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American Legal Ethics in an Age of Anxiety.

Michael Ariens

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ARTICLES

AMERICAN LEGAL ETHICS IN AN AGE OF ANXIETY

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I. Introduction	344
II. American Legal Ethics from Hoffman to the Canons . . .	349
A. Introduction.	349
B. David Hoffman's Legal Ethics.	353
C. Lawyerly Zeal in the Mid-19th Century	364
D. Defending the Guilty Client.	375
E. Sharswood, Lawyers and Professional Ethics in the 1850s.	384
F. David Dudley Field and Professional Honor	394

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III. The March to Modernity	407
IV. From a Golden Age to an Age of Anxiety	418
A. Introduction	419
B. The Golden Age	420
C. Surveying the Legal Profession	423
D. Joint Conference on Professional Responsibility	426
E. The Code of Professional Responsibility	433
F. Anxiety and the Model Rules	444
V. Conclusion	451

A notion that lectures on legal ethics conjure ethics into the listener is childish, in almost the exact measure in which the listener is he whom it is wished to cure.

K.N. Llewellyn, *The Bar Specializes—With What Results?*¹

I. INTRODUCTION

The rule of law constrains lawgivers. It requires, at a minimum, that the government be one of laws, and not of men.² Those constraints on lawgivers are both internal and external. Internal constraints such as humility, selflessness, and civic virtue have all been posited as necessary to limit the exercise of power by lawgivers. Because men are not angels,³ external constraints also exist to limit their exercise of power. One of the external constraints is a watchful eye from those in the daily law business—

1. K.N. Llewellyn, *The Bar Specializes—With What Results?*, 39 COM. L.J. 336, 340 (1934). This is a reprint of Llewellyn's article published in the May 1933 issue of *Annals of the American Academy of Political and Social Science*. K.N. Llewellyn, *The Bar Specializes—With What Results?*, 167 ANNALS AM. ACAD. POL. & SOC. SCI. 177 (1933).

2. See MASS. CONST. pt. 1, art. XXX (1780), reprinted in 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAW OF THE UNITED STATES 956, 960 (Ben Perley Poore ed., 2d ed. Washington, Gov't Printing Office 1878) ("In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men."); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men.").

3. See THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) ("If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.").

lawyers.⁴ As stated by Professor Brian Tamanaha, “[t]he legal profession, then, is located at the crux of the rule of law.”⁵ But if lawyers are at the crux of the rule of law, as its guardians, “[w]ho will guard the guards?”⁶ One check on the conduct of lawyers is the command that they adhere to a code of ethics. A code of ethics is designed to constrain the self-interested exercise of power by lawyers while providing them with the authority to maintain a watchful eye over the exercise of authority by lawgivers. But the authority given lawyers in American society is tenuous, and it has often been challenged and even rejected in different eras of American history. The subject of this article focuses on the development of American legal ethics as a defense and response to challenges to the authority and power exercised by lawyers. The thesis of this article is that internal professional debates about codes of ethics largely have occurred during times of professional anxiety concerning the role of lawyers in a democratic society.

Section II discusses the development of the self-policing limitations on the behavior of American lawyers, beginning in 1836 with David Hoffman’s “Resolutions in Regard to Professional Department” in his book *A Course of Legal Study*⁷ and continuing through 1908, when the American Bar Association (ABA) adopted its Canons of Ethics.⁸ A study of Hoffman’s Resolutions indicates they were offered as a measure to re-attain honor and status for a profession perceived by Hoffman to be under attack and in decline. In the two decades between the

4. Cf. BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 58 (2004) (“[A]ll liberal accounts of the rule of law presuppose the presence of a robust legal tradition.”).

5. *Id.* at 59.

6. The Latin phrase is “*Quis custodiet ipsos custodes?*” and is attributed to Juvenal. JUVENAL, SATIRES VI, act I, l. 347 (Niall Rudd trans., Clarendon Press 1991); JUVENAL, THE SATIRES OF JUVENAL 78 (Rolfe Humphries trans., Ind. Univ. Press 1958).

7. DAVID HOFFMAN, A COURSE OF LEGAL STUDY 752–77 (2d ed. Philadelphia, Thomas, Cowperthwait & Co. 1846) (reprinting the 1836 edition); see M.H. Hoeflich, *Legal Ethics in the Nineteenth Century: The “Other Tradition,”* 47 U. KAN. L. REV. 793, 793–99 (1999) (offering statements of lawyers other than Hoffman concerning legal ethics); cf. Norman W. Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 FORDHAM L. REV. 1397, 1415–16 (2003) (“[I]t is far from clear that [Hoffman’s Resolutions] are representative either of practice at the time or the consensus of republican legal elites on the specific legal duties entailed by their self-appointed role as the ‘governing class.’”).

8. See *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).

publication of Hoffman's Resolutions and the publication of Judge and Dean George Sharswood's October 2, 1854 Introductory Lecture to students at the University of Pennsylvania Department of Law, published as *A Compend of Lectures on the Aims and Duties of the Profession of the Law: Delivered Before the Law Class of the University of Pennsylvania*,⁹ a crisis of legal professionalism, including a crisis over the extent of the lawyer's duty to defend a guilty client, led Sharswood to modify substantially the standards of conduct embraced by Hoffman. Shortly after the end of the Civil War, the actions of preeminent lawyer David Dudley Field (and members of his law firm) in representing the speculators Jay Gould and Jim Fisk created another crisis of professionalism. Section II closes by discussing the adoption of the Canons of Ethics by the ABA in 1908, which are based on the 1887 Alabama Code of Ethics.¹⁰ The adoption of the Canons was the culmination of the effort by elite lawyers to provide protection against attacks that lawyers were solely interested in protecting their own and their clients' interests.

Section III analyzes why the heavily criticized Canons were not modified in the sixty years before the ABA's adoption of the Code of Professional Responsibility in 1969. The 1908 Canons of Ethics were thirty-two in number. In 1928, the ABA added thirteen Canons,¹¹ and in the 1930s, it adopted the two final Canons.¹²

9. GEORGE SHARSWOOD, *A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW* (Philadelphia, T. & J.W. Johnson 1854). The same work was subsequently titled *An Essay on Professional Ethics*. I will cite both to the *A Compend* edition of 1854, and the fifth edition of *An Essay on Professional Ethics* reprinted in 32 A.B.A. REP. 1 (1907).

10. *Transactions of the Thirty-first Annual Meeting of the American Bar Association*, 33 A.B.A. REP. 3, 55, 86 (1908) (documenting adoption of the Canons of Ethics). The committee noted that its work "was based upon Sharswood's Legal Ethics." *Id.* at 56; see James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 *FORDHAM L. REV.* 2395, 2400 (2003) ("In terms of the language and content of the Canons, the most influential of these sources was the code of ethics adopted by the Alabama State Bar Association . . .").

11. See *Report of the Special Committee on Supplements to the Canons of Professional Ethics*, 53 A.B.A. REP. 495, 495 (1928) (recommending approval of the supplemental Canons of Ethics); see also *Proceedings of the Fifty-first Annual Meeting of American Bar Association*, 53 A.B.A. REP. 29, 129-30 (1928) (discussing and approving all but one recommended supplemental Canon).

12. See *Proceedings of the Fifty-sixth Annual Meeting of American Bar Association*, 58 A.B.A. REP. 41, 155-78 (1933) (reporting debate and vote on amendments and adoption of Canon 46); *Proceedings of the House of Delegates*, 62 A.B.A. REP. 216, 352 (1937) (adopting Canon 47 as "Recommendation (k)" and other amendments from the

Although a revision of the Canons was suggested from the late 1920s through the mid-1930s, and again in the mid-1950s, it was not until 1964 that the ABA, through President Lewis F. Powell, Jr., appointed a special committee (the Wright Committee) to draft rules intended to replace the Canons.¹³ Section III concludes that while lawyers who attacked unethical conduct in the profession initially focused on modifying the Canons, the legal profession remedied this perceived lack of ethics through a concerted effort to restrict entry into the profession instead of replacing the Canons. In particular, the ABA's effort to increase the admissions standards of law schools came to fruition, as did the efforts by state bar associations to lower the percentage of successful bar examination applicants. A substantial reduction in the annual number of newly admitted lawyers during the 1930s allowed the profession to claim its ethical luster had been restored by the early 1940s.

Section IV begins with a discussion of the "golden age" of the legal profession in the late 1950s and early 1960s. It offers a history of the *Report of the Joint Conference on Professional Responsibility*,¹⁴ a landmark work of the ABA and the Association of American Law Schools (AALS). The Joint Conference *Report*, written by Harvard Law School Professor Lon L. Fuller, offered an explanation as to why lawyers were entrusted with the power to check the lawgiver. But it also cautioned the legal profession by reminding it that "a letter-bound observance of the Canons is not equivalent to the practice of professional responsibility."¹⁵ The Joint Conference *Report* avoided a declaration of rules and instead focused on the "central moral tradition within which American lawyers ought to live and

Supplementary Report of the Standing Committee on Professional Ethics and Grievances); *Report of the Special Committee on Canons of Ethics*, 58 A.B.A. REP. 428, 428–29 (1933) (recommending adoption of Canon 46); *Supplementary Report of the Standing Committee on Professional Ethics and Grievances*, 62 A.B.A. REP. 761, 761–67 (1937) (recommending adoption of Canon 47).

13. See *Proceedings of the House of Delegates at the 1964 Annual Meeting*, 89 A.B.A. REP. 365, 383 (1964) (noting appointment of the Special Committee on Evaluation of Ethical Standards).

14. Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958). It was also published as Lon L. Fuller & John D. Randall, *Professional Responsibility: A Statement*, 11 S.C. L.Q. 306 (1959).

15. Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1159 (1958).

dwelling.”¹⁶ Similarly, Fuller noted that a necessary yet insufficient condition of a code of ethics was a “sense of mission.”¹⁷ Although the Joint Conference *Report* influenced the drafting by the Wright Committee of the Code of Professional Responsibility, the Code was in many respects unable to achieve the promise found in the Joint Conference *Report*.

Finally, Section IV examines the reasons for the missed opportunity in the creation of the Code of Professional Responsibility, which was approved by the ABA in 1969.¹⁸ Although the American legal profession was, historically speaking, at the peak of its power and influence, many lawyers saw the drafting of the Code as an opportunity to engage in rent-seeking rather than as a statement of lawyers pledging fidelity to service to the public—having a “sense of mission.” Although more advanced than the Canons, the provisions of the Code too often were unable to go beyond lawyer economic self-interest. Nonetheless, most states adopted the Code by 1972.¹⁹ Despite its overwhelming success, the ABA appointed a commission in 1977 to evaluate “all facets of legal ethics.”²⁰ The commission, chaired by Nebraska lawyer Robert Kutak, fashioned the Model Rules of Professional Conduct, approved by the ABA in 1983.²¹ Fourteen years after

16. Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 HOFSTRA L. REV. 311, 311 (1990).

17. L.L. Fuller, *The Philosophy of Codes of Ethics*, 74 ELECTRICAL ENGINEERING 916, 917 (1955).

18. See *Report of the Special Committee on Evaluation of Ethical Standards*, 94 A.B.A. REP. 728, 728 (1969) (recommending adoption of the Code of Professional Responsibility). The Code of Professional Responsibility was made effective January 1, 1970. See *id.* (recommending that the Code of Professional Responsibility be adopted effective January 1, 1970); *Proceedings of the 1969 Annual Meeting of the House of Delegates*, 94 A.B.A. REP. 378, 392 (1969) (“[T]he House went on to adopt the code as written by the Committee on Evaluation of Ethical Standards.”).

19. See *Report of the Special Committee to Secure Adoption of the Code of Professional Responsibility*, 97 A.B.A. REP. 740, 741 (1972) (noting that “[forty-three] states and the District of Columbia have adopted” all or part of the Code).

20. Ted Schneyer, *Professionalism As Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 677 (1989) (quoting William B. Spann, Jr., *The Legal Profession Needs a New Code of Ethics*, B. LEADER, Nov.–Dec. 1977, at 2, 3).

21. See *Proceedings of the 1983 Annual Meeting of the House of Delegates*, 108 A.B.A. REP. 763, 778 (1983) (noting the adoption of the Model Rules of Professional Conduct); Ted Schneyer, *Professionalism As Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 677–78 (1989) (indicating that ABA President William B. Spann, Jr. “asked Omaha lawyer Robert Kutak to chair a

the adoption of the Model Rules, the ABA created an “Ethics 2000” Commission to determine whether to modify the Model Rules.²² The last subsection in Section IV notes the anxiety within the legal profession during the debate on the Model Rules and continuing through the Ethics 2000 Commission, and suggests the influence this anxiety played in the adoption of the Rules. The transition of legal ethics from a morality-infused view of the lawyer’s duty within a public profession to a law-based standard focusing largely on compliance with rules (contrary to Fuller’s injunction) was completed in the Model Rules. This did not ease the anxiety found in the legal profession; instead, its organizational leaders trilled louder and louder about the lawyer’s duty to maintain the rule of law. Section V offers a brief conclusion.

II. AMERICAN LEGAL ETHICS FROM HOFFMAN TO THE CANONS

The ethical principles [Sharswood] establishes are eternal and therefore just as pertinent today as they were more than a century ago.

Walter P. Armstrong, Jr., *A Century of Legal Ethics*²³

Compliance with several of Hoffman’s resolutions might be grounds for disbarment in 2001.

Michael I. Krauss, *The Lawyer As Limo: A Brief History of the Hired Gun*²⁴

A. Introduction

When the ABA adopted its Canons of Ethics in 1908, it helpfully included an “Index and Synopsis of Canons.”²⁵ This

special committee” that ultimately led to the formation of the Model Rules of Professional Conduct).

22. Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 441 (2002); E. Norman Veasey, Commission on Evaluation of the Rules of Professional Conduct (“Ethics 2000”): Chair’s Introduction (Aug. 2002), http://www.abanet.org/cpr/mrpec/e2k_chair_intro.html.

23. Walter P. Armstrong, Jr., *A Century of Legal Ethics*, 64 A.B.A. J. 1063, 1063 (1978). Armstrong was a former president of the ABA and a member of the Wright Committee. *Id.*; see also *Past and Present Officers*, 89 A.B.A. REP. 108 app. at 109 (1964) (listing Walter P. Armstrong as the sixty-fifth president of the ABA).

24. Michael I. Krauss, *The Lawyer As Limo: A Brief History of the Hired Gun*, 8 U. CHI. L. SCH. ROUNDTABLE 325, 332 (2001).

25. *Index and Synopsis of Canons*, 33 A.B.A. REP. 586, 586 (1908).

“Index and Synopsis” listed the titles of the thirty-two Canons of Ethics.²⁶ Following the titles were parentheticals listing the corresponding provisions to David Hoffman’s 1836 “Resolutions in Regard to Professional Department” contained in *A Course of Legal Study*²⁷ and the Code of Ethics adopted by the Alabama State Bar Association in 1887 and later by other states’ bar associations.²⁸ Alabama’s Code of Ethics, in turn, was based on Judge George Sharswood’s 1854 *A Compend of Lectures*.²⁹ Additionally, section III of the Canons included a lawyer’s oath of admission traceable to David Dudley Field’s³⁰ 1850 Code of Civil

26. *Id.*

27. *Id.*; 2 DAVID HOFFMAN, A COURSE OF LEGAL STUDY 752–75 (2d ed. Baltimore, Joseph Neal 1836).

28. *Index and Synopsis of Canons*, 33 A.B.A. REP. 586, 586 (1908); Thomas Goode Jones, *Code of Ethics*, in GILDED AGE LEGAL ETHICS: ESSAYS ON THOMAS GOODE JONES’ 1887 CODE 45, 45–59 (Carol Rice Andrews et al. eds., 2003). In 1907, compilations of the Alabama Code of Ethics, supplemented by additions made by ten other states—Colorado, Georgia, Kentucky, Maryland, Michigan, Missouri, North Carolina, Virginia, West Virginia and Wisconsin—were reproduced. *Appendix B*, 32 A.B.A. REP. 685, 685 (1907). The Alabama Code consisted of fifty-seven provisions. Thomas Goode Jones, *Code of Ethics*, in GILDED AGE LEGAL ETHICS: ESSAYS ON THOMAS GOODE JONES’ 1887 CODE 45, 45–59 (Carol Rice Andrews et al. eds., 2003). The reproduction consisted of seventy numbered provisions. *Appendix B*, 32 A.B.A. REP. 685, 688–713 (1907).

29. Compare Thomas Goode Jones, *Code of Ethics*, in GILDED AGE LEGAL ETHICS: ESSAYS ON THOMAS GOODE JONES’ 1887 CODE 45, 45–59 (Carol Rice Andrews et al. eds., 2003) (containing many similarities to Sharswood’s *A Compend of Lectures*), with GEORGE SHARSWOOD, A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW (Philadelphia, T. & J.W. Johnson 1854) (containing many of the ideas captured in the 1887 Alabama Code of Ethics). The title of Sharswood’s lectures was changed to *Essay on Professional Ethics* in the second edition published in 1860. See Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 ALA. L. REV. 471, 472 (1998) (noting that George Sharswood’s *Essay on Professional Ethics* influenced the formation of Alabama’s 1887 Code of Ethics). On the influence of Sharswood’s *Essay* on the Alabama Code, see also David I. Durham, *A Call for Regulation of the Profession*, in GILDED AGE LEGAL ETHICS: ESSAYS ON THOMAS GOODE JONES’ 1887 CODE 1, 3–4 (Carol Rice Andrews et al. eds., 2003), where the author states that “it is likely that Jones borrowed more heavily from the work of George Sharswood than any other single source,” and Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 ALA. L. REV. 471, 472 n.3 (1998), which lists sources that support the proposition that the 1887 Alabama Code of Ethics was based upon Sharswood’s *Essay on Professional Ethics*.

30. On the life of David Dudley Field, see generally DAUN VAN EE, DAVID DUDLEY FIELD AND THE RECONSTRUCTION OF THE LAW (1986), HENRY M. FIELD, THE LIFE OF DAVID DUDLEY FIELD (New York, Charles Scribner’s Sons 1898), Frederick C. Hicks, *Field, David Dudley*, in 6 DICTIONARY OF AMERICAN BIOGRAPHY 361 (Allen Johnson & Dumas Malone eds., 1931), and Helen K. Hoy, *David Dudley Field*, in 5 GREAT AMERICAN LAWYERS 123 (William Draper Lewis ed., 1908).

Procedure for the State of New York.³¹

The “Index and Synopsis” indicates the extent to which the ABA’s Canons of Ethics simply acknowledged the breadth of settled territory in the field of the ethical duties of lawyers.³² Of Hoffman’s fifty Resolutions (the last of which directed the lawyer to read the foregoing forty-nine twice yearly), only Resolutions 22, 39, 45, and 46 were not cross-referenced in the Canons.³³ Of the seventy provisions found in the Alabama and other state codes of ethics, the index referenced fifty-six provisions in the Canons.³⁴

One reason why the 1908 Canons relied heavily on Hoffman, Field, Sharswood, and the 1887 Code is that much of what was written resonated then, as it does today. Hoffman urged lawyers to avoid commingling their property with that of the client (26), return client funds as soon as possible (25), represent the client with zeal (18), never represent both sides in a matter (8), withdraw when lacking competence in the matter (20), treat all cases in the same conscientious fashion (23), respect the judge presiding in court (3), charge reasonable fees (27), refund any retained fees for services not rendered (29), avoid testifying in a case in which he represented a client (35), and communicate with the opposing party only with the consent and in the presence of the attorney for the opposing party (33).³⁵ The 1887 Alabama Code barred lawyers from using personal ties to influence the court (3),

31. See DAUN VAN EE, DAVID DUDLEY FIELD AND THE RECONSTRUCTION OF THE LAW 39 (1986) (noting that Field “labored far into the last night of 1849” in order to complete the 1850 civil and criminal codes of procedure); see also COMM’RS ON PRACTICE & PLEADINGS, THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW-YORK 205 (Albany, Weed, Parsons & Co. 1850) (including in section 511 an oath of admission “prescribed to advocates by the law of Geneva”). As noted by the ABA, this oath of attorneys was further traced back to the Swiss canton of Geneva. *Report of the Committee on Code of Professional Ethics*, 32 A.B.A. REP. 676, 676 (1907).

