' WKLY. REG., Nov. 4, 1820, at 145.

95. *Life and Character of Henry Brougham*, 33 N. AM. REV. 227 (1831) [hereinafter *Henry Brougham*].

96. See *Brougham's Speech*, 1 AM. JUR. & LAW MAG. 310 (1829); DAVID PAUL BROWN, REVIEW OF THE SPEECH OF HENRY BROUGHAM, ESQUIRE, UPON THE STATE OF THE LAW (Philadelphia, Mifflin and Parry 1828).

97. *Henry Brougham*, *supra* note 95, at 246.

98. *Id.*

99. See FREDERICK C. HICKS, MATERIALS AND METHODS OF LEGAL RESEARCH 204 (3d ed. 1942) (listing publications). The Philadelphia-based *Journal of Jurisprudence* published one volume in 1821 focused largely on Pennsylvania cases. The *Annual Law Register of the United States* collected and published state laws for one year, 1822, and then ceased. The New York-based *United States Law Journal and Civilian's Magazine* was also first published in 1822. A second volume under new editorship was published in 1826. Its articles were narrowly focused on commercial law. The *United States Law Intelligencer and Review*, published in Philadelphia beginning in 1829 and ending in 1831, offered nothing of rele-

article discussed the ethics of the “good advocate.” It concluded, “The good advocate is one who will not plead the cause wherein his tongue must be confuted by his conscience.”<sup>100</sup> Neither the 1836 second edition of David Hoffman’s *A Course of Legal Study*<sup>101</sup> nor Timothy Walker’s 1837 *Introduction to American Law*,<sup>102</sup> both of which offered American lawyers and law students the first maxims of legal ethics, mentioned Brougham. And although Hoffman’s *Resolutions in Regard to Professional Deportment* urged lawyers to represent clients with “honourable zeal,”<sup>103</sup> Hoffman implicitly rejected Brougham’s ethic, favoring instead an ethic of lawyer honor.<sup>104</sup>

## B. A “MONSTROUS DOCTRINE,” 1840-1860

The paucity of references to Brougham’s ethic of advocacy before 1841 was followed by a significant number during the remaining antebellum years. Brougham’s *Opinions of Lord Brougham* was published in the United States in 1839, and his *Speeches* in late 1841.<sup>105</sup> Further, the *Courvoisier* controversy of 1840 in London intensified the discussion of the ethics of advocacy in Great Britain and later in the United States.

During his trial for murder, Benjamin Courvoisier confessed his guilt to Charles Phillips, his barrister. Courvoisier also refused to plead guilty and demanded Phillips continue to represent him. Phillips acquiesced after conferring with Baron Parke, who assisted the trial judge but who otherwise did not preside.<sup>106</sup> After Courvoisier was found guilty and sentenced to death, he publicly confessed, and announced that Phillips knew of his guilt

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vance. Finally, the *American Jurist and Law Magazine*, published in Boston, published its first issue in 1829, and went out of business in 1843. *Id.* at 204.

100. *The Good Advocate*, 1 J.L. 58, 58 (1830). This quote is likely taken from an English work, THOMAS FULLER, *THE HOLY STATE* (1642), *quoted in* MAY, *supra* note 74, at 206, though the *Journal of Law* does not reference Fuller’s work. Brougham is unmentioned in this article.

101. 2 DAVID HOFFMAN, *A COURSE OF LEGAL STUDY* 744 (Baltimore, Joseph Neal, 2d ed. 1836) [hereinafter *LEGAL STUDY*]. *See also* DAVID HOFFMAN, *HINTS ON THE PROFESSIONAL DEPARTMENT OF LAWYERS* (Philadelphia, Thomas Cowperthwait & Co., 1846) (compiling previous material on legal ethics and ignoring Brougham).

102. TIMOTHY WALKER, *INTRODUCTION TO AMERICAN LAW* (Philadelphia, P.H. Nicklin & T. Johnson, 1837).

103. *LEGAL STUDY*, *supra* note 101, at 754.

104. *See* Michael Ariens, *Lost and Found: David Hoffman and the History of American Legal Ethics*, 67 ARK. L. REV. 571 (2014).

105. BROUGHAM, *SPEECHES*, *supra* note 1. The American printing of Brougham’s *SPEECHES* was announced in the November 1841 issue of the Boston-based *Monthly Law Reporter*. *See* 4 MONTHLY L. RPTR. 288 (1841).

106. MAY, *supra* note 74, at 214.

and continued to defend him.<sup>107</sup> *Courvoisier* revived the issue of the permissible breadth of criminal defense advocacy in Great Britain, and drew attention there to Brougham's speech on the ethic of advocacy.<sup>108</sup> Phillips's duty in representing *Courvoisier* was also discussed in American publications.<sup>109</sup>

In 1843, the *Pennsylvania Law Journal* became the first American magazine to publish an article evaluating and criticizing Brougham's definition of the ethics of the advocate.<sup>110</sup> It reprinted in part an anonymous review in the *Dublin University Magazine* of an English book titled *The Lawyer, his Character, and the Rule of Holy Life*, re-published in the United States by a Philadelphia publisher.<sup>111</sup> The review began, "The great principle of Mr. O'Brien's book is the obligation of governing legal practice by strict reference to the supreme Law of Conscience, in despite of the evil prescription that so strongly countenances oblique and dishonest courses."<sup>112</sup> The review called Brougham's defense of Caroline the "popular theory"<sup>113</sup> of the relation of lawyer and client in Great Britain, but a theory which "only evinces how easily a principle of false honour may assume the dignity of self-sacrificing virtue."<sup>114</sup> It noted two justifications were made in support of Brougham's maxim: one, the "representational" or "agency" model of the lawyer-client relationship, and two, the utilitarian view that obliging barristers to take all cases secured "*the greatest amount of justice in the country.*"<sup>115</sup> The first justification had been made anonymously by Brougham in the *Edinburgh Review* in late 1836.<sup>116</sup> This justification claimed an advocate stood in the place of the client and did not "appear at

107. See DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 126 (1973).

108. See *id.* at 131-40. These events are also discussed in CAIRNS, *supra* note 74, at 140-42, and MAY, *supra* note 74, at 214-21. See also Michael Ariens, *American Legal Ethics in an Age of Anxiety*, 40 ST. MARY'S L.J. 343, 375-76 (2008) (noting *Courvoisier* case and controversy in England and the United States about the ethics of defending the confessedly guilty client).

109. See *The Practice of the Bar*, 9 MONTHLY L. REP. 241, 242-54 (1846) (reprinting article from the *London Law Magazine* defending lawyers in the "late controversy in England between the Bar and the Press").

110. *The Lawyer, His Character, &c.*, 2 PENN. L.J. 185 (1843).

111. EDWARD O'BRIEN, *THE LAWYER, HIS CHARACTER, AND THE RULE OF HOLY LIFE: AFTER THE MANNER OF GEORGE HERBERT'S COUNTRY PARSON* (Philadelphia, Carey & Hart, 1843).

112. *The Lawyer, His Character, &c.*, *supra* note 110, at 185.

113. *Id.* at 186. Cairns disagrees, noting that "the predominant view was that there were moral qualifications on counsel's duty to his client." CAIRNS, *supra* note 74, at 126.

114. *The Lawyer, His Character, &c.*, *supra* note 110, at 187.

115. *Id.* at 188.

116. CAIRNS, *supra* note 74, at 141-42 (citing [Henry Brougham], *Rights and Duties of Advocates*, 64 EDINBURGH REV. 155 (1836) [hereinafter *Rights and Duties of Advocates*]).

all in his own person.”<sup>117</sup> Thus, the advocate was literally the mouthpiece of the client, who at that time was incompetent to testify.<sup>118</sup> The anonymous reviewer considered the agency theory wrong on the instrumental ground that it is the lawyer who “is *himself* the framer of the whole case.”<sup>119</sup> The utilitarian argument was rejected by refusing to concede either the general claim that zealous advocacy led to the greatest amount of justice in society or its application in specific cases.<sup>120</sup> The reviewer perceptively suggested a qualified adoption of Brougham: not “for the purpose of *opposing or denying* the higher principles of duty—but salutarly to *qualify* the application of them, by impressing upon the conscientious advocate the danger of overstrained scrupulosity in the refusal of cliencies.”<sup>121</sup> Brougham and others argued for greater license in advocacy, in part, because they accepted the premise that “an advocate was bound to accept all briefs, irrespective of his opinions of the merits of the client’s case.”<sup>122</sup> A barrister who not only rejected the duty to take on all briefs, but who refused a significant number due to a too scrupulous conscience harmed the legal system. The barrister’s duty to take any client’s brief was exacerbated by Parliament’s adoption in 1836 of the Prisoners’ Counsel Act, which allowed a felony defendant to use legal counsel to address the jury, not merely to argue questions of law or to examine witnesses.<sup>123</sup>

David Dudley Field<sup>124</sup> was the first American lawyer to evaluate and criticize Brougham’s ethic of advocacy.<sup>125</sup> Field wrote insightfully about a

117. *Id.* at 141 (citing *Rights and Duties of Advocates*, *supra* note 116, at 159).

118. This was also the rule in the United States, until Maine allowed a criminal defendant to take an oath and testify in 1864. See George Fisher, *The Jury’s Rise as a Lie Detector*, 107 YALE L.J. 575, 658, 662 (1997). See *id.* at 668 (listing in Table 1 of states ending legal incompetence of criminal defendant in 1860s).

119. *The Lawyer, His Character, &c.*, *supra* note 110, at 189.

120. *Id.* at 190-91.

121. *Id.* at 187.

122. CAIRNS, *supra* note 74, at 140 (citing justifications by Thomas Erskine and Brougham). On this “cab rank” view, see *id.* at 140 n.38. American lawyers understood the “cab rank rule” was inapplicable to them. See *The Practice of the Bar*, *supra* note 109, at 242 (“The English rule, that no barrister may decline a brief, under ordinary circumstances, and must be on that side for which he is first retained, or not be in the case at all, we regard as safer than our own practice, by which a counselor may select his own causes . . .”).

123. CAIRNS, *supra* note 74, at 3.

124. On Field, see DAUN VAN EE, *DAVID DUDLEY FIELD AND THE RECONSTRUCTION OF THE LAW* (1986); HENRY FIELD, *THE LIFE OF DAVID DUDLEY FIELD* (1898); Frederick C. Hicks, *Field, David Dudley*, in 6 DICT. OF AM. BIOG. 360 (Allen Johnson & Dumas Malone, eds., 1933); Stephen N. Subrin, *Field, David Dudley*, in YALE BIOG. DICT. OF AM. L. 193 (Roger K. Newman ed., 2009).

125. See [David Dudley Field,] *The Study and Practice of the Law*, 14 U.S. MAG. & DEM. REV. 345, 347 (1844) [hereinafter Field, *Study*]. This essay is reprinted in 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 484 (A. P. Sprague ed.,

changing legal profession in 1840s New York,<sup>126</sup> and, though critical of some of its failings, defended the position and role of the American lawyer as an “index of civilisation.”<sup>127</sup> But Field was confused about the origins of Brougham’s argument on behalf of zealous advocacy:

Lord Brougham has even gone so far as to say, in a speech in the English House of Lords, within a year or two, that the advocate is bound to carry his zeal for his client so far, as to forget that there is any other person in the world beside him, and to lose sight of every other consideration than the one of his success.<sup>128</sup>

Field concluded, “Now to our view a more revolting doctrine scarcely ever fell from any man’s lips. We think it unsound in theory and pernicious in practice.”<sup>129</sup> He later inaccurately quoted Brougham, “Forget that there is any other person in the world than his client,” and derided this assertion as a “monstrous declaration.” After Field noted that a lawyer owed duties to “other parties” and to “society” “as well as to the one who has retained him,” he concluded, “How *can* a man forget these, and retain his conscience or his memory?”<sup>130</sup>

Other antebellum law writers followed Field’s conclusion. New York lawyer Richard Kimball, like Field, called Brougham’s ethic a “monstrous doctrine.”<sup>131</sup> In an address to the Philadelphia Law Academy, William Porter rejected Brougham and declared that a lawyer was not exempt from the rule that “he who possesses power of any kind, holds it as a trustee for others.”<sup>132</sup> A well-known Philadelphia lawyer, David Paul Brown, wrote a

New York, D. Appleton and Co., 1884), and in part as David Dudley Field, *The Index of Civilization, in THE GOLDEN AGE OF AMERICAN LAW* 30 (Charles M. Haar ed., 1965).

126. By the 1840s, the New York City bar was a diverse body, and just a year before Field’s article the word “shyster” was first published as referring to a sly or conniving lawyer. See *The Pettifogger*, *THE SUBTERRANEAN*, July 22, 1843, at 12 (copy on file with author). See generally GERALD LEONARD COHEN, *ORIGIN OF THE WORD “SHYSTER”* (1982); GERALD LEONARD COHEN, *ORIGIN OF THE WORD “SHYSTER”: SUPPLEMENTARY INFORMATION* (1984). See also WILKES, *THE MYSTERIES OF THE TOMBS* (1844) (discussing awful lawyering for New York City’s poor held in the Tombs on criminal charges) (copy on file with author).

127. Field, *Study, supra* note 125, at 347.

128. *Id.* at 347-48. Field likely confused the year of Brougham’s speech (1820) with the 1841 American publication of Brougham’s *SPEECHES*.

129. *Id.* at 348.