32. Cf. Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1442 (2004) (“The striking similarity between the ABA Canons and the 1887 Alabama Code suggests that the ABA Canons did not make a dramatic shift in either substance or form of existing standards of conduct.”). Andrews argues that the ABA merely sought to clarify current rules of ethics. *Id.*

33. Compare 2 DAVID HOFFMAN, A COURSE OF LEGAL STUDY 752–75 (2d ed. Baltimore, Joseph Neal 1836) (containing fifty Resolutions), with *Canons of Ethics*, 33 A.B.A. REP. 575, 575–84 (1908) (containing thirty-two Canons).

34. See *Index and Synopsis of Canons*, 33 A.B.A. REP. 586, 586 n.1 (1908) (noting the cross-references to the compilation of canons from Alabama and other states, which number fifty-six throughout the thirty-two Canons).

35. 2 DAVID HOFFMAN, A COURSE OF LEGAL STUDY 752–67 (2d ed. Baltimore, Joseph Neal 1836).

required speaking to the court and opposing counsel with candor and fairness (and prohibited a lawyer from citing overruled cases and repealed statutes) (5), and barred a lawyer from making a false claim (10), pursuing a claim intended merely to harass or vex the opposing party (14), and representing conflicting interests in the same matter (25).³⁶ Further, the lawyer had the duty under the Alabama Code to maintain client confidences and secrets after the representation was completed (and even after the death of the client) (21), even if that meant later declining a matter from a prospective client (22).³⁷

As noted above, a few Resolutions were not referenced by the Canons of Ethics, and several Canons contained no comparable counterpart in the Resolutions.³⁸ Those Resolutions suggested: cases involving a client's reputation should not be settled, and that the highborn shall not use their status to force the attorney to compromise his client's case; the lawyer accept a jury verdict without impugning the jury's or the court's integrity; and the lawyer neither use rhetorical skills to fool listeners nor assume a pose of false modesty.³⁹ Just seven Canons failed to reference one or more of the Resolutions: two Canons (2 and 3) concerned the duty of the bar to avoid letting political considerations trump fitness for judicial office and the duty of a lawyer to avoid exerting personal influence on a judge regarding the merits of a matter; two Canons concerned newspapers, the first noting that statements by lawyers in the newspapers could prejudice the administration of justice (20) and the second banning advertising (27); one Canon banned barratry (28); one Canon demanded the lawyer use his

36. Thomas Goode Jones, *Code of Ethics*, in GILDED AGE LEGAL ETHICS: ESSAYS ON THOMAS GOODE JONES' 1887 CODE 45, 48–53 (Carol Rice Andrews et al. eds., 2003).

37. *Id.* at 52. The 1908 Canons did not include a provision on keeping client confidences. See generally *Canons of Ethics*, 33 A.B.A. REP. 575, 575–84 (1908). The lawyers' oath adopted with the Canons did include an oath respecting the keeping of client confidences. See *id.* at 584–85 (“I will maintain the confidence and preserve inviolate the secrets of my client . . .”). The ABA adopted *Confidences of a Client* as Canon 37 in 1928. See *Proceedings of the American Bar Association*, 53 A.B.A. REP. 29, 130 (1928) (adopting the Special Committee's recommended additions to the Canons); *Report of the Special Committee on Supplements to the Canons of Professional Ethics*, 53 A.B.A. REP. 495, 497 (1928) (recommending adoption of a Canon on client confidentiality).

38. Compare 2 DAVID HOFFMAN, A COURSE OF LEGAL STUDY 752–75 (2d ed. Baltimore, Joseph Neal 1836) (containing fifty Resolutions), with *Canons of Ethics*, 33 A.B.A. REP. 575, 575–84 (1908) (containing thirty-two Canons).

39. 2 DAVID HOFFMAN, A COURSE OF LEGAL STUDY 759–75 (2d ed. Baltimore, Joseph Neal 1836).

best efforts to restrain a client from doing anything a lawyer would not do (16); and one Canon discussed the lawyer's duties when advocating for a client outside of the courts (26).⁴⁰ Even though these Canons did not cross-reference any of Hoffman's Resolutions, their tone was consonant with the tenor of the Resolutions. Both Hoffman's Resolutions and the ABA's Canons were written in part to claim the law was an honorable profession despite attacks from within and without.

Despite the similarities from Hoffman through the 1908 Canons, a shift in the understanding of the role of the lawyer before the court and in relation to the client changed dramatically during this time. This shift is found most strongly in the understanding of "zeal" exerted by the lawyer in representing a client. Shifts occurred in the eighteen years between Hoffman's 1836 Resolutions and Sharswood's 1854 *A Compend of Lectures* and in the years between Sharswood's work and the 1871 attacks on the professional conduct of David Dudley Field in representing robber barons Jay Gould and Jim Fisk in the late 1860s and early 1870s.

B. *David Hoffman's Legal Ethics*

One reason for the similarity in tone (though not always the substance) between the Resolutions and the Canons of Ethics was a similar anxiety about the direction of the profession in the 1830s and in the early twentieth century. Hoffman's *A Course of Legal Study* was originally published in 1817, when Hoffman turned thirty-three years old.⁴¹ In 1810, when Hoffman began the practice of law in Baltimore, there were a relatively modest forty-three lawyers in the city.⁴² Apprentices studied law for three

40. *Canons of Ethics*, 33 A.B.A. REP. 575, 576-83 (1908); *Index and Synopsis of Canons*, 33 A.B.A. REP. 586, 586 (1908). Although not referenced in the "Index and Synopsis of Canons," Hoffman's twenty-fourth Resolution stated in part: "I will never be tempted . . . to purchase, in whole, or in part, my client's cause." 2 DAVID HOFFMAN, *A COURSE OF LEGAL STUDY* 760 (2d ed. Baltimore, Joseph Neal 1836).

41. DAVID HOFFMAN, *A COURSE OF LEGAL STUDY* (Baltimore, Coale & Maxwell 1817); cf. Maxwell Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 MD. L. REV. 673, 674 (1979) (noting that Hoffman was born in 1784).

42. See Maxwell Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 MD. L. REV. 673, 677 (1979) (describing the character of the Baltimore legal community and noting forty-three attorneys practiced there in 1810). Philadelphia lawyer David Paul Brown wrote a two volume memoir/guidebook/history of the Philadelphia bar from 1810 to 1856. Brown noted that in Philadelphia there were approximately 100 lawyers in the 1810s. 2 DAVID PAUL BROWN, *THE FORUM; OR, FORTY YEARS FULL*

years before becoming eligible to practice law, making it difficult for anyone but the sons of the wealthy and prosperous to become lawyers.⁴³ Because such a small, tight-knit, socially homogenous community already possessed of wealth had the ability to police itself, the listing of rules of professional deportment was superfluous. It makes sense, then, that the 1817 edition of *A Course of Legal Study* did not include any rules on professional deportment in the main content.⁴⁴ Hoffman included the subject of professional deportment as the last “Auxiliary Subject” (Title IV), and he listed eleven readings to which he added brief notes summarizing their content.⁴⁵ Hoffman introduced the subject of professional deportment with a short essay, notable for its optimistic tone.⁴⁶ The lawyer understood how to engage in proper conduct once he was learned, for Hoffman equated the acquisition of “liberal knowledge” with “honourable views.”⁴⁷ When Hoffman published his *Syllabus of a Course of Lectures* in 1821, he left to the 301st and last lecture the topic of professional deportment.⁴⁸ By 1836, when the second edition of *A Course of*

PRACTICE AT THE PHILADELPHIA BAR 58 (Philadelphia, Robert H. Small 1856); *see also* Gary B. Nash, *The Philadelphia Bench and Bar, 1800–1861*, 7 COMP. STUD. SOC'Y & HIST. 203, 214 (1965) (noting that 101 lawyers were “admitted to the Philadelphia bar from 1800–1805”). In 1810, Philadelphia was the second-largest city in the United States with a population of 53,722, while Baltimore was the third-largest city with a population of 46,555. U.S. Census Bureau, 1810 Fast Facts, <http://www.census.gov/history/www/1810/010907.html> (last visited Nov. 10, 2008).

43. *See* Maxwell Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 MD. L. REV. 673, 677 (1979) (indicating that prospective attorneys in Baltimore could apply for a license only after at least three years of study). In 1810, “[m]ost of the new practitioners [in Baltimore] were the sons of merchants or gentry.” *Id.*

44. *See generally* DAVID HOFFMAN, A COURSE OF LEGAL STUDY (Baltimore, Coale & Maxwell 1817).

45. *Id.* at 324–34.

46. *Id.* at 324–28.

47. *Id.* at 327.