130. *Id.* at 349.

131. RICHARD B. KIMBALL, *THE LAWYER: THE DIGNITY, DUTIES, AND RESPONSIBILITIES OF HIS PROFESSION* 26 (New York, George P. Putnam & Co., 1853).

132. WILLIAM AUGUSTUS PORTER, *THE INTRODUCTORY ADDRESS DELIVERED BEFORE THE LAW ACADEMY OF PHILADELPHIA, AT THE OPENING OF THE SESSION OF 1849-50, ON THE 19TH SEPTEMBER*, at 19 (Philadelphia, Edmond Barrington & Geo. D. Haswell, 1849). See

two-volume memoir of his life and career published in 1856.<sup>133</sup> Brown rejected Brougham's ethic of advocacy: it "can certainly never be approved by any just or reasonable man."<sup>134</sup> Without citing Brougham, Chief Justice Edward Bannister Gibson of the Pennsylvania Supreme Court wrote, "It is a popular, but gross mistake, to suppose that a lawyer owes no fidelity to any one except his client; and that the latter is the keeper of his professional conscience."<sup>135</sup>

Just two somewhat favorable references are made regarding Brougham's ethic of advocacy from 1841-1861. In the July, 1847 issue of the *Pennsylvania Law Journal*, the anonymous author, in discussing the propriety of a lawyer serving as a witness, stated Brougham's position, "however open to animadversion as a social principle, is, and will continue to be, the motive power by which most trials are conducted. In the heat of the contest other considerations recede."<sup>136</sup> Soon thereafter a judge in the Lancaster (Pa.) County Court of Common Pleas discussed the same issue and cited the quoted statement. But the court altered the original phrasing. It argued that Brougham's position, "although unsound in professional morality, is, and will continue to be, in *practice*, the ruling principle by which trials will generally be conducted."<sup>137</sup> The second statement offering some support for Brougham's ethic of advocacy was made in an 1860 tribute to the late Massachusetts lawyer Rufus Choate. Choate represented his clients zealously, and "carried it practically as far as Lord Brougham, and carried it to the extremest [sic] verge of honor; yet he was scrupulously careful not to do any thing which would be false to his attorney's oath, taken when he entered the bar, to be true to the court as well as the client."<sup>138</sup>

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also *The Practice of the Bar*, *supra* note 109, at 242 (noting that, unlike an English barrister, an American "counsellor may select his own causes, . . . [which may put him] in danger of becoming identified with his client, and of sharing his personal feelings").

133. DAVID PAUL BROWN, *THE FORUM; OR, FORTY YEARS FULL PRACTICE AT THE PHILADELPHIA BAR* (Philadelphia, Robert H. Small 1856) [hereinafter BROWN, *THE FORUM*]. On Brown, see John Louis Haney, *Brown, David Paul*, 3 *DICT. OF AM. BIOG.* 111 (Allen Johnson ed., 1929). See also Robert S. Bell, *THE PHILADELPHIA LAWYER: A HISTORY, 1735-1945*, at 114-15 (1992).

134. BROWN, *THE FORUM*, *supra* note 133, at 28.

135. *Rush v. Cavanaugh*, 2 Pa. (2 Barr) 187, 189 (1845).

136. *Lawyers No Witnesses in Their Own Cases*, 6 PENN. L.J. 405, 408 (1847).

137. *Mishler & Hertzler v. Baumgardner* (Pa. Ct. Com. Pleas 1847), 8 AM. L.J. 289, 307 (1849), 1 WEST. LEG. OBSERVER 33, 35 (1849).

138. EDWARD G. PARKER, *REMINISCENCES OF RUFUS CHOATE, THE GREAT AMERICAN ADVOCATE* 133 (New York, Mason Bros., 1860). A posthumous catalogue of Choate's books showed he possessed a copy of the 1838 English printing of Brougham's *SPEECHES*. See *CATALOGUE OF THE LIBRARY OF THE LATE HON. RUFUS CHOATE* 25 (Boston, Leonard & Co., 1859). Wendell Phillips, a well-known Massachusetts lawyer and politician, spoke disparagingly of Choate's ethics. He declared some of the people of Massachusetts allegedly said of Choate, "This is Choate, who made it safe to murder, and of whose health thieves inquired

That antebellum lawyers generally rejected the breadth of Brougham's ethic is found in the most popular book on lawyer ethics of the last half of the nineteenth century, George Sharswood's *Compend of Lectures*,<sup>139</sup> first published in 1854. Sharswood encouraged lawyers to represent clients with "warm zeal,"<sup>140</sup> and insisted that the lawyer was "not morally responsible for the act of the party in maintaining an unjust cause."<sup>141</sup> But Sharswood's role morality did not extend as far as Brougham assayed. Sharswood excused Brougham in part due to the "excitement of so great an occasion," but declared Brougham's declaration was a claim that, upon "cool reflection and sober reason [a proposition one] certainly never can approve."<sup>142</sup> Sharswood noted that appearances might deceive, and, therefore, one should rarely judge a lawyer's conduct. He did allow that a lawyer's zeal extended its farthest in defending one accused of a crime. Because the defendant possessed a "constitutional right to a trial according to law," and "ought not to be convicted and undergo punishment unless upon legal evidence," the lawyer should "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."<sup>143</sup> The ensuing editions of Sharswood's book, published from 1860-1884, used the same language.<sup>144</sup>

### C. THE MODUS VIVENDI, 1870-1910

#### 1. *New York, David Dudley Field and the Erie Wars*

Sharswood's conclusion concerning Brougham's ethic of advocacy remained a long-held commonplace view within the legal profession. What changed in the American legal profession from 1870-1910 was not the rejection of Brougham's ethics, but the belief that transformations of the practice of law made possible a practical adoption of Brougham's ethic. This

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before they began to steal." Henry Wade Rogers, *Legal Ethics*, 16 YALE L.J. 225, 232 (1907) (quoting Phillips).

139. GEORGE SHARSWOOD, A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW (Philadelphia, T. & J. W. Johnson, 1854). The book originated from his lectures to University of Pennsylvania law students in 1850. The second edition was published in 1860 under the title *An Essay on Professional Ethics*. The fifth edition was published posthumously in 1884. Sharswood changed little from the first through the fifth edition.

140. *Id.* at 24.

141. *Id.* at 26.

142. *Id.* at 29.

143. *Id.* at 31.

144. See GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 33-34 (Philadelphia, T. & J. W. Johnson, 2d ed. 1860). No substantive changes on the issue of the lawyer's duty of warm zeal were made in this or in the third, fourth or fifth editions.



transformation of the legal profession made elite lawyers more insistent that Brougham's understanding of client loyalty was false, even as they feared its unacknowledged acceptance.

In an otherwise forgotten 1869 speech to the graduating law class of the University of Chicago, a lawyer named Thomas Hoyne emphatically disagreed with Brougham's statement of the lawyer's duty: "Now I do not believe in this doctrine of the client stepping in to usurp the place of conscience in the advocate, so as to render him utterly regardless of all his other obligations to truth, to justice, to right, and to others."<sup>145</sup> Hoyne linked this standard of lawyer behavior to effectuating the rule of law. Though the published record followed Hoyne's conclusions, it appeared honored in the breach as often as in the observance.

The most famous and trenchant example of this Brougham-like duty of client loyalty was the legal representation, beginning in 1868, by David Dudley Field and his partner Thomas Shearman, of Daniel Drew, Jay Gould and "Diamond" Jim Fisk, who wanted to wrest control of the Erie Railway from Cornelius Vanderbilt. The Erie "wars," joined by elite lawyer revulsion toward New York City "Boss" William Tweed, whom Field also represented in the early 1870s, generated tremendous public outcry concerning the low ethics of lawyers.<sup>146</sup> In the *North American Review*, Charles Adams, great-grandson and grandson of the second and sixth Presidents, recounted the actions of Field and Shearman as beyond even Brougham's reckoning. After quoting Brougham, Adams wrote:

Certainly no counsel could have acted more fully up to both the letter and spirit of this famous rule, than did Messrs. David Dudley Field and Thomas G. Shearman, of counsel for the Erie Railway Company, on this notable occasion. They even "cast to the wind" the single faint limitation conveyed by Lord Brougham in the words "to *save*" and "to *protect*" by all "expedient means"; and, in the intense fervor of their devotion to their clients, had recourse in aggressive proceedings to process-

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145. 1 CHI. LEG. NEWS 394, 395 (1869). See also *President, Directors and Company of the Third Western Turnpike Rd. Co. v. Loomis*, 32 N.Y. (5 Tiffany) 127 (1865) (holding Brougham's statement an "atrocious but memorable declaration"); D. BETHUNE DUFFIELD, *THE LAWYER'S OATH: AN ADDRESS DELIVERED BEFORE THE CLASS OF 1867, OF THE LAW DEPARTMENT, UNIVERSITY OF MICHIGAN, MARCH 27TH, 1867*, at 9 (Ann Arbor, Dr. Chase's Steam Printing House, 1867) (rejecting Brougham).

146. See generally JOHN STEELE GORDON, *THE SCARLET WOMAN OF WALL STREET* (1988); GEORGE MARTIN, *CAUSES AND CONFLICTS* 3-8, 55-67 (1970). On Tweed, see generally KENNETH D. ACKERMAN, *BOSS TWEED: THE RISE AND FALL OF THE CORRUPT POL WHO CONCEIVED THE SOUL OF MODERN NEW YORK* (2005).

es of law which were subsequently judicially characterized as procured "in aid of fraudulent purposes." . . . The ingenious device, also, of arresting one's opposing counsel and holding him to \$25,000 bail, at the moment when his professional services are likely to become peculiarly necessary, is a feature in legal amenities with which the English barrister could not have been expected to be familiar. A high authority has now, however, established these as part of the duties of the American advocate. Instances of similar devotion will, therefore, unless the now obsolete practice of disbarring should chance to be revived, probably hereafter become more common than they hitherto have been.<sup>147</sup>

Field, whose 1844 essay rejected Brougham's ethic as "monstrous," both defended his behavior and continued formally to reject Brougham. He declared that though "[i]t is lawful to advocate what it is lawful to do, . . . I do not assent to the theory of BROUGHAM that the lawyer should know nobody but his client."<sup>148</sup>

This formal rejection of Brougham, combined with the implicit assertion that the lawyer possessed a duty to do all lawful things on behalf of a client, became the standard approach to legal ethics for decades. William Allen Butler's February 1871 talk to a New York audience,<sup>149</sup> published later that year as *Lawyer and Client: Their Relations, Rights, and Duties*, stated the view adopted by most elite lawyers of Brougham's speech: "This was a high and somewhat rapid flight of oratory, far beyond any justifiable

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147. Charles F. Adams, *An Erie Raid*, 112 N. AM. REV. 241, 284 (1871), reprinted in CHARLES F. ADAMS, JR. & HENRY ADAMS, CHAPTERS OF ERIE, AND OTHER ESSAYS 182-83 (Boston, James R. Osgood & Co., 1871). A trenchant essay at that time criticizing both Adams's views and any lawyerly adoption of Brougham's ethic is *A Great Lawsuit and a Field Fight*, 13 THE GALAXY 376 (1872).

148. DAVID DUDLEY FIELD, THE LAWYER AND HIS CLIENTS: THE RIGHTS AND DUTIES OF LAWYERS, THE RIGHTS AND DUTIES OF THE PRESS, THE OPINIONS OF THE PUBLIC: CORRESPONDENCE / BY DAVID DUDLEY AND DUDLEY FIELD, OF THE NEW YORK BAR, WITH SAMUEL BOWLES, OF THE SPRINGFIELD REPUBLICAN 9 (Springfield, (Mass.), Republican Office, 1871) (reprinting Jan. 5, 1871 letter of David Dudley Field to Samuel Bowles). Dean Theodore Dwight of the Columbia College Law School condemned Brougham's "sentiments in strong language" in his commencement speech in 1870, and obliquely referenced Field's behavior in the Erie cases. See *Columbia College Law School*, 1 Alb. L.J. 419, 419 (1870).

149. See *Local Miscellany*, N.Y. HERALD TRIB., 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).

limit of duty or privilege. . . . It is rarely quoted, except to be condemned."<sup>150</sup> Other postbellum writers echoed Butler. Henry Sedgwick urged lawyers to "[f]orget the fallacious eloquence of Brougham."<sup>151</sup> Dorman B. Eaton stated, in referring to Brougham, "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."<sup>152</sup> And Theodore Bacon summarized in 1883 the consensus view: "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."<sup>153</sup> The condemnation of Brougham, in fact, appeared more and more often in published talks and legal treatises from the 1880s and 1890s.<sup>154</sup>

One lawyer who championed Brougham's ethic was A. Oakey Hall, a former District Attorney and Mayor of New York implicated in the Tammany Hall scandals of the early 1870s.<sup>155</sup> In a series of reminiscences for the lawyer magazine *The Green Bag* in the 1890s, Hall regularly praised

150. WILLIAM ALLEN BUTLER, *LAWYER AND CLIENT: THEIR RELATION, RIGHTS, AND DUTIES* 41-42 (New York, D. Appleton and Co., 1871).

151. HENRY 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).

152. 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).

153. Theodore Bacon, *Professional Ethics*, 17 J. SOC. SCI. 37, 41 (1883).

154. See 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* 163 (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 (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."); JOHN WESLEY DONOVAN, *MODERN JURY TRIALS AND ADVOCATES* 181 (Albany, Banks and Brothers, 1881) (calling Brougham's ethic "offensive to good morals and especially degrading to advocacy"); GEORGE F. HOAR, *THE FUNCTION OF THE AMERICAN LAWYER IN THE FOUNDING OF STATES: AN ADDRESS DELIVERED BEFORE THE GRADUATING CLASSES AT THE FIFTY-SEVENTH ANNIVERSARY OF THE YALE LAW SCHOOL* 21 (New Haven, Tuttle Morehouse & Taylor, 1881) ("But the moral sense of mankind has rejected Lord Brougham's extravagant and immoral statement of the duty of the advocate.").

155. See ACKERMAN, *supra* note 146, at 176-80. Hall was eventually acquitted at the third trial, though his reputation was stained for years afterward. See *id.* at 284, 348-50. See also Harry J. Carman, *Hall, Abraham Oakey*, in 8 *DICT. OF AM. BIOG.* 114 (Dumas Malone ed., 1933).

past trial lawyers for acting as “disciples” of Brougham.<sup>156</sup> But in terms of published voices, Hall was an outlier.

## 2. *A Professionalism Crisis, 1890-1910*

The late nineteenth century consensus rejecting Brougham's ethic of advocacy arose at the same time as a “professionalism” crisis began etching itself in the minds of the elite of the American legal profession. This crisis consisted of several strands: a near doubling in the number of American lawyers in the last two decades of the nineteenth century,<sup>157</sup> and an even steeper rise in its non-Protestant composition,<sup>158</sup> a quest for celebrity (and sometimes, notoriety) in the practice of criminal law,<sup>159</sup> and a fear that the

156. A. Oakey Hall, *Ogden Hoffman*, 5 GREEN BAG 297 (1893); A. Oakey Hall, *Cross-Examination as an Art*, 5 GREEN BAG 423 (1893); A. Oakey Hall, *John Van Buren*, 7 GREEN BAG 209 (1895); A. Oakey Hall, *Thomas Addis Emmet*, 8 GREEN BAG 273 (1896). See also A. Oakey Hall, *Daniel Dougherty and the Philadelphia Bar*, 9 GREEN BAG 141, 143 (1897) (noting Philadelphia bar rejected Brougham's ethic and “has always equaled, if it did not surpass, all other bars, in freedom from pettifoggers and from chicanery”).

157. “Whether growing richer or poorer, there is one certain thing about the lawyers, and that is the increase in their number is beyond all proportion to the increase in population.” 4 LAW NOTES 103 (1900); *Winnow the Bar*, 1 AM. LAW. 5 (Apr. 1893) (urging scrutiny of all claiming status of lawyer to eliminate “practitioners who most largely discredit the profession”); JOHN DOS PASSOS, *THE AMERICAN LAWYER—AS HE WAS—AS HE IS—AS HE CAN BE* 175 (1907) (“THE EXCESSIVE NUMBER OF LAWYERS, IS DETRIMENTAL, BOTH TO THE COMMUNITY AND THE MORALE, OF THE PROFESSION.”). See also JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 60 (2004) (noting census reports showing rise in lawyers from 64,137 in 1880 to 114,460 in 1900) [hereinafter WITT, *THE ACCIDENTAL REPUBLIC*]; ROBERT A. SILVERMAN, *LAW AND URBAN GROWTH: CIVIL LITIGATION IN THE BOSTON TRIAL COURTS, 1880-1900*, at 75 (1981) (noting doubling of Boston lawyers between 1880-1900) [hereinafter SILVERMAN, *LAW AND URBAN GROWTH*]; Terence C. Halliday, *Six Score Years and Ten: Demographic Transitions in the American Legal Profession, 1850-1980*, 20 LAW AND SOC'Y REV. 53, 62 (1986) (listing census figures in Table 1). The census number before 1910 included notaries and others who were not admitted to the bar. *Id.* at 55 n.2.

158. See WITT, *THE ACCIDENTAL REPUBLIC*, *supra* note 157, at 60 (noting large increase in number of white lawyers of foreign-born parents between 1890 and 1910).

159. See CAIT MURPHY, *SCOUNDRELS IN LAW* (2010) (discussing notorious turn of the twentieth century criminal defense lawyers Howe and Hummel and their genius at self-promotion); JOHN A. FARRELL, *CLARENCE DARROW: ATTORNEY FOR THE DAMNED* (2011); HOWARD K. BERRY, *HE MADE IT SAFE TO MURDER: THE LIFE OF MOMAN PRUIETT* (Oklahoma Heritage Association, First Edition ed. 2001) (detailing notorious actions of Oklahoma criminal defense lawyer of late nineteenth through first several decades of the twentieth century); ADELA ROGERS ST. JOHNS, *FINAL VERDICT* (paper ed. 1962) (discussing life of her father, Earl Rogers, a famous Los Angeles criminal defense lawyer from the late nineteenth century); ALFRED COHN & JOE CHISHOLM, *TAKE THE WITNESS* (1934) (discussing the criminal defense work of Earl Rogers).

absence of an enforceable standard of moral character<sup>160</sup> invited a lowering of ethical conduct of lawyers, allowing an influx of pettifoggers,<sup>161</sup> criminal law shysters<sup>162</sup> and venal corporate lawyers.<sup>163</sup> Some elite lawyers argued the crisis was linked to the increase in contingent fee cases<sup>164</sup> resulting from a massive rise in personal injury cases.<sup>165</sup>

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160. See, e.g., *The Profession's Duty*, 1 AM. LAW. 4 (May 1893) ("Among the regularly admitted and duly licensed practitioners, there is a considerable percentage who debase their own faculties and degrade the profession by practices in every degree as reprehensible any ever employed by unauthorized practitioners."). *The American Lawyer* was published monthly in New York beginning in 1893. Its intended audience was the business lawyer, and it regularly ran editorials bemoaning moral failures within the profession.

161. See T. Fletcher Dennis, *The Lawyer from a Moral Standpoint*, 5 AM. J. POL. 76, 77 (1894), reprinted in 50 ALB. L.J. 17 (1894) and 2 MINN. L.J. 179 (1894) (comparing lawyers with pettifoggers, and declaring purpose of latter is to "defeat the ends of justice"). This essay was also reprinted in part as *Counsel and Client*, 6 GREEN BAG 475 (1894).

162. See Robert L. Harman, *The Lawyer and the Shyster*, 5 AM. LAW. 443 (1897); H. M. Wiltse, *Who is the Shyster?*, 5 AM. LAW. 490 (1897); Isaac Miller Hamilton, *Monstrosities of the Law*, 2 AM. LAW. 294, 295 (1894). Members of the Alabama State Bar Association regularly inveighed against the rise of shysters in the state. See *Report of the Comm. on Leg. Educ. and Admission to the Bar*, REPORT OF THE ORGANIZATION AND OF THE FIRST, SECOND, AND THIRD ANNUAL MEETINGS OF THE AL. ST. B. ASS'N 250, 263 (Montgomery, Ala., Smith & Armstrong, 1882); *Address by Sterling B. Toney*, PROC. 16TH ANNUAL MEETING OF THE ALA. ST. B. ASS'N 76, 83 (Montgomery, Ala., Brown Printing Co., 1893); Samuel M. Meek, *The Power and Influence of the Bar*, PROC. 18TH ANNUAL MEETING OF THE ALA. ST. B. ASS'N ii, xxvii (Montgomery, Ala., Brown Printing Co., 1895); *Report of the Committee on Local Bar Associations*, PROC. 22D ANNUAL MEETING OF THE ALA. ST. B. ASS'N 104 (Montgomery, Ala., Brown Printing Co., 1899).

163. See GILDED AGE LEGAL ETHICS: ESSAYS ON THOMAS GOODE JONES' 1887 CODE (Carol Rose Andrews et al. eds., 2003) [hereinafter GILDED AGE LEGAL ETHICS]; Theodore Roosevelt, *Address at Harvard University* (June 28, 1905), in 4 THEODORE ROOSEVELT, PRESIDENTIAL ADDRESSES AND STATE PAPERS 407, 419-20 (1910) (criticizing lawyers who work to aid the wealthy to "override and circumvent the law"); *The Opportunity in the Law*, 39 AM. L. REV. 555, 555-63 (1905) (publishing May 4, 1905 speech by Louis D. Brandeis criticizing materialism of lawyers).

164. IRVING G. VANN, CONTINGENT FEES: AN ADDRESS IN THE HUBBARD COURSE ON LEGAL ETHICS (1905); *The Abuse of Personal Injury Litigation*, 18 GREEN BAG 193, 202 (1906) ("The vast majority of these cases are prosecuted by plaintiffs suing as paupers, by lawyers employed on a contingent fee basis. A worse combination to the end of securing justice can hardly be imagined."). *But see* *Jeffries v. Mutual Life Ins. Co.*, 110 U.S. 305 (1884) (holding contingent fee contract not champertous in state law claim); *Taylor v. Bemiss*, 110 U.S. 42 (1884) (holding contingent fee contract not champertous in federal claim); GILDED AGE LEGAL ETHICS, *supra* note 163, at 58 (allowing use of contingent fee contracts in 1887 Alabama Code of Ethics, though noting "they lead to many abuses, and certain compensation is to be preferred").

165. See E. Parmalee Prentice, *The Speculation in Damage Claims for Personal Injury*, 164 N. AM. REV. 199, 199 (1897) (noting large increase of personal injury claims between 1875-1896 in Cook County (Chicago)); Edwin A. Parker, *Anti-Railroad Personal Injury Litigation in Texas*, 19 PROC. TEX. B. ASS'N 165, 167-70 (1900) (noting rise in personal injury suits against railroads in Texas between 1881-1900 and extensive damage awards); Randolph E. Bergstrom, *COURTING DANGER: INJURY AND LAW IN NEW YORK CITY*,

The most trenchant complaint was disgust at lawyer behavior in the courtroom between 1870 and 1910.<sup>166</sup> During this time trial lawyers became more technically proficient and inclined to use that proficiency as trials became more clearly adversarial in nature. One prominent example is the 1881 trial of Charles Guiteau for the murder of President James Garfield.<sup>167</sup> Guiteau shot Garfield at close range, and was immediately apprehended. His lawyers defended Guiteau ably and fully on the ground of insanity. The trial, including jury selection, took over two months, and the nearly 3,000 page transcript of the proceedings was peppered with legal and evidentiary objections made by the government and the defense. Both parties made tactical and strategic choices requiring the court to issue legal rulings (particularly concerning the many experts), and cross-examination was sharp and extensive.<sup>168</sup> By the end of the century, the Pennsylvania Supreme Court concluded some criminal defense attorneys took their technically-improved representation of the client too far. One writ of error was “a flagrant example of the perverted standard of professional ethics which assumes that counsel should help his client to escape the proper consequences of his act by any move or device, short, perhaps, of actual fraud or imposition.”<sup>169</sup>

This was quite different from antebellum practice. As noted by one elite lawyer writing in 1907, when the famous antebellum criminal defense lawyer David Paul Brown of Philadelphia rose to address the jury

he carefully placed his gold snuff box in front of him, took from his pocket a bandanna, silk handkerchief, blew his nose in the true spirit of a snuff fiend, glanced slowly and carefully around the court room, and after many minutes of clever preliminary acting, he bowed gravely to the Court, and

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1870-1910 at 20 (1992) (Table 4) (noting rise in personal injury cases in New York City from 12 to 595 between 1870-1910); Silverman, *LAW AND URBAN GROWTH*, *supra* note 157, at 105 (noting number of streetcar personal injury lawsuits rose from about twelve to over 800 between 1880-1900). *See generally* WITT, *THE ACCIDENTAL REPUBLIC*, *supra* note 157.

166. DOS PASSOS, *supra* note 157, at 25 (“The Civil War marks the commencement of an era of professional change—perhaps I am justified in saying, an intellectual decadence—in the Bar. There certainly was a transformation, from a profession to a business.”).

167. *See* REPORT OF THE PROCEEDINGS IN THE CASE OF THE UNITED STATES VS. CHARLES J. GUTEAU (Washington, D.C., Government Printing Office, 1882).

168. This is all the more remarkable because Guiteau’s principal lawyer was George Scoville, a patent lawyer who “knew almost nothing about the criminal justice system.” CANDICE MILLARD, *DESTINY OF THE REPUBLIC: A TALE OF MADNESS, MEDICINE AND THE MURDER OF A PRESIDENT* 275 (paper ed. 2011).