48. DAVID HOFFMAN, SYLLABUS OF A COURSE OF LECTURES ON LAW (1821), *reprinted in* 1 THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES 250, 277 (Steve Sheppard ed., 1999). The lecture on professional deportment was in Title XI of the *Syllabus*. *Id.* Although appointed professor of law in 1814, Hoffman, who had a profitable law practice, did not begin giving lectures at the University of Maryland until 1822. Maxwell Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 MD. L. REV. 673, 678–83 (1979). He continued there until 1832, when he left the school on bad terms. *Id.* at 683. Nonetheless, Hoffman made a lasting impression on the university and legal scholarship. *See generally* ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 123–26 (1921) (explaining Hoffman's contributions to the University of Maryland); Thomas L. Shaffer, *David*

Legal Study was published, much had changed. Not only did Hoffman add to his list of readings, the second edition included a Note 18, titled “Observations on Professional Department,” and the fifty “Resolutions in Regard to Professional Department.”⁴⁹ Hoffman’s “Observations on Professional Department” in Note 18 was a largely melancholy statement regarding the legal profession. Note 18 reflected on the many “evil enticements” besetting the lawyer, who was to reject those enticements and follow only “those principles emphatically denominated *honourable*.”⁵⁰ Within the eight printed pages of Note 18, Hoffman uses “*honourable*” and “*honour*” twelve times, and the manner in which he returned to the topic suggests Hoffman saw professional honor slipping away.⁵¹ The Resolutions, which appear at the conclusion of the section on professional department, were an attempted antidote to “the debasement of professional mores that he perceived in the Jacksonian era.”⁵²

Baltimore was ruled by a small elite when Hoffman grew up,⁵³ and as the youngest son of a successful merchant family, Hoffman

Hoffman’s Law School Lectures, 1822–1833, 32 J. LEGAL EDUC. 127 (1982) (detailing Hoffman’s contributions to legal scholarship).

49. 2 DAVID HOFFMAN, A COURSE OF LEGAL STUDY 744, 752–75 (2d ed. Baltimore, Joseph Neal 1836).

50. *Id.* at 746–47; DAVID HOFFMAN, HINTS ON THE PROFESSIONAL DEPARTMENT OF LAWYERS 32 (Philadelphia, Thomas, Cowperthwait & Co. 1846).

51. 2 DAVID HOFFMAN, A COURSE OF LEGAL STUDY 744–51 (2d ed. Baltimore, Joseph Neal 1836).

52. Maxwell Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 MD. L. REV. 673, 684 (1979); *see also* 2 DAVID HOFFMAN, A COURSE OF LEGAL STUDY 720–75 (2d ed. Baltimore, Joseph Neal 1836) (including the Resolutions at the end of the “Professional Department” section). The addition of “Professional Department” struck some type of chord within the legal profession beyond Baltimore. The second edition of *A Course of Legal Study* was reviewed in the Boston-based *American Jurist and Law Magazine* by F.J.T. of the Philadelphia Bar. In the last paragraph of the review, the author praised Hoffman’s material on professional department in remarking that “[u]pon a future occasion we design to make this division the text for a separate article.” F.J.T., *Hoffman’s Course of Legal Study*, 15 AM. JURIST & L. MAG. 321, 341 (1836). I have not found any subsequent article by the *American Jurist and Law Magazine* discussing Hoffman’s “Professional Department.”

53. *See* Maxwell Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 MD. L. REV. 673, 674 (1979) (“[Baltimore] was governed by an interlocking elite of merchants and landed gentry whose authority extended over all areas of municipal life.”). Baltimore’s population was 46,555 in 1810 and 62,738 in 1820. U.S. Census Bureau, 1810 Fast Facts, <http://www.census.gov/history/www/1810/010907.html> (last visited Nov. 10, 2008); U.S. Census Bureau, 1820 Fast Facts, <http://www.census.gov/history/www/1820/010916.html> (last visited Nov. 10, 2008).

was part of that elite.⁵⁴ By 1836, that era was gone.⁵⁵ A Federalist and later a Whig, Hoffman “was the voice for educated elites who feared that the potential greatness of the [n]ation was being undercut by the common ways and broad democratic participation of the 1830s.”⁵⁶ The social stratification that was part of Hoffman’s youth had been displaced by a mania for equality.⁵⁷ The bar, Hoffman believed, was the last redoubt of the gentleman.⁵⁸ Attacks on the legal profession by the “lower orders,” Hoffman wrote in 1837, was an indirect tribute to the

54. See Maxwell Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 MD. L. REV. 673, 674 (1979) (noting that Hoffman, the youngest child, was “[b]orn in 1784 into a prosperous mercantile family”).

55. Cf. Bill Sleeman, *Law and Letters: A Detailed Examination of David Hoffman’s Life and Career* 18 (Univ. of Md. Sch. of Law Legal Studies Research, Working Paper No. 2005-29, 2005), available at <http://ssrn.com/abstract=680668> (noting that the “broad democratic participation of the 1830s” led to fear among the educated elites of rule “by the common ways”).

56. *Id.* But see MICHAEL F. HOLT, THE RISE AND FALL OF THE AMERICAN WHIG PARTY 951 (1999) (rejecting the notion that people were attracted to the American Whig Party only because they had “a sense of social and moral superiority”). Hoffman was an exception to Holt’s rule. Cf. Bill Sleeman, *Law and Letters: A Detailed Examination of David Hoffman’s Life and Career* 15 (Univ. of Md. Sch. of Law Legal Studies Research, Working Paper No. 2005-29, 2005), available at <http://ssrn.com/abstract=680668> (noting that Hoffman was “an active participant in both Baltimore and national politics, first as a Federalist and later as a member of the Whig party”).

57. See STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM 68–70 (2000) (concluding that after the election of 1800, a “widespread anti-elitism” surfaced such that the “intellectual elites never again” could “predominate among the nation’s political leaders”); G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835, at 20–27 (abr. paper ed. Oxford Univ. Press 1991) (1988) (noting social stratification, observing challenges to elitism in the form of growth in public education and suffrage reform, and concluding that the “equality principle, then, appears as both an energizing and a threatening force in early-nineteenth-century America”); GORDON S. WOOD, REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT 259–60 (2006) (“[T]he revolutionary gentry soon came to realize that the people in America were beyond public criticism; they could not, as in the past, refer to them as the common ‘herd.’”). See generally ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Henry Reeve trans., Legal Classics Library 1988) (1838) (noting generally the possibly deleterious quest for equality). “Democratic institutions awaken and foster a passion for equality which they can never entirely satisfy. This complete equality eludes the grasp of the people at the very moment which it thinks to hold it fast, and ‘flies,’ as Pascal says, ‘with eternal flight’” *Id.* at 181.

58. See ANTHONY GRUMBLER [DAVID HOFFMAN], MISCELLANEOUS THOUGHTS ON MEN, MANNERS, AND THINGS 323–24 (2d ed. Baltimore, Plaskitt & Gugle 1841) (1837) (“[I]f there be still remaining among us any elements that can be called aristocratic, they will be found no where so certainly, as among gentlemen of the legal profession.”).

knowledge and virtue held by most lawyers.⁵⁹ The rise of public opinion⁶⁰ and the decline of rule by elites had created an individualism in the early 1830s in which, as Tocqueville noted, “nobody’s position is quite stable.”⁶¹ These changes seemed to be accompanied by a decline in respect for the law, personified not only by the actions of President Andrew Jackson⁶² but also in the rise of riots in the United States in the mid-1830s—numbering at least fifty-three in 1835, including one in Baltimore in August.⁶³

In 1836, when the second edition of *A Course of Legal Study* was published, Hoffman was fifty-two years old. By this time, he had largely turned away from the legal profession and from the United States,⁶⁴ possibly because he foresaw a future dominated by a despised Jacksonian democracy.⁶⁵ Hoffman did not teach law at the University of Maryland after 1832, and officially resigned his position in 1836.⁶⁶ His legal practice was largely

59. *Id.*; see also DAVID HOFFMAN, HINTS ON THE PROFESSIONAL DEPARTMENT OF LAWYERS 60–61 (Philadelphia, Thomas, Cowperthwait & Co. 1846) (reprinting the same statement also found in *Miscellaneous Thoughts on Men, Manners, and Things*).

60. See GORDON S. WOOD, REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT 245–74 (2006) (discussing the ways in which individual opinions, in the aggregate, resulted in public opinion and became the substitute for the elitist leadership).

61. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 507 (J.P. Mayer ed., George Lawrence trans., Perennial Classics 2000) (1835). Tocqueville was one of the first to use the term “individualism.”

62. See DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848, at 411 (2007) (“[Jackson] did not manifest a general respect for the authority of the law when it got in the way of the policies he chose to pursue.”). Howe offers numerous examples of Jackson’s “impatience with legal restraints,” including his removal of federal deposits from the Bank of the United States. *Id.*

63. See *id.* at 431, 434 (listing the number of riots, though not all were recorded, reported in *Niles’ Register*, which ranged from one in 1830 to fifty-three in 1835, and describing a riot in Baltimore in August of 1835).

64. See Bill Sleeman, *Law and Letters: A Detailed Examination of David Hoffman’s Life and Career* 11–14 (Univ. of Md. Sch. of Law Legal Studies Research, Working Paper No. 2005-29, 2005), available at <http://ssrn.com/abstract=680668> (noting that Hoffman’s legal representation in reported cases ended in the early 1830s, followed shortly by his battle with the University of Maryland from 1832 to 1833, and subsequent departure for England). Hoffman began a literary career in the mid-1830s. *Id.* at 18–19.

65. Cf. DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848, at 485 (2007) (“Party itself became a partisan issue in the presidential election of 1836.”). The Democratic Party, which Jackson controlled, held its national convention in Baltimore in 1835. *Id.*

66. Maxwell Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 MD. L. REV. 673, 683 (1979).

moribund by then as well.⁶⁷ Baltimore itself had changed dramatically: its population increased by 120% between 1810 and 1840, and it was the second-largest city in the United States by 1830.⁶⁸ The democratizing tendencies of the Jacksonian era included democratizing the legal profession, which some, including Hoffman, saw as portending its debasement.⁶⁹ As Hoffman wrote in 1837, he desired lawyers be “the most entrusted, . . . honoured, and withal, the most efficient and useful body of men.”⁷⁰

67. See *id.* at 685 n.47 (“Hoffman did not give up his law practice completely until 1847 . . .”). But see Bill Sleeman, *Law and Letters: A Detailed Examination of David Hoffman's Life and Career* 13–14 (Univ. of Md. Sch. of Law Legal Studies Research, Working Paper No. 2005-29, 2005), available at <http://ssrn.com/abstract=680668> (indicating that the last reported case in which Hoffman is listed as counsel was in 1830, and asserting that although he represented the owners of the wharves in *Barron v. Baltimore* at the state level, Hoffman did not represent them in 1833 when the case was heard and decided by the United States Supreme Court).

68. See U.S. Census Bureau, 1810 Fast Facts, <http://www.census.gov/history/www/1810/010907.html> (last visited Nov. 10, 2008) (listing the population of Baltimore as 46,555 in 1810); U.S. Census Bureau, 1840 Fast Facts, <http://www.census.gov/history/www/1840/010951.html> (last visited Nov. 10, 2008) (listing the population of Baltimore as 102,313 in 1840); U.S. Census Bureau, 1830 Fast Facts, <http://www.census.gov/history/www/1830/010950.html> (last visited Nov. 10, 2008) (listing Baltimore as the second-largest city in the United States). By 1840, Philadelphia slipped to the fourth-largest city, with a population of 93,665. New Orleans was the third-largest city. U.S. Census Bureau, 1840 Fast Facts, <http://www.census.gov/history/www/1840/010951.html> (last visited Nov. 10, 2008).

69. See Norman W. Spaulding, *The Luxury of the Law: The Codification Movement and the Right to Counsel*, 73 FORDHAM L. REV. 983, 989 n.24 (2004) (noting the democratic attacks on the bar in the 1830s); see also Emory Washburn, *On the Legal Profession in New England*, 19 AM. JURIST & L. MAG. 49, 52 (1838) (presenting the issue of democratizing the legal profession as whether it will consist of “an enlightened, educated, independent body of men, or a host of self-constituted, noisy and narrow-minded pettifoggers”). Washburn also railed against the charge that the bar was a monopoly and part of a problematic aristocracy. Emory Washburn, *On the Legal Profession in New England*, 19 AM. JURIST & L. MAG. 49, 69–70 (1838). On Washburn, see Robert M. Spector, *Emory Washburn: Conservator of the New England Legal Heritage*, 22 AM. J. LEGAL HIST. 118, 118 (1978), honoring Washburn as a principled scholar.

70. ANTHONY GRUMBLER [DAVID HOFFMAN], MISCELLANEOUS THOUGHTS ON MEN, MANNERS, AND THINGS 323 (2d ed. Baltimore, Plaskitt & Gule 1841) (1837); see DAVID HOFFMAN, HINTS ON THE PROFESSIONAL DEPARTMENT OF LAWYERS 60 (Philadelphia, Thomas, Cowperthwait & Co. 1846) (including the same language from *Miscellaneous Thoughts on Men, Manners, and Things*); see also PERRY MILLER, THE LIFE OF THE MIND IN AMERICA 105 (1965) (acknowledging that lawyers were the objects of ridicule in the Jackson era and quoting Hoffman without specific attribution); cf. BRUCE A. KIMBALL, THE “TRUE PROFESSIONAL IDEAL” IN AMERICA 179 (Rowman & Littlefield Publishers, Inc. 1995) (1992) (concluding that lawyers possessed “the highest status among the ‘learned professions’ in the first half of the nineteenth century”).

The ease with which aspiring attorneys were admitted to the profession of law by 1840, when just one-third of the states required *any* definite period of preparation before entering the bar,⁷¹ allowed “pettifoggers”⁷² to bring the profession into disrepute.⁷³ Hoffman, a believer in rule by the elite, viewed the mass of lawyers as unworthy of membership in the small group he believed possessed the right and duty to govern.⁷⁴ The Resolutions were a call for a return to an earlier era and a plaintive wail that the “honour” of the profession might be lost.⁷⁵

71. ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 86 (1921); *see also* ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 8 (1983) (“By 1840, there were apparently only nine university-affiliated law schools with a total of 345 students.”).

72. BLACK’S LAW DICTIONARY 1032 (5th ed. 1979) (“A lawyer who is employed in a small or mean business, or who carries on a disreputable business by unprincipled or dishonorable means.”).

73. *See* PERRY MILLER, THE LIFE OF THE MIND IN AMERICA 135–36 (1965) (noting “the lax requirements of most Western states” that allowed poorly educated pettifoggers to draw contempt on the profession through their avarice and incompetence); ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 238 (1953) (commenting that the uneducated pettifoggers of John Adams’s time could rely on procedure in “taking advantage of a defendant or stalling a plaintiff”); GEORGE SHARSWOOD, A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW 80 (Philadelphia, T. & J.W. Johnson 1854) (“A horde of pettifogging, barratrous, custom-seeking, money-making lawyers, is one of the greatest curses, with which any state or community can be visited.”); Emory Washburn, *On the Legal Profession in New England*, 19 AM. JURIST & L. MAG. 49, 52 (1838) (asking whether the legal profession would have “an enlightened, educated, independent body of men, or a host of self-constituted, noisy and narrow-minded pettifoggers”).

74. *See, e.g.*, Stephen E. Kalish, *David Hoffman’s Essay on Professional Deportment and the Current Legal Ethics Debate*, 61 NEB. L. REV. 54, 62 (1982) (noting Hoffman’s support of codification, but only if “entrusted to scholars in the law” and not to “[m]ere common lawyers” (quoting 2 DAVID HOFFMAN, A COURSE OF LEGAL STUDY 679, 686 (2d ed. Baltimore, Joseph Neal 1836))).

75. The concept of honor was central to Hoffman’s understanding of the profession of law and became more important between the first and second editions of *A Course of Legal Study*. There also are a number of references to honor in the Resolutions. *See* DAVID HOFFMAN, HINTS ON THE PROFESSIONAL DEPARTMENT OF LAWYERS 8 (Philadelphia, Thomas, Cowperthwait & Co. 1846) (“The most extensive legal acquirements, moreover, gained by the most methodical course of reading, will not make an accomplished and efficient lawyer. The knowledge of and strict adherence to professional deportment, are altogether essential to his honourable and permanent success.”). Hoffman also noted that “professional eminence, and even the highest distinctions of state are open to all who prove themselves meritorious of them, and that virtue and honour, and industry are the only effectual means of surmounting the difficulties of life, and of reaping the benefits of wealth and of distinction.” *Id.* at 25. Hoffman further stressed “honourable” obligations and principles of lawyers and the legal profession and demanded “honourable” deportment. *Id.* at 32–33. Indeed, Hoffman

The optimistic tone found in the introduction to “Professional Deportment” in the first edition of *A Course of Legal Study* was replaced by pessimism in the second edition.⁷⁶ The legal profession “brings its ministers into a too intimate and dangerous acquaintance with man’s depravity; it places them in the midst of temptations; and whilst engaged in rescuing others, they sometimes fall the only lamented victims.”⁷⁷

That Hoffman’s fifty Resolutions in the second edition of *A Course of Legal Study* were more a call for regeneration than a representation of the ethical standards of a legal profession in the late 1830s and following may best be understood by assessing the response to the publication of the second edition of Hoffman’s *A Course of Legal Study*. The 1817 edition of *A Course of Legal Study* was greatly praised in an extensive (thirty-three page) review by Justice Joseph Story in the Whig-oriented *North American Review*.⁷⁸ The second edition, now two volumes and double the length of the first edition—including the fifty “Resolutions in Regard to Professional Deportment”—received no review but merely a notice of its publication in the *North American Review*.⁷⁹ Not unexpectedly, the *United States*

repeated “honour” or “honourable” twelve times alone in Note 18, the note in which his observations on professional deportment were addressed. *Id.* at 31–36. Despite this sense of honor espoused by Hoffman, the legal profession was under attack in the 1830s. See ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 201 (1984) (arguing that “egalitarian tendencies of the 1830s exacerbated hostility” of the public toward the lawyer elite); SAMUEL HABER, THE QUEST FOR AUTHORITY AND HONOR IN THE AMERICAN PROFESSIONS, 1750–1900, at xii (1991) (noting that despite the honor accorded to professions in the late colonial period, professions “came under a withering attack” between 1830 and 1880).

76. See 2 DAVID HOFFMAN, A COURSE OF LEGAL STUDY 744–45 (2d ed. Baltimore, Joseph Neal 1836) (“It is, however, an undeniable truth, that culpable ambition, false pride, the love of lucre, and even dishonesty, sometimes make silent, insidious, and almost imperceptible, inroads on the morals, and the virtuous resolutions of young practitioners . . .”).

77. *Id.* at 745.

78. See Joseph Story, *A Course of Legal Study Respectfully Addressed to the Students of Law in the United States*, 6 N. AM. REV. 45, 45–77 (1817) (reviewing DAVID HOFFMAN, A COURSE OF LEGAL STUDY (1817)); see also Joseph Neal, *Recommendations of the First Edition* to 1 DAVID HOFFMAN, A COURSE OF LEGAL STUDY 1–2 (2d ed. Baltimore, Joseph Neal 1836) (listing favorable reviews of the first edition by United States Supreme Court Chief Justice John Marshall, Justice Gabriel Duvall, Justice Joseph Story, Chancellor James Kent, and others in order to persuade readers to purchase the second edition).

79. See *Quarterly List of New Publications*, 43 N. AM. REV. 283, 285 (1836) (listing the 1836 second edition of Hoffman’s *A Course of Legal Study* as a new publication).