169. *Commonwealth v. Hill*, 39 A. 1055, 1055 (Pa. 1898). *See also* *Commonwealth v. Jongrass*, 37 A. 207 (Pa. 1897). The errors alleged would commonly form an appeal today.

began his classic, ornate, address to the “gentlemen of the jury.”<sup>170</sup>

The tactics and stratagems of late nineteenth century trial lawyers were criticized on more technical grounds. One legal journal criticized the prosecutor in the 1893 murder trial of Lizzie Borden for failing to prepare professionally, by ignoring his duty “to learn from his witnesses before they came into court the story they each would tell.”<sup>171</sup> This was “professional negligence.”<sup>172</sup> In criminal trials of the 1890s, lawyers in different parts of the nation were quite similar in approach, varying by degree rather than kind in terms of evidentiary objections made and legal disputes argued. A late 1897 Iowa murder trial demonstrates the extent to which defense lawyers believed an ethic of advocacy required nearly constant action: to prevent the state’s star witness from damning their client, the defendant’s lawyers “repeatedly objected during his testimony.”<sup>173</sup> Their cross-examination of that witness included attacks on his credibility (he was in line to receive a reward for his actions), and even made legalistic arguments during cross-examination that barely related to the factual dispute (the witness tracked the defendant from Iowa to the Klondike in Canada and arrested him, which defense counsel argued was unlawful). Defense counsel ended its cross-examination one day with, “[W]e will see on Monday whether you are telling the truth.”<sup>174</sup> The Iowa defense lawyers understood their role as creating confusion, of “objecting to every single prosecution point, no matter how small.”<sup>175</sup> During the 1890s newspapers daily printed stories of murder and murder trials, of which the most famous was the trial of Lizzie Borden.<sup>176</sup> Those stories often detailed the tactical actions of lawyers, which those lawyers could use to burnish their reputations and pocketbook.<sup>177</sup>

170. DOS PASSOS, *supra* note 157, at 29.

171. *Professional Duty*, 1 AM. LAW. 4 (July 1893).

172. *Id.* at 5.

173. PETER KAUFMAN, SKULL IN THE ASHES: MURDER, A GOLD RUSH MANHUNT, AND THE BIRTH OF CIRCUMSTANTIAL EVIDENCE IN AMERICA 145 (2013).

174. *Id.* at 147.

175. *Id.* at 150.

176. EDMUND PEARSON, TRIAL OF LIZZIE BORDEN (Notable Trials Library Spec. ed. 1989) (1938).

177. The number of recently published books discussing murder trials of the 1890s suggests the plethora of material available to write such stories. See PAUL COLLINS, THE MURDER OF THE CENTURY: THE GILDED AGE CRIME THAT SCANDALIZED A CITY & SPARKED THE TABLOID WARS (2011) (noting 1897 murder in New York); HAROLD SCHECHTER, THE DEVIL’S GENTLEMAN: PRIVILEGE, POISON, AND THE TRIAL THAT USHERED IN THE TWENTIETH CENTURY (2007) (discussing 1898 murder in New York); ROBERT LOERZEL, ALCHEMY OF BONES: CHICAGO’S LUETGERT MURDER OF 1897 (2004) (Chicago murder case); KAUFMAN, *supra* note 173 (discussing 1897 Iowa murder). See also ELIZABETH DALE, THE CHICAGO TRUNK MURDER: LAW AND JUSTICE AT THE TURN OF THE CENTURY (2011) (discussing 1885

Elite lawyers reacted in several ways. The Alabama State Bar Association drafted a Code of Ethics in 1887,<sup>178</sup> which ten other voluntary state bar associations largely adopted in the following two decades.<sup>179</sup> The American Bar Association began work on its Canons of Ethics in 1905,<sup>180</sup> which it adopted in 1908.<sup>181</sup> Roscoe Pound, then an obscure academic, gave a famous speech at the 1906 Annual Meeting of the ABA attacking the view that a lawsuit was akin to a game, which “leads counsel to forget that they are officers of the court and to deal with the rules of law and procedure exactly as the professional foot ball coach with the rules of the sport.”<sup>182</sup> “The inquiry is not, What do substantive law and justice require: instead, the inquiry is, Have the rules of the game been carried out strictly?”<sup>183</sup> The legal profession also engaged in more sustained efforts to disbar at least some lawyers.<sup>184</sup>

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murder case); TIMOTHY MESSER-KRUSE, *THE TRIAL OF THE HAYMARKET ANARCHISTS: TERRORISM AND JUSTICE IN THE GILDED AGE* (2011) (discussing Chicago’s 1886 Haymarket murder trial). An older iteration is NEWMAN LEVY, *THE NAN PATTERSON CASE* (1959) (discussing 1904 murder trial and re-trial in which author’s father successfully defended accused).

178. See PROC. 10TH MEET. ALA. ST. B. ASS’N 10-21 (1888) (debating and adopting Code of Ethics); CODE OF ETHICS, ADOPTED BY THE ALABAMA STATE BAR ASSOCIATION, DECEMBER 14, 1887, *GILDED AGE LEGAL ETHICS*, at 45-59; REP. COMM. ON CODE OF PROF. ETHICS, 31 A.B.A. REP. 675, 685 (1907) (App. B) (reprinting Code of Ethics of Alabama State Bar Association and other states).

179. REP. COMM. ON CODE OF PROF. ETHICS, 31 A.B.A. REP. 675, 685 (1907) (App. B) (reprinting Code of Ethics of Alabama State Bar Association and other states).

180. See Henry St. George Tucker, *Address of the President*, 28 A.B.A. REP. 299, 383-88 (1905) (urging creation of a code of ethics); *Transactions of the Twenty-eighth Annual Meeting of the American Bar Association*, 28 A.B.A. REP. 23, 132 (1905) (creating committee to draft code of ethics).

181. *Transactions of the Thirty-first Annual Meeting of the American Bar Association*, 33 A.B.A. REP. 3, 55, 86 (1908) (adopting the Canons of Ethics).

182. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 405 (1906).

183. *Id.* at 406.

184. A Westlaw search in the file “allstates” using a Boolean search of “disbar! & attorney & da(bef 1910)” found the following number of disbarment cases (mostly appellate) by decade:

1900-09	355
1890-99	208
1880-89	87
1870-79	48

Using the same file, a Boolean search of “roll w/5 attorney & stri! & da(bef 1910)” found the following number of (mostly appellate) cases by decade.

1900-09	117
1890-99	74
1880-89	40
1870-79	66



Lawyers continued publicly to reject Brougham's ethic, while acknowledging the manifold faults of the profession. *The American Lawyer*, "A Business Journal for Business Lawyers," editorialized in 1893: "In their advocacy of their clients [sic] claims, lawyers have neither moral nor legal right to pervert testimony, distort or conceal facts, or seek to circumvent the law."<sup>185</sup> Although a lawyer "may rightfully take measures, institute proceedings and introduce defenses that he as an individual would not . . . the lawyer should never so absorb the man as to induce him to either seek legal ends by illegal means or illegal ends by legal means."<sup>186</sup> The 1887 Alabama Code of Ethics concluded that nothing had been worse for the profession "than the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is an attorney's duty to do everything to succeed in his client's cause."<sup>187</sup> In 1907, elite New York lawyer John Dos Passos<sup>188</sup> published *The American Lawyer—As He Was—As He Is—As He Can Be*,<sup>189</sup> which began with the confession that "when a lawyer undertakes an honest introspection of his profession, he . . . must then say some ugly things about himself."<sup>190</sup> Dos Passos did so, and then laid some of the blame on Brougham's ethic of advocacy. Dos Passos claimed Brougham's statements "have done incalculable harm and damage to youthful, designing, or resourceful lawyers."<sup>191</sup> They did such harm because too many lawyers had relied on Brougham's assertions "over and over again . . . to cover all kinds of dishonest practices and defenses."<sup>192</sup> Dos Passos concluded, "in any rational view it was wholly, unmitigatedly, and disastrously bad."<sup>193</sup>

In 1902, Thomas H. Hubbard gave \$10,000 to endow a chair in legal ethics at his alma mater, Albany Law School, and he was invited to give the inaugural lecture. In discussing the relation of lawyer and client, Hubbard favorably discussed Brougham's ethic, noting that, though lawyers often dissuade clients from making claims or defenses "that ought not to be brought or interposed," when the client so demanded, "it is the decision of the client and not of the lawyer that finally prevails."<sup>194</sup> But Hubbard's

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185. *The Profession's Duty*, *supra* note 160, at 4.

186. *Id.*

187. GILDED AGE LEGAL ETHICS, *supra* note 163, at 50 (reprinting item 10 of Code).

188. On Dos Passos, see H. W. Howard Knott, *Dos Passos*, *John Randolph*, 5 *DICTIONARY OF AMERICAN BIOGRAPHY* 388 (Allen Johnson & Dumas Malone eds., 1933).

189. *DOS PASSOS*, *supra* note 157.

190. *Id.* at 4.

191. *Id.* at 141.

192. *Id.* at 142. Dos Passos also noted Brougham's "public repudiation" of his statements in his 1859 letter to William Forsyth. *See id.*

193. *DOS PASSOS*, *supra* note 157, at 143.

194. THOMAS H. HUBBARD, *Legal Ethics*, in *LEGAL ETHICS LECTURES DELIVERED BEFORE THE STUDENTS OF LAW DEPARTMENT OF UNION UNIVERSITY* 13, 19 (1903) [hereinaf-

larger point was that this approach, adopted by “distinguished practitioners” and accepted in practice, should be abolished:

The lawyer should be emancipated from servitude to his client in respect to the commencement and conduct of suits.

The lawyer should control in determining what cases may be brought before the court; what suits may be begun, what defenses may be interposed. . . . In all matters that involve conscience, whether matters of form or substance, the lawyers' decision should be supreme from the beginning to the end of litigation. The custom should be shattered, that permits the lawyer to personate the client; to argue against his own convictions; to substitute his client's morals and conscience for his own in the conduct of his cause.<sup>195</sup>

Hubbard and Dos Passos articulated a constant refrain of lawyers writing on ethics in the early twentieth century.<sup>196</sup> Much was tied to this air of crisis, a belief that an honorable profession was now in “ill repute.”<sup>197</sup> The profession's poor reputation was a consequence of lawyers thinking only of the needs of their clients, as suggested by Brougham. This thought process

ter HUBBARD, *Legal Ethics*]. On Hubbard, see Robert E. Riegel, *Hubbard, Thomas Hamlin*, 9 *DICT. OF AM. BIOG.* 332 (Dumas Malone ed., 1943).

195. HUBBARD, *Legal Ethics*, *supra* note 194, at 23.

196. See Henry Wade Rogers, *Legal Ethics*, 16 *YALE L.J.* 225, 235-36 (1907) (“I have only to say that [Brougham's ethic] has been properly denounced as ‘a degenerate view’ of professional duty and honor.”); AARON V. S. COCHRANE, *THE LAWYER AND HIS CLIENT* 12-13 (1908) (rejecting Brougham and calling it “drastic and extreme”); FRANK IRVINE, *ETHICS IN THE TRIAL COURT* 5-6 (1913) (“Great mischief has been done by the frequent quotation of a passage in Lord Brougham's speech in Queen Caroline's Case.”); HENRY M. BATES, *THE DUTY OF LAWYERS WITH REFERENCE TO REFORM AND PROGRESS* 13-14 (1913) (noting Brougham's statement “cannot have been meant literally, but it has been made the prop of many a disingenuous apology for conduct clearly and radically unethical”); Alfred J. Murphy, *The Function of the Lawyer of Today*, 21 *LAW STUD. HELPER* 5, 6 (1913) (rejecting Brougham but noting approach “has not become wholly obsolete in practice”); T. De Witt Talmage, *A Sermon to Lawyers*, 2 *LAWY. SCRAP BOOK* 301, 305 (1912) (arguing “no right-minded lawyer could adopt sentiment”); George Gordon Battle, *The Duty of Counsel in Defending Against a Criminal Charge, A Client Whom He Knows or has Reason to Believe to be Guilty*, 2 *LAWY. SCRAP BOOK* 177, 195 (1912) (“[T]he words used by Lord Brougham are extreme and exaggerated. . . .”). See also Charles E. Wolverton, *The Ethics of Advocacy*, 8 *AM. LAW.* 62, 64 (1900) (Brougham's “words were uttered, however, as a menace, and not to indicate a rule of ethics; and it must be conceded that, under our modernized institutions, the occasion for invoking such a principle can scarcely arise”).

197. Homer Greene, *Can Lawyers Be Honest?*, 152 *N. AM. REV.* 194, 203 (1893).

also allowed lawyers erroneously to accept the idea that law was merely a trade or business.<sup>198</sup> In response, elite lawyers increasingly insisted on declaring the duty of the lawyer to act not solely as an agent of the client, but as an officer of the court.<sup>199</sup> The criminal defense lawyer upheld the rule of law by requiring the prosecution to offer evidence proving the defendant's guilt beyond a reasonable doubt.<sup>200</sup> He did not do so by offering perjured testimony, personal assurances of the defendant's innocence, or, more broadly, by focusing solely on the needs of one's client. The inculcation of professionalism (effectuating the rule of law, acting as an officer of the court) was set in contrast to Brougham's prescription to know only one's client.

Canon 15 of the ABA's 1908 Canons of Ethics was titled, "How Far a Lawyer May Go in Supporting a Client's Cause." It largely mimicked the 1887 Code of Ethics of the Alabama State Bar Association, calling "false" the belief that "it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause."<sup>201</sup> The lawyer's duty of client loyalty was "to be performed within and not without the bounds of the law." A client was "entitled to the benefit of any and every remedy and defense . . . and he may expect his lawyer to assert every such remedy or defense."<sup>202</sup>

198. See, e.g., Robert Treat Platt, *The Decadence of Law as a Profession and its Growth as a Business*, 12 YALE L.J. 441 (1903); George F. Shelton, *Law as a Business*, 10 YALE L.J. 275 (1901); *Henry Laurens Clinton*, 10 GREEN BAG 133, 137 (1898) ("Indeed the defense of criminals in New York City is said by many in its Bar Institute to have ceased as part of a profession and to have become a trade."). See generally JULIUS HENRY COHEN, *THE LAW: BUSINESS OR PROFESSION?* (1916).

199. See COHEN, *supra* note 198, at 22 ("It is because of the lawyer's position as an officer of the Court that the disciplinary process is made practicable."); ARTHUR H. DEAN, WILLIAM NELSON CROMWELL 1854-1948: AN AMERICAN PIONEER IN CORPORATION, COMPARATIVE, AND INTERNATIONAL LAW 167 (1957) (claiming that William Cromwell, a first-generation office lawyer, "never forgot that he was first and foremost an 'officer of the court'"); SAMUEL HABER, *THE QUEST FOR AUTHORITY AND HONOR IN THE AMERICAN PROFESSION, 1750-1900* at 208 (1991) (citing, among others, Thomas Cooley); Alfred Hemenway, *The American Lawyer, Address at the 1905 Annual Meeting of the American Bar Association*, in 28 A.B.A. REP. 390, 390 (1905) ("On admission to the Bar each [lawyer] becomes an officer of the court.").

200. See Dennis, *supra* note 161, at 81; Louis J. Rosenberg, *The Status of an Attorney Defending a Guilty Client*, 10 YALE L.J. 24 (1900); GILDED AGE LEGAL ETHICS, *supra* note 163, at 50-51 (reprinting Alabama Code item 13, which urged lawyers to defend criminally charged persons to effectuate the rule of law).

201. ABA CANONS OF PROFESSIONAL ETHICS Canon 15 (1908). Item 10 of the Code of Ethics of the Alabama State Bar Association called "false" the claim "that it is an attorney's duty to do everything to succeed in his client's cause." GILDED AGE LEGAL ETHICS, *supra* note 163, at 50.

202. ABA CANONS OF PROFESSIONAL ETHICS Canon 15, *supra* note 201.

The *modus vivendi* on the lawyer's duty to a client was thus framed as early as 1871, when David Dudley Field defended his conduct in the Erie wars, and confirmed in the ABA's 1908 Canons of Professional Ethics. A lawyer possessed a duty to offer every legal claim or defense available to the client, but the lawyer remained an officer of the court and thus was prohibited from straying beyond the law in representing a client. A lawyer promoted the rule of law in using all lawful means when representing a client, and therefore was not morally responsible for any lawful ends sought by the client. The lawyer also obeyed his own conscience, and did not act as his client's mouthpiece. Finally, Brougham's ethic of advocacy went beyond the bounds of ethical behavior.

#### D. EXCEPTIONS TO PROVE THE RULE, 1920-1965

This implicit agreement within the legal profession may be why references to Brougham's advocacy ethics were rare for the next four-plus decades.<sup>203</sup> Most of these rare references repeated the timeworn conclusion. On two important occasions, however, the standard view of Brougham's ethics was turned on its head. In the February 1927 issue of *Harper's Monthly Magazine*, lawyer Newman Levy called Brougham's statement the "classic statement of a lawyer's duty to his client."<sup>204</sup> A generation later, Boston lawyer Charles Curtis wrote an apparent full-throated defense of the identification of the private practice lawyer with the client, relying in part on Brougham. In Curtis's opinion, "Lord Brougham's menace has become the classic statement of the loyalty which a lawyer owes to his client, perhaps because being a menace it is so extreme."<sup>205</sup>

Neither Levy nor Curtis explained how Brougham's statement of the duty of the advocate had been transformed from a reviled assertion to the

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203. Francis Chapman, *Lectures on Legal Ethics (III)*, 3 TEMP. L.Q. 409, 412 (1929) ("[I]n no sound view of ethics have you any right to go to any such lengths"); George P. Costigan, Jr., *The Full Remarks on Advocacy of Lord Brougham and Lord Chief Justice Cockburn at the Dinner to M. Berryer on November 8, 1864*, 19 CAL. L. REV. 521 (1931) (contextualizing Brougham); *Recent Criminal Cases*, 26 AM. INST. CRIM. L. & CRIMINOLOGY 276, 276 (1936); Philbrick McCoy, *Some Professional Responsibilities of the Practicing Lawyer*, 25 ROCKY MTN. L. REV. 463, 4750-76 (1953); LLOYD PAUL STRYKER, *THE ART OF ADVOCACY 276-77* (2007) (1954) (contextualizing Brougham); James A. Gardner, *A Re-Evaluation of the Attorney-Client Privilege (Part I)*, 8 VILL. L. REV. 279, 334 (1963) (citing Brougham's statement and discussing relation to "lawyer's identifying himself with the client's cause").

204. Newman Levy, *Lawyers and Morals*, HARPER'S MTHLY MAG., Feb. 1927, at 288, 292 [hereinafter Levy, *Lawyers and Morals*].

205. Charles P. Curtis, Jr., *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 4 (1951). This is repeated in CHARLES P. CURTIS, *IT'S YOUR LAW 7* (1954). On Curtis, see Melvin I. Urofsky, *Curtis, Charles Pelham*, DICT. OF AM. BIOG. SUPP. SIX, at 142 (John A. Garraty ed., 1980); Thomas A. Reed, *Curtis, Charles Pelham, Jr.*, in YALE BIOG. DICT. OF AM. L. at 139.

classic statement of the lawyer's duty of zeal, and neither cited any source for his conclusion. That may be because each quoted Brougham's ethic of advocacy in significant part to unsettle the pretensions of lawyers, to use the extreme view of Brougham to call for a new or revived professionalism among lawyers. Both Levy and Curtis were interested in making the legal profession face the inevitable tension of the lawyer as Janus, one who owed a duty of zealous representation to the client as well as a duty to society as an officer of the court. Both offered the statement of Brougham to expose the pretentiousness of high-minded lawyers who believed this tension applied only to down-market criminal defense lawyers, not elite law firm lawyers.

Levy was primarily a criminal defense lawyer and the son of Abraham Levy, a well-known New York City criminal defense lawyer from the 1890s until his death in 1920.<sup>206</sup> Levy's attack is a paradigmatic example of then-nascent legal realism, a plea to lawyers that is both cynical and romantic. Levy concluded the disjunction between "professional aspirations and professional conduct" would remain "[u]ntil the bar is prepared to assume a more realistic attitude toward its functions and its activities."<sup>207</sup> This realistic attitude was not found in the various codes of legal ethics, which emphasized "manners rather than morals,"<sup>208</sup> and which gave the lawyer power to invade the privacy of witnesses and to subject them to slanderous attacks. Levy rejected the distinction between low status criminal defense lawyers and high status business lawyers, concluding that both engaged in dilatory tactical measures. He noted that only the latter, however, wished to continue to claim his (nearly all such lawyers were then male) virtue.<sup>209</sup> This pretentiousness was all the more galling because the "guardians of the aristocratic traditions" desperately worked to "purge the bar of shysters," never acknowledging that they, too, were workers for hire.<sup>210</sup> As the robber baron Jay Gould reputedly said three decades earlier about all lawyers, "brains were the cheapest meat in the market."<sup>211</sup>

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206. On Newman Levy, see NEWMAN LEVY, *MY DOUBLE LIFE: ADVENTURES IN LAW AND LETTERS* (1958) (self-styled memoir) [hereinafter LEVY, *MY DOUBLE LIFE*]; *Newman Levy is Dead at 77; Lawyer Noted for Light Verse*, N.Y. TIMES, Mar. 23, 1966, at 47. Levy wrote a true crime story of a 1904 New York murder in which his father Abraham served as defense counsel in the three trials. See LEVY, *supra* note 177. He discussed his father's reputation in *id.* at 67-69 (noting lawyer and novelist Arthur Train "considered Abe Levy the greatest criminal lawyer that this country had ever produced") and in LEVY, *MY DOUBLE LIFE*, at 14.

207. Levy, *Lawyers and Morals*, *supra* note 204, at 289.

208. *Id.*

209. *Id.* at 293.

210. *Id.*

211. Shelton, *supra* note 198, at 276.

Levy also wrote in the aftermath of the fall of William "Bill" Fallon, a notorious criminal defense lawyer in New York City during the 1910s and early 1920s. Fallon was known, in the subtitle of a book about him, as "the famous criminal lawyer who defended over one hundred and twenty-five homicide cases and never lost a trial!"<sup>212</sup> Many of Fallon's cases ended in hung juries, and in 1923 Fallon was indicted in both state and federal court with conspiring to obstruct justice by bribing a juror named Charles Rendigs, who had served as a juror in an earlier case in which Fallon had represented an accused.<sup>213</sup> Fallon, who represented himself, was acquitted in both cases and managed to avoid disbarment, but his career was finished.<sup>214</sup> He was a paradigmatic example of the bombastic (and highly intelligent) lawyer, one who saw no boundaries in representing his clients.

This was the context in which Levy quoted Brougham. Brougham's ethic of advocacy was the "classic statement" because it "has long been accepted in practice if not in theory by a large part of the profession."<sup>215</sup> But the romantic in Levy wanted to believe in something better: "[I]t is more hopeful to believe that the legal profession still contains within itself the essence of a higher morality and an enduring sense of public obligation."<sup>216</sup>

Curtis wrote in 1951, as the American legal profession began to promote its importance to American society. Curtis, a Boston Brahmin, adopted the jurisprudential stream of the times, and did so in part to check a self-congratulatory profession. Jurisprudentially, Curtis wanted lawyers to consider the importance of craftsmanship: "A lawyer may have to treat the practice of law as if it were a game, but if he can rely on craftsmanship, it may become an art, and 'Art, being bartender, is never drunk; and Magic that believes itself, must die.'"<sup>217</sup> Craftsmanship in the practice of law was one of the hallmarks of the legal process school of the post-World War II era.<sup>218</sup> Further, Curtis viewed the consummate private practice lawyer as a Stoic, not a Christian.<sup>219</sup> The practice of law was not an altruistic undertaking, and thus, not a Christian undertaking. Instead, "[t]he practice of law is

212. GENE FOWLER, *THE GREAT MOUTHPIECE: A LIFE STORY OF WILLIAM J. FALLON* (paper ed. 1962) (1931). The quote is found on the front cover of the 1962 paperback edition.

213. *Id.* at 287-89, 293.

214. *Id.* at 294, 327, 333. Fallon died in April, 1927, shortly after Levy's article was published. *See id.* at 340.

215. Levy, *Lawyers and Morals*, *supra* note 204, at 292.

216. *Id.* at 294.

217. CURTIS, *supra* note 205, at 22 (quoting Peter Viereck, *TERROR AND DECORUM* 53 (1948)).

218. *See* G. Edward White, *The Evolution of Reasoned Elaboration: Evolution and Social Change*, in *PATTERNS OF AMERICAN LEGAL THOUGHT* 136, 148 (1978). *See generally* NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 205-99 (1995).

219. CURTIS, *supra* note 205, at 19.

vicarious,"<sup>220</sup> and "detachment" from the client was essential.<sup>221</sup> This detachment allowed the lawyer to develop a zest for the case, and "this zest may deepen into a peculiar and almost spiritual satisfaction."<sup>222</sup> Only an approach taken from the Stoics allowed the lawyer to "discharge his 'entire duty' to his clients."<sup>223</sup> Curtis used Brougham to shock his readers, lawyers and law students, out of their complacency, and to face the necessary extremism of the lawyer's duty of loyalty to the client. Brougham's ethic of advocacy demonstrated how the lawyer played his role, and, "What really and ultimately matters is that the game shall be played as it should be played."<sup>224</sup>

Curtis's *Stanford Law Review* article was immediately denounced by Henry Drinker, a Philadelphia lawyer and legal ethics writer.<sup>225</sup> Drinker concluded Curtis offered "many distorted and misleading statements as to the lawyer's duty to his clients, to the courts, and to the public."<sup>226</sup> The famed criminal defense lawyer Lloyd Paul Stryker, writing in the aftermath of Curtis's arguments, contextualized Brougham's statement, and revised the duty of loyalty as "the duty of the advocate to say for his client all that could have been honestly spoken by the client himself in his own behalf had he been able."<sup>227</sup>

The essays by Levy and Curtis were the only possibly dissonant sounds in a world in which Brougham's ethic of advocacy had been formally excised. By the mid-1960s, the American legal profession largely believed it had resolved the difficult issue of the lawyer's competing duties of zealousness demonstrating client loyalty and as an officer of the court. Time had apparently sorted out this difficulty without any specific resolution needed from the institutions of the American legal profession. This changed markedly beginning in the late 1960s.

220. *Id.*

221. *Id.* at 19-21.

222. *Id.* at 21.

223. *Id.* at 20.

224. CURTIS, *supra* note 205, at 21 (quoting GILBERT MURRAY, *THE STOIC PHILOSOPHY* 50 (1915)).

225. See Henry S. Drinker, *Some Remarks on Mr. Curtis' "The Ethics of Advocacy"*, 4 *STAN. L. REV.* 349 (1952) [hereinafter Drinker, *Some Remarks*]. See generally HENRY S. DRINKER, *LEGAL ETHICS* (1953). On Drinker, see Sarah Barringer Gordon, *Drinker, Henry Sandwith*, in *YALE BIOG. DICT. OF AM. L.* at 175.