Magazine and Democratic Review did not review the work either. The only lengthy review of the 1836 second edition of *A Course of Legal Study* is found in the Boston-based *American Jurist and Law Magazine*.⁸⁰ In a twenty-page review, only the last paragraph discussed Hoffman's material on professional deportment.⁸¹ The author praised the fifty Resolutions and indicated that "[u]pon a future occasion we design to make this division the text for a separate article."⁸² I have not found any such article. One year later, Hoffman published a book titled *Miscellaneous Thoughts on Men, Manners, and Things* under the pseudonym Anthony Grumbler.⁸³ *Miscellaneous Thoughts* was reviewed in the *North American Review*, although the review largely consists of belated praise for Hoffman's *A Course of Legal Study*.⁸⁴ The critic noted:

[W]e cannot omit the present opportunity,—having a momentary jurisdiction over the learned author,—to express our continued sense of the distinguished merits of this work, upon which, time and the approving sanction of foreign jurists have fixed a seal. If we were called upon to designate any single work, which had exercised a greater influence over the profession of the law in this country than all others, . . . and, in fine, most contributed to elevate the standard of professional learning and morals, we should unhesitatingly select Hoffman's "Course of Legal Study."⁸⁵

This praise appears to be offered in part because some of the *Miscellaneous Thoughts* of Anthony Grumbler had led the reviewer "to fear that this work [*A Course of Legal Study*] had not received that notice or patronage from the profession at home, . . . which we know it richly deserves."⁸⁶ Hoffman himself was

80. See F.J.T., *Hoffman's Course of Legal Study*, 15 AM. JURIST & L. MAG. 321, 321-41 (1836) (reviewing DAVID HOFFMAN, *A COURSE OF LEGAL STUDY* (2d ed. Baltimore, Joseph Neal 1836)).

81. *Id.* at 341.

82. *Id.*

83. ANTHONY GRUMBLER [DAVID HOFFMAN], *MISCELLANEOUS THOUGHTS ON MEN, MANNERS, AND THINGS* (2d ed. Baltimore, Plaskitt & Gugle 1841) (1837); see also *Grumbler's Miscellaneous Thoughts*, 45 N. AM. REV. 482, 482 (1837) (book review) ("[W]e may, without even the credit of a shrewd guess, venture to pronounce the name of the author; to lift the vizard of Anthony Grumbler, Esq., . . . [w]ho else can he be . . . [w]e venture to say, David Hoffman, Esq., of the Baltimore Bar . . .").

84. *Grumbler's Miscellaneous Thoughts*, 45 N. AM. REV. 482, 482-84 (1837) (book review).

85. *Id.* at 482.

86. *Id.* at 483.

apparently dismayed at the reception of the second edition, noting in August 1846 that “[t]his work, in its *second* edition, has not been extensively circulated, though largely called for, owing to some difficulties with publishers.”⁸⁷

In 1846, Hoffman was living in Philadelphia and teaching at his Law Institution.⁸⁸ That year, the second edition of *A Course of Legal Study* was reprinted, and the same Philadelphia publisher offered a “new” book for sale from Hoffman, *Hints on the Professional Department of Lawyers, with Some Counsel to Law Students*.⁸⁹ One justification Hoffman gave for reprinting the second edition of *A Course of Legal Study* was the Baltimore publisher’s poor circulation of the 1836 edition.⁹⁰ The reason for the publication of *Hints* was Hoffman’s “deep conviction that the high tone of the Bar has suffered some impairment” since the publication in 1836 of the second edition.⁹¹ Consequently, Hoffman believed a work dedicated to professional department “might often prove useful” to young would-be lawyers.⁹² Although packaged as a new book, *Hints* largely reprinted the material on professional department found in the second edition of *A Course of Legal Study*.⁹³

87. DAVID HOFFMAN, HINTS ON THE PROFESSIONAL DEPARTMENT OF LAWYERS 3 (Philadelphia, Thomas, Cowperthwait & Co. 1846); see also DAVID HOFFMAN, A COURSE OF LEGAL STUDY, at iii (2d ed. Philadelphia, Thomas, Cowperthwait & Co. 1846) (stating that the 1836 second edition “was only very partially published”).

88. See DAVID HOFFMAN, HINTS ON THE PROFESSIONAL DEPARTMENT OF LAWYERS 3 (Philadelphia, Thomas, Cowperthwait & Co. 1846) (including notice that “[t]he Author’s Law Institution commences every year on the first of October”); see also Thomas L. Shaffer, *David Hoffman’s Law School Lectures, 1822–1833*, 32 J. LEGAL EDUC. 127, 138 (1982) (noting that Hoffman taught at his Philadelphia-based Law Institution from 1844 to 1847); Bill Sleeman, *Law and Letters: A Detailed Examination of David Hoffman’s Life and Career* 27 (Univ. of Md. Sch. of Law Legal Studies Research, Working Paper No. 2005-29, 2005), available at <http://ssrn.com/abstract=680668> (indicating that Hoffman conducted a “private law school in Philadelphia” from 1844 to 1847).

89. DAVID HOFFMAN, A COURSE OF LEGAL STUDY (2d ed. Philadelphia, Thomas, Cowperthwait & Co. 1846); DAVID HOFFMAN, HINTS ON THE PROFESSIONAL DEPARTMENT OF LAWYERS (Philadelphia, Thomas, Cowperthwait & Co. 1846).

90. DAVID HOFFMAN, HINTS ON THE PROFESSIONAL DEPARTMENT OF LAWYERS 3 (Philadelphia, Thomas, Cowperthwait & Co. 1846) (acknowledging “some difficulties with publishers” as a reason why the second edition of *A Course of Legal Study* was not widely circulated).

91. *Id.*

92. *Id.*

93. See *id.* at 60–62 (reprinting the fifty Resolutions and Note 18 from *A Course of Legal Study* and a portion of *Miscellaneous Thoughts* to respond to vituperative attacks on the legal profession).

In 1846, the *American Jurist and Law Magazine*, the most jurisprudentially-inclined law review, no longer existed.⁹⁴ The Philadelphia-based *American Law Magazine*, edited by George Sharswood, ceased publication in January 1846.⁹⁵ The Boston-based *Monthly Law Reporter*, the Philadelphia-based *Pennsylvania Law Journal*, the *New York Legal Observer*, the Cincinnati-based *Western Law Journal*, and the Philadelphia-based *Legal Intelligencer* were the existing law journals in 1846.⁹⁶ These journals were written to aid practicing lawyers by giving them practical information, opinions most recently issued, and summaries of practice books. They also printed obituaries and short articles on legal topics. Neither the reprinted second edition of *A Course of Legal Study* nor Hoffman's *Hints* was reviewed in any of these publications. Neither the *North American Review* nor the *American Whig Review* (which began publishing in January 1845) noted the publication of *Hints* or the reprinting of the second edition of *A Course of Legal Study*, and, as expected, no notice was taken by the *United States Magazine and Democratic Review*. Although Bill Sleeman suggests that *Hints* "was enthusiastically received by the legal community,"⁹⁷ I have found no evidence that it made any impression whatsoever. It simply disappeared.⁹⁸ The next year Hoffman did likewise, leaving the United States for England, from where he did not return until 1854, the year he died.⁹⁹

94. See FREDERICK C. HICKS, MATERIALS AND METHODS OF LEGAL RESEARCH 204 (3d ed. 1942) (listing 1829 to 1843 as the years in which the *American Jurist and Law Magazine* was published).

95. See *id.* (noting that the *American Law Magazine* was published only from 1843 to 1846).

96. See *id.* at 204–05 (listing the years during which early nineteenth century legal periodicals were published).

97. Bill Sleeman, *Law and Letters: A Detailed Examination of David Hoffman's Life and Career* 10 (Univ. of Md. Sch. of Law Legal Studies Research, Working Paper No. 2005-29, 2005), available at <http://ssrn.com/abstract=680668>.

98. I have not found any reference to Hoffman's *Hints* in my research of secondary materials. All references are to the second edition of *A Course of Legal Study*.

99. See Bill Sleeman, *Law and Letters: A Detailed Examination of David Hoffman's Life and Career* 27 (Univ. of Md. Sch. of Law Legal Studies Research, Working Paper No. 2005-29, 2005), available at <http://ssrn.com/abstract=680668> (giving a timetable of Hoffman's life and work and indicating that Hoffman left for England in 1847, returned in 1854, and passed away the same year).

C. *Lawyerly Zeal in the Mid-19th Century*

The legal profession's understanding of the extent of the duty to represent a client shifted between the 1836 Resolutions and Sharswood's 1854 *A Compend of Lectures*. Hoffman argued the lawyer was the "sole judge" of when or whether to argue that a claim was time-barred or that his client was a minor.¹⁰⁰ He also cautioned lawyers from identifying too strongly with their clients: "In point of *interest*, also, as well as of feeling, the lawyer is occasionally too intimately connected with his client not to feel the force of those passions which lessen the ardour of virtue."¹⁰¹ For Hoffman, the lawyer's honor required him to keep his own conscience and avoid adopting the client's. Other elite lawyers of the era echoed Hoffman. David Paul Brown, a Philadelphia lawyer born in 1795 and admitted to the Philadelphia bar in 1816, urged in his 1856 memoir that a lawyer decline handling a matter that required pleading the statute of limitations if the lawyer "actually knows that the note is due."¹⁰² In addition, Brown concluded that although "[a] lawyer is not morally responsible for the act or motive of a party, in maintaining an unjust cause, . . . he *is* morally responsible, if he does it knowingly, however he may 'plate sin with gold.'"¹⁰³ Harvard Law Professor Simon Greenleaf, in his 1834 inaugural address, said: "I look with pity on the man, who regards himself a mere machine of the law;—whose

100. 2 DAVID HOFFMAN, A COURSE OF LEGAL STUDY 755 (2d ed. Baltimore, Joseph Neal 1836); see *Report of the Committee on Code of Professional Ethics*, 31 A.B.A. REP. 676 app. H, at 719–20 (1907) (reprinting Hoffman's Resolutions, which include a lawyer's duty not to assert the statute of limitations as a defense if a client is "conscious" of his debt, as well as a lawyer's duty not to plead "[i]nfancy against an honest demand" as Resolutions 12 and 13, respectively); see also 2 DAVID PAUL BROWN, THE FORUM; OR, FORTY YEARS FULL PRACTICE AT THE PHILADELPHIA BAR 71–72 (Philadelphia, Robert H. Small 1856) (concluding that if a lawyer "actually knows that the note is due, unless there be some statute against conscience, he had better not undertake the case"). See generally M.H. Hoeflich, *Legal Ethics in the Nineteenth Century: The "Other Tradition,"* 47 U. KAN. L. REV. 793, 808 (1999) (noting that David Paul Brown agreed with Hoffman that an attorney should not assert the statute of limitations to avoid a valid and unpaid debt).

101. 2 DAVID HOFFMAN, A COURSE OF LEGAL STUDY 746 (2d ed. Baltimore, Joseph Neal 1836). Hoffman also warned that "[t]he success of the client is always that of the counsel: the interests and feelings of the latter become . . . identified with those of the former, and be they meritorious or the reverse, the tie is often of such a nature as to generate the seeds of moral evil." *Id.* at 745.

102. 2 DAVID PAUL BROWN, THE FORUM; OR, FORTY YEARS FULL PRACTICE AT THE PHILADELPHIA BAR 71–72 (Philadelphia, Robert H. Small 1856).

103. *Id.* at 30.

conceptions of moral and social duty are all absorbed in . . . supposed obligation to his client, and this of so low a nature as to render him a very tool and slave”¹⁰⁴ David Dudley Field, in an 1844 essay, wrote that one false assumption about the legal profession was that a client “may rightfully avail himself of every defect in an adversary’s proof which the rules of evidence, or accident, or time, may have caused.”¹⁰⁵ The 1850 Code of Civil Procedure drafted for the State of New York (the Field Code) includes an oath for attorneys in section 511.¹⁰⁶ Appended as a note to this oath of attorneys is a condensed and edited version of Field’s 1844 essay that continued to urge a limited duty of loyalty owed by a lawyer to a client.¹⁰⁷ Rejecting as “unsound in theory, and most pernicious in practice” the claim that a client is entitled to “whatever the law can give him,” Field’s note concludes that a lawyer may not “overlook the moral aspects of the claim” made by his client in determining what course of action to take.¹⁰⁸

But Hoffman’s view of the lawyer as judge of the client’s cause was rejected beginning shortly after he expressed it. Timothy Walker studied law under Samuel Howe from 1827 to 1828 and, after Howe’s death, under Joseph Story at Harvard from 1829 to 1830.¹⁰⁹ Walker moved to Ohio, helped found the Cincinnati Law

104. Simon Greenleaf, *A Discourse Pronounced at the Inauguration of the Author as Royall Professor of Law in Harvard University* (1834), in *THE GLADSOME LIGHT OF JURISPRUDENCE* 134, 140 (Michael H. Hoeflich ed., 1988).

105. *The Study and Practice of the Law*, 14 U.S. MAG. & DEMOCRATIC REV. 345, 348 (1844). Field’s essay is reprinted in part in David Dudley Field, *The Index of Civilization*, reprinted in *THE GOLDEN AGE OF AMERICAN LAW* 30 (Charles M. Haar ed., 1965).

106. *COMM’RS ON PRACTICE & PLEADINGS, THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW-YORK* 205 (Albany, Weed, Parsons & Co. 1850) (including in section 511 an oath of admission). The 1850 Code was never adopted by the State of New York. DAUN VAN EE, *DAVID DUDLEY FIELD AND THE RECONSTRUCTION OF THE LAW* 44 (1986); Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 *LAW & HIST. REV.* 311, 317 (1988). On the importance of oaths at this time, see generally M.H. Hoeflich, *Legal Ethics in the Nineteenth Century: The “Other Tradition,”* 47 *U. KAN. L. REV.* 793, 798 n.27 (1999), indicating the plethora of literature on oaths for attorneys in the mid-1800s, and Carol Rice Andrews, *The Oath of Lawyers, “Both Ancient and Modern,”* 22 *GEO. J. LEGAL ETHICS* (forthcoming 2008–2009), tracing the history of lawyer oaths from medieval Europe to modern America.

107. *COMM’RS ON PRACTICE & PLEADINGS, THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW-YORK* 205–09 (Albany, Weed, Parsons & Co. 1850).

108. *Id.* at 207–08; see also *The Study and Practice of the Law*, 14 U.S. MAG. & DEMOCRATIC REV. 345, 348 (1844) (providing additional insight into Field’s opinion on a lawyer’s duty of loyalty toward a client).

109. See WALTER THEODORE HITCHCOCK, *TIMOTHY WALKER: ANTEBELLUM*

School in 1833, and was the editor of the *Western Law Journal* from 1843 to 1853.¹¹⁰ His book, *Introduction to American Law*, was first published in 1837 and contained the subtitle: *Designed As a First Book for Students*.¹¹¹ A popular work, it went through eleven editions, the last published in 1905. The first edition consisted of forty lectures. The introductory lecture of the 1837 edition included a section (section 7) on the “Dignity of the Profession.”¹¹² Although Walker was aware of Hoffman’s *Course of Legal Study*, this section spoke only glancingly of professional deportment, focusing instead on the distinction between the “successful pettifogger” and the “high-minded jurist”—only the latter of whom possessed the honor given those “[s]urrounded by the ‘gladsome light of jurisprudence.’”¹¹³ Two years later, Walker gave a valedictory address “to the [g]raduates of the Law Class, in the Cincinnati College” that was published in 1844 in the Walker-edited *Western Law Journal*.¹¹⁴ The third ingredient Walker listed for professional success was integrity, necessary in part because the profession was “not reputed to have a very high standard of professional ethics.”¹¹⁵ A most difficult question was: “When a client has a bad cause, shall we prosecute it for him?”¹¹⁶

LAWYER 13–18 (1990) (detailing the relationship between Howe and Walker).

110. See *id.* at 56–77 (detailing Walker’s influence on the Cincinnati Law School); Amos H. Tuttle, *Walker, Timothy*, in 19 DICTIONARY OF AMERICAN BIOGRAPHY 363, 363 (Dumas Malone ed., 1943) (indicating that Walker organized a private law school in Cincinnati in 1833 and served as editor for the *Western Law Journal* starting in 1843).

111. TIMOTHY WALKER, *INTRODUCTION TO AMERICAN LAW* (2d ed. Cincinnati, Derby, Bradley & Co. 1846) (1837). Both Walker’s *Introduction to American Law* and Hoffman’s *A Course of Legal Study* were dedicated to Joseph Story. *Id.* at iii; 1 DAVID HOFFMAN, *A COURSE OF LEGAL STUDY*, at iii–iv (2d ed. Baltimore, Joseph Neal 1836).

112. TIMOTHY WALKER, *INTRODUCTION TO AMERICAN LAW* 17 (Philadelphia, P.H. Nicklin & T. Johnson 1837).

113. *Id.* at 17–18. In section 9, “Plan of These Lectures,” Walker recommended that students interested in legal bibliography refer to *A Course of Legal Study*. *Id.* at 20. In his review of *Introduction to American Law*, George S. Hilliard quoted section 7 in its entirety as inculcating “those rules of professional conduct and deportment, which flow from self-respect, and the constant sense of what is due to truth and the community, as well as to one’s clients.” G.S.H., *Walker’s Introduction to American Law*, 18 AM. JURIST & L. MAG. 375, 388–89 (1838) (reviewing TIMOTHY WALKER, *INTRODUCTION TO AMERICAN LAW* (Philadelphia, P.H. Nicklin & T. Johnson 1837)).

114. See Timothy Walker, *Ways and Means of Professional Success: Being the Substance of a Valedictory Address to the Graduates of the Law Class, in the Cincinnati College*, 1 W. L.J. 542, 542–49 (1844) (printing the text of Walker’s speech).

115. *Id.* at 546.

116. *Id.* at 547.

The answer was yes, for “a lawyer is not accountable for the moral character of the cause he prosecutes, but only for the manner in which he conducts it.”¹¹⁷ “Any other conclusion would make lawyers their clients’ conscience-keepers, and require them to prejudge a cause by declining to undertake it.”¹¹⁸ The second edition of *Introduction to American Law* was published in 1846. Walker deleted section 7, placing some of his comments in that section into a new and final section of the book (section 259), which constituted a variation of his valedictory address and possessed the same title.¹¹⁹ Walker wrote more expansively in this section than in the valedictory address about a lawyer’s moral duties. Walker had apparently thought more deeply about the issue of taking a client’s “bad cause” since his 1839 address, evidenced by the fact that he acknowledged “two classes of cases”: the first when the law was against the client; and the second “when though the law may be with him, the abstract justice of the case appears to be against him.”¹²⁰ Walker reiterated his conclusion from 1839: “I have come to the conclusion, that no principle of moral obligation prohibits me from prosecuting his cause.”¹²¹ Walker noted that the lawyer who prejudged a case might be wrong, for he was not infallible; he was not the client’s “conscience keeper,” and, most importantly, “[e]very man . . . has a right to have his case fairly presented before the court.”¹²² This did not mean, however, “that every thing is fair in litigation.”¹²³

Others also rejected Hoffman’s conclusions. In an 1843 essay, Peleg W. Chandler, a young (he turned twenty-seven the month the essay was published) lawyer trained at Harvard Law School and founder and editor of the Boston-based *Monthly Law Reporter*, asked: “[M]ust the lawyer, when thus applied to, first

117. *Id.*

118. *Id.* David Dudley Field published his contrary conclusion that “[t]he true lawyer . . . never prostitutes . . . to a bad cause” in the April 1844 issue of the *United States Magazine and Democratic Review*—mere months prior to the publication of Walker’s address. *The Study and Practice of the Law*, 14 U.S. MAG. & DEMOCRATIC REV. 345, 351 (1844).