226. Drinker, *Some Remarks*, *supra* note 225, at 349.

227. STRYKER, *supra* note 203, at 277.

#### IV. REVIVING BROUGHAM, 1965-1983

##### A. THE ABSENCE OF ZEAL AND THE CRIMINAL DEFENSE LAWYER

The professed limitations on the conduct of the criminal defense lawyer through the 1950s are exemplified in the 1957 *Code of Trial Conduct* of the American College of Trial Lawyers.<sup>228</sup> The goal of the College of Trial Lawyers was in “maintaining high standards of professional conduct and deportment in the courtroom and hearing room.”<sup>229</sup> The College praised its own boldness, noting that “this is the first time any lawyer group has undertaken to promulgate a code of standards of ethics, deportment and conduct for the trial lawyer.”<sup>230</sup> But the standards promoted by the College reflected a complacent profession, one largely ignoring the tension found in serving two masters, the client and the court.

The College’s discussion of the duties of the criminal defense lawyer reflected this complacency, ignoring the thoughtful critiques and questions offered by Levy and Curtis. Rule three, titled *Employment in Criminal Cases*, began with the rule of law argument made a century earlier, that every person accused of a crime, no matter how infamous, had a right to a fair trial, and that a lawyer’s repugnance to the accused or the crime was insufficient to decline to take the case.<sup>231</sup> Rule four required the lawyer to “raise all valid defenses.”<sup>232</sup> But if the defendant made a “confidential disclosure of facts clearly and credibly showing guilt, the lawyer should not present any evidence inconsistent with those facts.”<sup>233</sup>

Thus, the criminal defense lawyer, even without a confession, was to judge the credibility of the client’s confidential disclosure to determine if that statement clearly showed guilt. If the statement did so, the lawyer was to temper the defense of the accused. George Sharswood’s 1854 *Compend*

228. *A Code of Trial Conduct: Promulgated by the College of Trial Lawyers*, 43 A.B.A. J. 223 (1957) [hereinafter *Code of Trial Conduct*]. The College was created in 1950 and was limited to a select few highly successful lawyers. See MARION A. ELLIS & HOWARD E. COVINGTON, JR., *SAGES OF THEIR CRAFT: THE FIRST FIFTY YEARS OF THE AMERICAN COLLEGE OF TRIAL LAWYERS* (2000).

229. *Code of Trial Conduct*, *supra* note 228, at 223.

230. *Id.*

231. *Id.* at 224. Because of the Cold War and fears of a taint of Communism, lawyers in the 1950s worried about the ability of those accused of crimes linked to their Communist beliefs to obtain defense counsel. See *Proceedings of the 1953 Annual Meeting of the House of Delegates*, 94 A.B.A. REP. 118, 133 (1953) (adopting resolution of Special Committee on Individual Rights as Affected by National Security reaffirming the duty of the bar to represent even the most unpopular defendants).

232. *Code of Trial Conduct*, *supra* note 228, at 224.

233. *Id.*



of *Lectures* concluded that 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.”<sup>234</sup> Even when the client confidentially confessed he was guilty of the crime charged, Sharswood declared the lawyer for the accused was bound to use “ALL FAIR ARGUMENTS ARISING ON THE EVIDENCE.”<sup>235</sup> The clearest statement concerning the lawyer’s duty to the client was found in the preamble to the Code. It phrased the lawyer’s duty as one of “undivided allegiance,” using “all honest and appropriate means within the law to protect and enforce legitimate interests.”<sup>236</sup> Not only did the College avoid using the word “zeal,” it set strict parameters on that undivided allegiance to remind its readers that no Brougham-like efforts would be countenanced.

Others bemoaned the state of criminal justice, including criminal defense practice. A Massachusetts trial judge asked, in 1953, “[W]hy do those who have started practice within the last two score years, or perhaps a little earlier, regard practice of the criminal law as unworthy of their time and minds?”<sup>237</sup> That same year, the President of the American Bar Association concluded, “[T]he bar has never given sufficient attention to the problem of criminal justice in America,”<sup>238</sup> in significant part “because most of our lawyers practice civil law exclusively.”<sup>239</sup> Edward Levi of the University of Chicago Law School noted in a 1952 talk that the workings of criminal law “have been insulated away from a large part of the bar.”<sup>240</sup> A criminologist writing in the mid-1950s evinced some surprise that “[m]ost of the convictions (93.8 percent) were not convictions in a combative, trial-by-jury sense, but merely involved sentencing after a plea of guilty had been entered.”<sup>241</sup> He added, “[O]n the eventual disposition of the cases, e.g., whether sent to prison or placed on probation,” it did not matter whether the defendant was represented by an attorney.<sup>242</sup>

The lack of zeal in criminal defense work during this time may be demonstrated in two cases that held defendants received ineffective assis-

234. SHARSWOOD, *supra* note 139, at 31. *See also id.* at 31 (requiring criminal defense lawyer 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”).

235. *Id.* at 44.

236. *Code of Trial Conduct*, *supra* note 228, at 224.

237. Daniel T. O’Connell, *Problems Confronting Trial Courts*, 37 J. AM. JUD. SOC’Y 71, 73 (1953).

238. Robert G. Storey, *The Legal Profession and Criminal Justice*, 36 J. AM. JUD. SOC’Y 166, 166 (1953).

239. *Id.*

240. *See* EDWARD H. LEVI, *FOUR TALKS ON LEGAL EDUCATION* 31-32 (1952).

241. Donald J. Newman, *Pleading Guilty for Consideration: A Study of Bargain Justice*, 46 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 780, 781 (1956).

242. *Id.* at 782.

tance of counsel, exceptions that proved the rule. In the 1957 case of *Lunce v. Overlade*,<sup>243</sup> two defendants were provided a court-appointed attorney before their trial for robbery in Indiana. Their attorney "advised them that if they pleaded guilty he could probably get" them a sentence of less than life.<sup>244</sup> The defendants told him (the attorney is not named in the court's opinion) they were innocent. He told them that "unless they pleaded guilty there was nothing he could or would do for them," and also told them that despite his duty to represent them, "he had no intention of pursuing their interests any further."<sup>245</sup> When the trial was called, the attorney was absent, and never appeared. The trial court insisted on proceeding, and an Ohio attorney (also not named in the opinion) representing a third defendant who successfully moved for dismissal of the charges, agreed to represent the two remaining defendants without charge. The Seventh Circuit noted, "counsel, who was not admitted to practice before the courts of Indiana and who was apparently wholly unversed in Indiana law and practice, proceeded, without any preparation, to conduct petitioners' defense."<sup>246</sup>

As one would expect, this ended badly. Both defendants were convicted, and this same counsel "attempted to prosecute an appeal, but because of his ignorance of Indiana appellate procedure he failed to perfect the appeal and finally gave up."<sup>247</sup> The Indiana Supreme Court affirmed the convictions.<sup>248</sup> In collateral proceedings petitioning for a writ of *habeas corpus*, the Seventh Circuit issued the writ and reversed the convictions. It held, "The record made by Ohio counsel in his defense of petitioners irrefutably demonstrates that he was so ignorant of Indiana law and procedure that it was virtually impossible for him to protect or even to assert petitioners' rights."<sup>249</sup>

A federal district court, in a second case two years later, found the lack of zeal by defense counsel in a state murder case so astonishing that it too issued a writ of *habeas corpus* in collateral proceedings. It held that defense counsel was ineffective after admitting "that his conscience would not permit him to adopt certain customary trial procedures."<sup>250</sup> More remarkable was the conclusion of a 1960 annotation on the subject of incompetency of counsel: *Lunce* was

unusual in that it is one of a very limited group of cases which, in addition to recognizing that the

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243. *Lunce v. Overlade*, 244 F.2d 108 (7th Cir. 1957).

244. *Id.* at 109.

245. *Id.*

246. *Id.* at 109-10.

247. *Id.* at 110.

248. *Lunce v. State*, 122 N.E.2d 5 (Ind. 1954).

249. *Overlade*, 244 F.2d at 110.

250. *Johns v. Smyth*, 176 F. Supp. 949, 953 (E.D. Va. 1959).

representation afforded an accused by an attorney of his own choice may be so inadequate that his conviction should be set aside, and has gone further and has discussed in detail the circumstances that may justify vacation of the judgment.<sup>251</sup>

By 1960, it appeared that in some significant number of cases criminal defense behavior was far from Brougham's "an advocate . . . knows, in the discharge of that office, but one person in the world, that client and none other."<sup>252</sup> A sociological study in the mid-1950s of criminal defense lawyers, published in book form in 1967, suggested the breadth of the problem. The author concluded, "If the comments of our respondents may be accepted, it would seem that there is an element in the legal profession who deviate rather seriously from these [ethical] standards as well as a group whose attitude of complacency in this matter leaves something to be desired."<sup>253</sup> In the April 1964 issue of *Harper's Magazine*, the author, a professor of law at the University of Michigan, wrote, "[B]ig-city criminal lawyers are the pariahs of the legal profession. . . . In part because of the indifference and disdain which the leaders of the bar feel for those who practice criminal law, the field is rife with unethical or dubious practices."<sup>254</sup>

Some lawyers reminded the public that zealous advocacy by defense counsel was essential to protect the liberties of all Americans.<sup>255</sup> In the early 1960s, the use of contempt citations to silence zealous criminal defense counsel was slightly narrowed.<sup>256</sup> In *Cooper v. Superior Court*,<sup>257</sup> the California Supreme Court overturned a contempt citation levied against defense counsel, who attempted to address the trial court respectfully to inform it that its actions were error. And several books were published during this time in support of the liberal value of zealous advocacy. In 1962, the fa-

251. W. M. Moldoff, Annotation, *Incompetency of Counsel Chosen by Accused as Affecting Validity of Conviction*, 74 A.L.R.2d 1390, 1397 (1960).

252. HANSARD'S PARLIAMENTARY DEBATES, *supra* note 1, at 114.

253. ARTHUR LEWIS WOOD, CRIMINAL LAWYER 131 (1967). However, Wood also concluded, "In truth, it is difficult to impute more unethical conduct to criminal lawyers." *Id.* at 114.

254. B. J. George, Jr., *A New Approach to Criminal Law*, HARPER'S, Apr. 1964, at 183.

255. See, e.g., *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1161 (1958) (concluding "partisan advocacy plays a vital and essential role in one of the most fundamental procedures of a democratic society" and is "an indispensable part of a larger ordering of affairs"); E. Wayne Thode, *The Ethical Standard for the Advocate*, 39 TEX. L. REV. 575, 576 (1961) (rejecting "non-authoritative ethical standards" because it "is an interference with the client-lawyer relationship . . .").

256. Prosecutorial misconduct remained a significant problem for the remainder of the 1960s. See Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629 (1972).

257. *Cooper v. Superior Court*, 359 P.2d 274 (Cal. 1961).

mous criminal defense lawyer Edward Bennett Williams<sup>258</sup> wrote a book on the important role of the criminal defense lawyer in protecting the liberties of Americans pursuant to the rule of law.<sup>259</sup> The rule of law distinguished the United States from “the system of which Mr. Khrushchev is so proud.”<sup>260</sup> And a San Francisco criminal defense lawyer named J. W. “Jake” Ehrlich was the subject of a 1955 biography that sold over two million copies, a book which noted his adversarial zeal.<sup>261</sup>

Despite those success stories, the criminal defense lawyer was pigeonholed at the low end of the bar,<sup>262</sup> and regularly portrayed in the 1960s as displaying traits antithetical to even modest definitions of professionalism.<sup>263</sup> In a 1964 law review article, a criminal law professor examined why his students were hostile to criminal law work.<sup>264</sup> In a scathing review of a book written by a criminal defense lawyer, the reviewer noted that, if criminal defense work was as written, it “can only deter high-minded lawyers from entering [the practice of criminal defense].”<sup>265</sup> In 1966, the *ABA Journal* published an article bemoaning the state of the criminal defense bar, for criminal cases “all too often . . . go by default to small segments of the Bar, and these coteries develop an extralegal know-how that consists of jockey-

258. On Williams, see EVAN THOMAS, *THE MAN TO SEE: EDWARD BENNETT WILLIAMS, ULTIMATE INSIDER; LEGENDARY TRIAL LAWYER* (paper ed. 1992); Evan Thomas, *Williams, Edward Bennett*, in *YALE BIOG. DICT. OF AM. L.* at 591.

259. EDWARD BENNETT WILLIAMS, *ONE MAN'S FREEDOM* (1962).

260. *Id.* at 7; *See also id.* at 300 (“We tell the world every day that the concept of government by consent must prevail over the concept of government by compulsion, that the concept of government-of-laws must prevail over the concept of government-of-men.”).

261. JOHN WESLEY NOBLE & BERNARD AVERBUCH, *NEVER PLEAD GUILTY: THE STORY OF JAKE EHRLICH THE BRILLIANT CRIMINAL LAWYER* (1955). Ehrlich wrote an autobiography, *A LIFE IN MY HANDS* (1965), which was criticized by one lawyer for its excessive zeal. *See* Harris B. Steinberg, “*Are You for Real, Jake Ehrlich?*”—*A Review*, 20 *THE RECORD* 220 (1965) (reviewing J. W. EHRLICH, *A LIFE IN MY HANDS* (1965)). Unlike its predecessor, it did not make the *New York Times* best seller list. On Ehrlich, see Roger K. Newman, *Ehrlich, Jacob W.*, in *YALE BIOG. DICT. OF AM. L.* at 183.

262. *See* Introduction, *The Defense Function*, in *ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE* 114 (1974) (noting criminal law “practice has steadily lost popularity in comparison with others . . . for over a half century”). *See also* Ralph Slovenko, *Attitudes on Legal Representation of Accused Persons*, 2 *AM. CRIM. L.Q.* 101, 102 (1964) (concluding lawyers found criminal defense practice unremunerative and “environmentally degrading”).

263. This was not the case in terms of fictional portrayals of criminal defense lawyers. In both television shows such as *Perry Mason* and in books and movies such as *Anatomy of a Murder* and *To Kill a Mockingbird*, the criminal defense lawyer was a heroic figure. *See* Michael Ariens, *The Agony of Modern Legal Ethics, 1970-1985*, 5 *ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS* 140, 150-52 (2014).

264. Slovenko, *supra* note 262, at 102.

265. Steinberg, *supra* note 261, at 227.

ing cases before the right judge, copping a plea or making a deal."<sup>266</sup> Some lawyers hoped *Gideon v. Wainwright*<sup>267</sup> would "bring more and better lawyers into the criminal courts," and the increase in community clinics would provide greater legal aid.<sup>268</sup> The 1966 Airlie Conference on Legal Manpower Needs of Criminal Law concluded that a "minimum estimate" indicated the need for 4,000-6,000 more criminal defense lawyers.<sup>269</sup> The Conference also concluded, like others, that "in general the criminal practice is not financially attractive enough and is too little respected in the community."<sup>270</sup> One sociologist concluded in 1967 that the criminal defense lawyer practiced law as a "confidence game."<sup>271</sup> Not only was the criminal defense lawyer not zealous in representing clients, "the adversary features which are manifest are for the most part muted and exist even in their attenuated form largely for external consumption."<sup>272</sup> In a study based on interviews of seventy-one criminal defendants about the criminal justice system, the author concluded the following about the experience those defendants had with their lawyers: "For the bulk of the defendants—represented by public defenders—their attorney appeared to be at best a middleman and at worst an enemy agent."<sup>273</sup> Finally, a 1971 study of ten Texas criminal defense lawyers in private practice suggested that "pressures toward cooperation" with the prosecution existed to the same extent as was alleged in the case of the public defender, making zealous representation the exception rather than the norm.<sup>274</sup>

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266. Henry H. Foster, Jr., *Lawmen, Medicine Men and Good Samaritans*, 52 A.B.A. J. 223, 225 (1966).

267. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

268. Foster, *supra* note 266, at 225.

269. *Report of the Conference on Legal Manpower Needs of Criminal Law*, 41 F.R.D. 389, 393 (1966) [hereinafter *Report of the Conference*]; see also Edward W. Kuhn, *The President's Annual Address: The Rule of Law in a Challenging World*, 52 A.B.A. J. 825, 829-30 (1966) (noting deficit of criminal defense lawyers). See also Criminal Justice Act of 1964, 18 U.S.C. § 3006A, Pub. L. 88-455, Aug. 20, 1964 (noting goal is to "promote the cause of criminal justice by providing for the representation of defendants who are financially unable to obtain an adequate defense in criminal cases in the Courts of the United States").

270. *Report of the Conference, supra* note 269, at 411.

271. Abraham S. Blumberg, *The Practice of Law as a Confidence Game*, 1 L. & SOC'Y REV. 15, 31 (1967).

272. *Id.* at 24.

273. JONATHAN D. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE 123 (paper ed. 1972).

274. Jackson B. Battle, Comment, *In Search of the Adversary System—The Cooperative Practices of Private Criminal Defense Attorneys*, 50 TEX. L. REV. 60, 61 (1971).

## B. THE 1960s AND IDEOLOGICAL CHANGE

A shift in the ideology of criminal defense practice arose as a consequence of both the Supreme Court's Constitutional Criminal Procedure revolution of the 1960s<sup>275</sup> and the civil rights and student movements of the same period.<sup>276</sup>

The Court's 1963 *Gideon* decision, which constitutionally mandated a lawyer be provided an indigent felony defendant, was but a beginning of the Court's re-shaping of the criminal justice system. The Court followed with decisions concerning the privilege against self-incrimination (*Malloy v. Hogan*),<sup>277</sup> the right to confront witnesses (*Pointer v. Texas*),<sup>278</sup> a ban on prosecution comment on the defendant's decision not to testify (*Griffin v. California*),<sup>279</sup> the right of an indigent defendant to counsel on appeal (*Douglas v. California*),<sup>280</sup> *Miranda* warnings,<sup>281</sup> the right to a speedy trial (*Klopfer v. North Carolina*),<sup>282</sup> the right of a criminal defendant to compulsory process (*Washington v. Texas*),<sup>283</sup> two cases expanding the right of confrontation (*Bruton v. United States*<sup>284</sup> and *Barber v. Page*<sup>285</sup>), and other cases enlarging the constitutional rights of the criminally accused.<sup>286</sup>

The civil rights and anti-Vietnam War movements brought those protesting societal ills in regular contact with the criminal justice system. The result was an increasing concern with the defense of those accused of crimes. For self-styled radical lawyers, the "detachment" of the lawyer from the client was denounced "as a hoax and as the graveyard of any hope of social transformation."<sup>287</sup> A distinction between the "liberal" ACLU lawyer

275. See POWE, *supra* note 8, at 379-444; STUNTZ, *supra* note 8, at 216-43.

276. See WILLIAM L. O'NEILL, *COMING APART: AN INFORMAL HISTORY OF AMERICA IN THE 1960S* at 158-94, 279-92 (paper ed. 1978).

277. *Malloy v. Hogan*, 378 U.S. 1 (1964).

278. *Pointer v. Texas*, 380 U.S. 400 (1965).

279. *Griffin v. California*, 380 U.S. 609 (1965).

280. *Douglas v. California*, 372 U.S. 353 (1963).

281. *Miranda v. Arizona*, 384 U.S. 436 (1966).

282. *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

283. *Washington v. Texas*, 388 U.S. 14 (1967).

284. *Bruton v. United States*, 391 U.S. 123 (1968).

285. *Barber v. Page*, 390 U.S. 719 (1968).

286. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating exclusionary rule of Fourth Amendment into Due Process Clause of the Fourteenth Amendment); *Pate v. Robinson*, 383 U.S. 375 (1965) (requiring hearing on competency to stand trial).

287. Robert Lefcourt, *Introduction*, in *LAW AGAINST THE PEOPLE: ESSAYS TO DEMYSTIFY LAW, ORDER AND THE COURTS* 4 (paper ed. 1971). See also Gerald B. Lefcourt, *The Radical Lawyer Under Attack*, in *LAW AGAINST THE PEOPLE*, at 253, 259 ("Movement lawyers have started a process of challenge and protest that counters the 'officer of the court' consciousness and affirms their role as political beings struggling against illegitimate rulers and fighting for the rights and aspirations of oppressed people."); Fred Cohn, *Soldiers Say No*, in *LAW AGAINST THE PEOPLE*, at 300 ("It is a growing belief among a new generation of

and the radical lawyer was that the former's "constitutional principles have insulated him from a more partisan commitment."<sup>288</sup> The radical lawyer "need not share the precise politics of his client, but those politics should be his prime concern, and not the abstract enforcement of the abstract principles that make up the Bill of Rights."<sup>289</sup> This close identification of lawyer and client was anathema to most lawyers.

In this milieu, Brougham's ethic of advocacy was urged as a way to revitalize the lawyer's *traditional* duty of client loyalty, particularly when representing the indigent or otherwise powerless client. This effort had the effect of both arguing for a rise in professionalism in criminal defense practice, and rejecting the radical view that lawyers should wholly identify with their clients. The first sharp attack demanding an attention to zealous advocacy in criminal defense practice came in 1966 from a talk (later published with responses) to criminal defense lawyers in the District of Columbia by Monroe Freedman, then a professor of law at George Washington University. Freedman asked three questions: was it proper to cross-examine a truthful witness to discredit that witness? Was it proper to put a witness on the stand who you know will commit perjury? Was it proper to give the accused legal advice when you believe that knowledge will tempt him to commit perjury?<sup>290</sup> Freedman concluded the answer to each was yes.<sup>291</sup> His talk led to a failed attempt to disbar him<sup>292</sup> and was a harbinger of a re-invigorated ideal of zealous advocacy.<sup>293</sup>

When Freedman's *Lawyers' Ethics in an Adversary System* was published in 1975, he was comfortable claiming that the definition of zeal in

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lawyers that the distinction between themselves and their clients is often arbitrary and elitist." See also Richard Wasserstrom, *Lawyers and Revolution*, 30 U. PITT. L. REV. 125, 130 (1968) (noting "the lawyer *qua* advocate plays an essentially non-critical role").

288. Jonathan Black, *Introduction*, in *RADICAL LAWYERS: THEIR ROLE IN THE MOVEMENT AND IN THE COURTS* 12 (paper ed. 1971).

289. *Id.* "It is impossible to be a political radical while playing the games of the system in court. The confines and biases of the lawyer's role are a continuing damper on his activity as a radical, let alone a revolutionary." *Id.* at 12.

290. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1469 (1966).

291. He later gave a much more nuanced answer to the third question. See FREEDMAN, *supra* note 3, at 75.

292. *Id.* at viii.

293. See *Standards of Conduct for Prosecution and Defense Personnel: A Symposium*, 5 AM. CRIM. L.Q. 8 et seq. (1966) (discussing ethical duties of defense counsel when defendant claims innocence, when defendant acknowledges guilt but will not plead guilty and when defendant claims innocence but wishes to plead guilty to lesser charge). None of the participants justified their conclusions based on Brougham, and one, then-Judge Warren Burger, rejected the claim that "a lawyer is bound to do whatever his client demands." See Warren Burger, *Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint*, 5 AM. CRIM. L.Q. 11, 15 (1966).

the ABA's Canons of Ethics and its Code of Professional Responsibility was captured in the "classic statement of that ideal by Lord Brougham" in his representation of Caroline.<sup>294</sup> Freedman was joined by others. A lawyer named Paul Teschner also called Brougham's view the "classic statement."<sup>295</sup> Teschner underscored the need for zealous representation of persons in criminal and other public law matters because "the viability of public law is itself dependent upon a real limitation of state power."<sup>296</sup> That was why criminal defense lawyers "must never prevaricate in their representation of clients merely because the state is involved."<sup>297</sup> Teschner's conclusion reiterated the views of lawyers from the 1950s, though those lawyers made such statements without using Brougham for support. Those lawyers, including the well-known criminal defense lawyer Lloyd Paul Stryker, contextualized rather than embraced Brougham.<sup>298</sup> This recent history was apparently forgotten. Harvard Law School Professor Charles Fried joined the revisionist parade in 1976, accepting without citing any authority that Brougham's defense of Caroline formed the "traditional view of the lawyer's role."<sup>299</sup> Professor Lee Teitelbaum invoked Brougham to urge lawyers to understand their role was crucial to ensuring the rights of the accused, even the confessedly guilty accused, to "put the state to its burden of proof before conviction and sentence."<sup>300</sup> Like Teschner, Teitelbaum focused on the importance of a zealous criminal defense lawyer in serving "a tenet of our political philosophy that any individual is entitled to claim a substantial distance from a State acting to deprive him of liberty."<sup>301</sup> This, of course, was central to earlier writings of lawyers, which rejected or contextualized Brougham.

Finally, the ABA on two occasions focused the American lawyer's attention to the ideal of zealous representation, though it did not mention Brougham. First, it adopted the Code of Professional Responsibility in 1969,<sup>302</sup> Canon 7 of which was titled, *A Lawyer Should Represent a Client*

294. FREEDMAN, *supra* note 3, at 9.

295. Paul A. Teschner, *Lawyer Morality*, 38 GEO. WASH. L. REV. 789, 834 (1970).

296. *Id.* at 835.

297. *Id.*

298. STRYKER, *supra* note 203, at 277.

299. Fried, *supra* note 4, at 1060 n.1. Fried, a Harvard Law School professor, may have been echoing either Freedman, who wrote a year earlier and whose book was reviewed in the January 1976 issue of the Harvard Law Review, see Ronald D. Rotunda, *Book Review*, 89 HARV. L. REV. 622 (1976), or Charles Curtis, a Boston lawyer and a Harvard Law School graduate.

300. Lee E. Teitelbaum, *The Advocate's Role in the Legal System*, 6 N.M. L. REV. 1, 8 (1975).

301. *Id.* at 21.

302. See *Report of the Special Committee on Evaluation of Ethics Standards*, 94 A.B.A. REP. 728 (1969) (recommending adoption of Code by ABA House of Delegates);



*Zealously Within the Bounds of the Law*. Disciplinary Rule 7-101, titled *Representing a Client Zealously*, made it a disciplinary offense for a lawyer intentionally to “fail to seek the lawful objectives of his client through reasonably available means.”<sup>303</sup> Second, the ABA adopted in 1971 its *Standards on the Prosecution Function and the Defense Function*.<sup>304</sup> This project began in 1964, the same year the ABA began its work on the Code of Professional Responsibility.<sup>305</sup> The ABA’s standards on the *Defense Function* stressed the “primary role of [defense] counsel is to act as champion for his client,” and noted that “[c]ourage and zeal in the defense of his client’s interest are qualities without which one cannot fully perform as an advocate.”<sup>306</sup>

### C. WATERGATE AND HARD TIMES

These efforts to reinforce the importance of zealous representation by criminal defense counsel were affected by other events taking place at the same time. The Watergate burglars were tried in early 1973, and for the next eighteen months the public witnessed a lurid display of lawyers attempting to defend their often venal and self-interested actions.<sup>307</sup> The public’s abhorrence of lawyers appeared in part a result of lawyers acting as Brougham-like agents of their clients and not as “officers of the court.” The stature of American lawyers among the public tumbled during and in the aftermath of Watergate. A 1973 Harris Poll found that just 24 percent of the public had confidence in lawyers.<sup>308</sup> A 1976 Gallup Poll found that just 25 percent of the public believed lawyers rated very high or high in their “hon-

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*Proceedings of the 1969 Annual Meeting of the House of Delegates*, 94 A.B.A. REP. 378, 389-92 (1969) (approving adoption of Code). On the creation of the Code, see Ariens, *supra* note 107, at 433-44.

303. CODE OF PROFESSIONAL RESPONSIBILITY Disc. R. 7-101 (A)(1).

304. See AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE ADMINISTRATION OF JUSTICE: THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 71 (1974).

305. *Id.* at iv.

306. *Id.* at 109-10.

307. See 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.”). See generally Ariens, *supra* note 262, at 182-84 (discussing impact of Watergate scandal on lawyer ethics).

308. See Michael Asimow, *Lawyers, Popular Perception of*, in OXFORD COMPANION TO AMERICAN LAW 495 (Kermit L. Hall ed., 2002). See also *Hearings on The Organized Bar*, at 6, 7 (noting that this still beat Congress, which received an 18 percent confidence mark).

esty and ethical standards.”<sup>309</sup> Writing in 1975, one ABA President admitted, “Early in its development Watergate was characterized as a lawyer’s scandal.”<sup>310</sup>

In 1976, the National Organization of Bar Counsel released a list of twenty-nine lawyers involved in Watergate-related bar disciplinary matters.<sup>311</sup> From that list, seven were disbarred, and eleven others, including two lawyers neither indicted nor named as unindicted co-conspirators, were publicly disciplined.<sup>312</sup>

At the same time, the American legal profession felt the tremors of an economic downturn. In 1972, *Business Week* claimed “the outlook for lawyers is grim,” and predicted an oversupply of 200,000 lawyers by 1985.<sup>313</sup> That same year, the ABA created a Task Force on Professional Utilization because it was concerned about “the increase in the number of” lawyers.<sup>314</sup> Later in the decade, the Supreme Court held minimum fee schedules unconstitutional,<sup>315</sup> and struck down Arizona’s ban on lawyer advertising.<sup>316</sup> Additionally, the Federal Trade Commission opened an investigation of the American legal profession in December 1977.<sup>317</sup> Richard Sander and E. Douglass Williams provide the best evidence of the economic straits in the legal profession of the 1970s: in 1983 dollars, the median income of lawyers in 1969 was \$47,638. In 1979, lawyer median income had declined to \$36,716,<sup>318</sup> a twenty-three percent drop in real income in ten years. Instead

309. GALLUP, *Honesty/Ethics in Professions*, <http://www.gallup.com/poll/1654/honesty-ethics-professions.aspx#3> (last visited Nov. 6, 2014). This compared much less favorably than public polls regarding the standing of lawyers taken during the first half of the 1960s. See Ariens, *supra* note 262, at 147-53.

310. James D. Fellers, *President’s Page*, 61 A.B.A. J. 529 (1975).

311. See *N.O.B.C. Reports on Results of Watergate-Related Charges against Twenty-nine Lawyers*, 62 A.B.A. J. 1337 (1976) [hereinafter *N.O.B.C. Reports*]. For a more caustic view of a critic, see Jerold S. Auerbach, *The Legal Profession After Watergate*, 22 WAYNE L. REV. 1287, 1287 (1976) (“The law-enforcers, lawyers all, were the law-breakers.”).

312. *N.O.B.C. Reports*, *supra* note 311, at 1337. See also Kathleen Clark, *The Legacy of Watergate for Legal Ethics Instruction*, 51 HASTINGS L.J. 673, 678-79 (1999) (noting discipline of sixteen lawyers and not including the two lawyers not indicted or listed as unindicted co-conspirators).

313. *Special Report, The Job Gap for College Graduates in the '70s*, BUS. WK., Sept. 23, 1972, at 48, 51.

314. See *Report of the Task Force on Professional Utilization*, 97 A.B.A. Rep. 818, 819 (1972) (quoting charge of ABA Board of Governors to Task Force). The number of lawyers increased from 355,242 in 1970 to 542,205 in 1980. See THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980S at 4 (Barbara A. Curran et al. eds., 1985).

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

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

317. See *F.T.C. Goes Public on Lawyer Probe*, 64 A.B.A. J. 959 (1978).

318. Richard H. Sander & E. Douglass Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 LAW & SOC. INQ. 431, 448 (1989).

of earning 1.85 times the income of the median American worker, the median income lawyer now earned 1.35 times, a significant loss of earning power in just one decade.<sup>319</sup>

#### D. THE FATAL TURN, 1977-1983

These crises, one ideological and the other material, required decision makers within the American legal profession to make a choice: would lawyers defend the role morality of the neutral advocate acting for the benefit of the client, or adopt a role that embraced a larger view of the lawyer as a servant of the public, as an officer of the court? The profession chose the former option, though not without debate.

In August 1977, the ABA created a special committee, later known as the Kutak Commission, to investigate "all facets of legal ethics."<sup>320</sup> This was apparently because the 1969 Code of Professional Responsibility suffered "from a defect common to the adolescent stage of growth. . . . It is rigid and simplistic, complex and contradictory, and difficult to read."<sup>321</sup> When a private, "working draft" of the proposed Model Rules was leaked in August 1979,<sup>322</sup> and when the initial Discussion Draft was officially published in January 1980, the Kutak Commission went out of its way to avoid using "zeal" or "zealous."<sup>323</sup> Indeed, in its private meetings that led to these drafts, the Kutak Commission concluded: "'Zealous,' it seems, has curiously come to mean 'overzealous.' Strong sentiment was found around the table for dropping 'zeal' altogether as a descriptive term with ethical consequences. It carries with it simply too much baggage."<sup>324</sup> In addition to

319. *Id.* at 449. See also RICHARD A. POSNER, *OVERCOMING LAW* 67 (1995) (noting "the price of legal services fell (in real, that is, inflation-adjusted, terms), rather than, as popular and professional opinion alike supposes, rose, between 1970 and 1985").

320. See William B. Spann, Jr., *The Legal Profession Needs a New Code of Ethics*, B. LEADER, Nov.-Dec. 1977, at 2, 3. See generally *Board of Governors Proceedings*, 102 A.B.A. REP. 581 (1977) (approving creation of committee).

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

322. See Mark H. Aultman, *Legal Fiction Becomes Legal Fantasy*, 7 J. LEGAL PROF. 31, 39 (1982) (noting "working draft" was "to be reviewed by a select few" but was published by the Bureau of National Affairs' Daily Report for Executives on August 13, 1979); See *The Record: Text of Initial Draft of Ethics Code Rewrite Committee*, LEGAL TIMES, Aug. 27, 1979, at 26 (publishing working draft).

323. Neither the working draft nor the Discussion Draft uses either word.

324. See COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS JOURNALS, Feb. 23-24, 1979 (Research Triangle Park, North Carolina) 19-20 (copy on file with author). The JOURNALS are a compilation of the twelve meetings of the Kutak Commission that took place before it released its Discussion Draft on January 30, 1980. The only publicly available compilation of the JOURNALS I am aware of is located at Yale Law School. It was likely given to the Library by Kutak Commission Reporter Geoffrey C. Hazard, Jr., then a Yale

avoiding the words “zeal” and “zealous,” proposed rules on client confidences (Rule 1.7)<sup>325</sup> and a duty of candor toward the tribunal (Rule 3.1)<sup>326</sup> in the Discussion Draft made the lawyer as much an “officer of the court” as the mouthpiece of the client.

A significant number of lawyers reacted badly to the Discussion Draft of the Kutak Commission, to both the general limitations on zeal as essential to client loyalty and in particular to the idea that the Model Rules might mandate the disclosure of some client confidences.<sup>327</sup> When the Proposed Final Draft was issued in May 1981, no mandatory disclosure exception to the rule on client confidences (renumbered as Rule 1.6) remained.<sup>328</sup> Further, it now used the word “zeal,” though it cautioned that zeal was “better conceived as one of commitment to achievement of the client’s lawful objectives.”<sup>329</sup> The ABA finally approved Rule 1.6 of the Model Rules of Professional Conduct in February 1983, but the exceptions to the rule of confidentiality were even narrower.<sup>330</sup> When the Model Rules were adopted in August, they emphasized the lawyer’s duties to a client and soft-pedaled other duties. Zeal was now embraced: “A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”<sup>331</sup>

The zealous advocate, justified in the criminal law for reasons invoking the rule of law and the need to find a champion to aid those whose life or liberty was at stake against a powerful state, was re-cast. The Model Rules indicated all advocates were required to act zealously. The legal profession defended its social role through an ever-tightening focus on zeal-

Law School professor. An email from me to Prof. Hazard’s University of Pennsylvania email address asking if this was the case was unanswered.

325. ABA COMM. ON EVALUATION OF PROF’L STANDARDS, DISCUSSION DRAFT, MODEL RULES OF PROF’L CONDUCT 21-26 (January 30, 1980) (stating general rule, Rule 1.7, that client confidences are to remain undisclosed, but listing two exceptions to general rule, including one mandating disclosure) [hereinafter DISCUSSION DRAFT]. See generally Michael Ariens, “Playing Chicken”: *An Instant History of the Battle Over Exceptions to Client Confidences*, 33 J. LEGAL PROF. 239, 257-58 (2009) (discussing history of approach taken in Discussion Draft regarding exceptions to client confidences, and noting disgruntlement in profession with proposal).

326. DISCUSSION DRAFT, *supra* note 325, at 59-68 (noting in comments duty of criminal defense counsel to disclose perjury of defendant).

327. See generally COMPILATION OF COMMENTS ON THE MODEL RULES OF PROFESSIONAL CONDUCT (4 vols. Geoffrey C. Hazard, Jr., comp. 1980) (reprinting comments on Discussion Draft) (copy on file with author). See also Ariens, *supra* note 325 (discussing history of client confidentiality rule and its exceptions).

328. ABA COMM. ON EVALUATION OF PROF’L STANDARDS, PROPOSED FINAL DRAFT, MODEL RULES OF PROF’L CONDUCT (May 30, 1981).

329. *Id.* at 25.

330. See *Proceedings of the 1983 Midyear Meeting of the House of Delegates*, 108 A.B.A. REP. 289, 296-98 (1983).

331. MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. (1983).

ousness.<sup>332</sup> The justification of zealous advocacy aligned the ideological and material interests of private practice lawyers. It was both economically beneficial to concern oneself with the interests of one's client and the epitome of professional behavior. Best of all, one could refer to Brougham for support.

In 1980, Dean L. Ray Patterson, the initial Reporter for (and later Consultant to) the Kutak Commission, declared, "The 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 duty of the lawyer."<sup>333</sup> Writing in the aftermath of the response to the Discussion Draft, Patterson foresaw Brougham's ethic of advocacy was now a "classic statement" of the duty of loyalty of lawyer to client. It was classic because it fit the material and ideological interests of much of the profession.

## V. CONCLUSION

Brougham's ethic of advocacy continues to represent a challenge to the American legal profession's understanding of its role and purpose in American society. Those who wrote in the 1970s defending the criminal defense lawyer's zealous advocacy wrote in the hope and expectation that the profession would live up to its highest ideals, particularly in the aftermath of the Watergate mess. The state's power to take the life or liberty of a person necessitated a criminal defense bar that took seriously its role in effectuating the rule of law. That some criminal defense lawyers at all times served their clients (and thus, society) zealously was clear. But the fear that the respectable bar had ignored the practice of criminal law as well as the institutions of criminal justice provided some cause to use Brougham's ethic of advocacy to encourage the effort to grasp the profession's aspirational ideals.

The efforts to adapt Brougham's ethic to justify the conduct of lawyers beyond the criminal defense bar has been challenged from within and from

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332. An early critical view regarding excessive zeal was Marvin Frankel, *The Search for the Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975). Frankel served as a member of the Kutak Commission. For a critical view of a reliance on zeal as applied to counselors representing clients, see Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669 (1978).

333. L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 918 (1980). One ABA Section criticized the Discussion Draft in a long letter to the Reporter declaring, "Taken as a whole, the Model Rules, and most particularly the provisions covering Confidential Communications . . . reflect a retreat from the traditional view of a lawyer's role as confidant and zealous representative of the client." See 3 COMPILATION OF COMMENTS § O-40 at 27 (reprinting comment of ABA Standing Committee on Legal Aid and Indigent Defendants).

outside the profession.<sup>334</sup> American lawyers possess a fearsome public reputation, which may be why the public finds lawyer jokes so appealing.<sup>335</sup> The profession is also replete with thoughtful, concerned persons who understand the tension found in either the acceptance or rejection of Brougham's ethic of advocacy. Lawyers have always attempted to serve both their clients and themselves, and also have been required to serve the legal system as officers of the court. Despite the best efforts to cabin one or more of these duties, this professional and personal tension is ineradicable. The lawyer is always juggling several balls, in the impossible hope that they will remain in the air.

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334. See THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS (David Luban ed., 1983); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 166 (1988) ("[T]he role of legal hired gun is morally untenable."); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29.

335. See generally MARC GALANTER, LOWERING THE BAR: LAWYER JOKES & LEGAL CULTURE (2005).