119. See TIMOTHY WALKER, INTRODUCTION TO AMERICAN LAW 661 (2d ed. Cincinnati, Derby, Bradley & Co. 1846) (1837) (including in the 1846 edition section 259, “Ways and Means of Professional Success”).

120. *Id.* at 664.

121. *Id.*

122. *Id.* at 664–65.

123. *Id.* at 665.

settle in his own mind, beyond the possibility of mistake, precisely where the truth and equity of the cause lies?"¹²⁴ Answering his question in the negative, Chandler wrote, "We hold, not only that a lawyer may honorably and honestly engage in a cause of doubtful justice, but that, . . . he is bound fairly and fully to present to the court and jury whatever of law or fact there may be favorable to his client"¹²⁵ Chandler was writing in response to several articles in the *New York Observer* concerning the morality of the practice of law. He defended the work of the criminal defense lawyer and rejected the view that pleading the statute of limitations was a "technical rule[] of law," asking, "what right has a lawyer to set up his own scruples of conscience by denying to a citizen the protection of one of these laws?"¹²⁶ Three years later, Chandler defended his earlier position, writing, "The place to try causes is before the properly constituted tribunals"¹²⁷ Chandler's audience in the *Monthly Law Reporter* was "workingmen of the profession,"¹²⁸ which accounts in part for his rejection of Hoffman's gentlemanly approach.

Most well known, however, were the statements made by Judge George Sharswood in his 1854 lectures to his law students at the University of Pennsylvania.¹²⁹ Sharswood rejected Hoffman's

124. Peleg Chandler, *Legal Morality*, 5 MONTHLY L. REP. 529, 530 (1843).

125. *Id.*

126. *Id.* at 531.

127. Peleg Chandler, *The Practice of the Bar*, 9 MONTHLY L. REP. 241, 242 (1846); see also PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA* 204 (1965) (quoting Peleg Chandler's *The Practice of the Bar* without attribution). For background information on Chandler, see H.W. Howard Knott, *Chandler, Peleg Whitman*, in 3 DICTIONARY OF AMERICAN BIOGRAPHY 615, 615 (Allen Johnson ed., 1929).

128. *Miscellany*, 1 MONTHLY L. REP. 55 (1838); cf. MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876*, at 142-44 (1976) (noting a change in tone of lawyer's magazines beginning in the 1830s corresponding with a shift away from "formal educational requirements"); WALTER THEODORE HITCHCOCK, *TIMOTHY WALKER: ANTEBELLUM LAWYER* 109 (1990) (noting the *Law Reporter* viewed itself as "a practical journal of the law as it is"). The *Western Law Journal* was also imbued with the spirit of reform of the law: "We trouble ourselves but little, perhaps too little, upon theories as to what it should be." WALTER THEODORE HITCHCOCK, *TIMOTHY WALKER: ANTEBELLUM LAWYER* 109 (1990).

129. The Department of Law of the University of Pennsylvania was revived in 1850 with the appointment of District Judge George Sharswood as the sole professor. See Margaret Center Klingelsmith, *History of the Department of Law*, in *UNIVERSITY OF PENNSYLVANIA: OPENING OF THE NEW BUILDING OF THE DEPARTMENT OF LAW* 213, 221 (1900) (describing Judge Sharswood's selection as professor of law). Sharswood's first lecture was given on September 30, 1850, and by mid-1852, two other professors were

argument that a lawyer should never plead the statute of limitations.¹³⁰ Sharswood began with the positivist notion that “[t]he party has a right to have his case decided upon the law and the evidence, and to have every view presented to the minds of his judges, which can legitimately bear upon that question.”¹³¹ Using “mere notions of justice” rather than law to decide cases would lead to a discretion that “would constitute the most appalling of despotisms.”¹³² Thus, even though the lawyer “is an officer of the court,” and “not merely the agent of the party,” “[t]he party has a right to have his case decided on the law and the evidence.”¹³³

appointed. *Id.* at 221–22. On June 1, 1852, Sharswood was appointed Professor of the Institutes of Law. *Id.*

130. See GEORGE SHARSWOOD, *A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW* 25–26 (Philadelphia, T. & J.W. Johnson 1854) (arguing that because a “party has a right to have his case decided upon the law,” a lawyer “is not morally responsible” for arguing the statute of limitations as a defense); see also GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* (5th ed. 1907), reprinted in 32 *A.B.A. REP.* 1, 83 (1907) (same).

131. GEORGE SHARSWOOD, *A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW* 26 (Philadelphia, T. & J.W. Johnson 1854). Sharswood used slightly different language in the revised edition. See GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* (5th ed. 1907), reprinted in 32 *A.B.A. REP.* 1, 82 (1907) (“Every case is to be decided, by the tribunal before which it is brought for adjudication, upon the evidence, and upon the principles of law applicable to the facts as they appear upon the evidence.”).

132. GEORGE SHARSWOOD, *A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW* 25 (Philadelphia, T. & J.W. Johnson 1854); GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* (5th ed. 1907), reprinted in 32 *A.B.A. REP.* 1, 82 (1907); cf. JOHN T. BROOKE, *THE LEGAL PROFESSION: ITS MORAL NATURE, AND PRACTICAL CONNECTION WITH CIVIL SOCIETY* 16 (Cincinnati, H.W. Derby & Co. 1849) (“Now, when a lawyer lends himself to a dishonest man, to plead the statute of limitations, or take any similar advantage to bar or defeat a fair claim, what does he, but willingly aid one of the crew of the great ship of state, to injure and defraud another?”). Brooke was a longtime rector of Christ Church in Cincinnati, not a lawyer. See *id.* at tit. p. (displaying the title Rector of Christ Church, Cincinnati under the author’s name).

133. GEORGE SHARSWOOD, *A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW* 26 (Philadelphia, T. & J.W. Johnson 1854); GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* (5th ed. 1907), reprinted in 32 *A.B.A. REP.* 1, 83 (1907). Sharswood’s position was largely adopted by the legal profession when the Canons of Ethics were adopted in 1908. See *Legal Ethics*, 19 *GREEN BAG* 489, 489 (1907) (adopting the same view espoused by Sharswood in criticizing the shortsightedness of those who argue that a lawyer should not plead the statute of limitations); George P. Costigan, Jr., *The Proposed American Code of Legal Ethics*, 20 *GREEN BAG* 57, 63 (1908) (noting that legislative approval of the defense of statute of limitations provides a “strong public policy” for lawyers to plead it). Costigan was the editor of the first course book on American legal ethics. GEORGE P. COSTIGAN, JR., *CASES AND OTHER AUTHORITIES ON LEGAL ETHICS* (1917).

The statute of limitations was a part of the law. As a matter of moral sensibility, Sharswood concluded that “*in foro conscientiae*, a defendant who knows that he honestly owes the debt sued for and that the delay has been caused by indulgence or confidence on the part of his creditor, ought not to plead the statute.”¹³⁴ Sharswood’s understanding echoed the point made by Philadelphia lawyer William Porter in 1849, in his address to the Law Academy of Philadelphia.¹³⁵ Porter, a vice-provost of the Law Academy, gave a lecture on the legal profession that rejected both Lord Brougham’s understanding of the advocate’s role and (without citing him) Hoffman’s claim that a lawyer is the sole judge of his client’s cause.¹³⁶ For Sharswood, not only was the lawyer not the judge of the client’s cause, but a client’s moral sensibility—or lack thereof—was not the lawyer’s concern.¹³⁷ Consonant with Timothy Walker, Sharswood also concluded that a lawyer “is not morally responsible for the act of the party in maintaining an unjust cause, nor for the error of the court, if they fall into error, in deciding it in his favor.”¹³⁸

134. GEORGE SHARSWOOD, A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW 25–26 (Philadelphia, T. & J.W. Johnson 1854); GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (5th ed. 1907), *reprinted in* 32 A.B.A. REP. 1, 83 (1907); *accord* Thomas L. Shaffer & Robert F. Cochran, Jr., “Technical” Defenses: Ethics, Morals, and the Lawyer As Friend, 14 CLINICAL L. REV. 337, 341–42, 344–45 (2007) (discussing Sharswood’s view on the moral obligations of lawyers in their relationships with clients and citing his *Essay on Professional Ethics*).

135. *See* WILLIAM A. PORTER, THE INTRODUCTORY ADDRESS DELIVERED BEFORE THE LAW ACADEMY OF PHILADELPHIA 19 (Philadelphia, Edmond Barrington & Geo. D. Haswell 1849) (implying that lawyers recognize “when [they] are in the wrong” while advocating on behalf of a client). On the history of the Law Academy of Philadelphia, see generally GEORGE SHARSWOOD, THE ORIGIN, HISTORY, AND OBJECTS OF THE LAW ACADEMY OF PHILADELPHIA (Philadelphia, Kay & Brother 1883).

136. *See* WILLIAM A. PORTER, THE INTRODUCTORY ADDRESS DELIVERED BEFORE THE LAW ACADEMY OF PHILADELPHIA 18–19 (Philadelphia, Edmond Barrington & Geo. D. Haswell 1849) (arguing that an advocate should not protect the client “at all hazards and costs to all others,” and that a lawyer holds power only “as a trustee for others”).

137. *See* GEORGE SHARSWOOD, A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW 26 (Philadelphia, T. & J.W. Johnson 1854) (noting the importance of “hear[ing] and weigh[ing] both sides” of a matter, which imparts on an attorney the duty to “have every view presented to the minds of [the] judges”); GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (5th ed. 1907), *reprinted in* 32 A.B.A. REP. 1, 83–84 (1907) (explaining that “[t]he court or jury ought certainly to hear and weigh” all the evidence, and that it is the attorney’s duty to present this evidence).

138. GEORGE SHARSWOOD, A COMPEND OF LECTURES ON THE AIMS AND DUTIES

Although Hoffman, Sharswood, and Field all noted a lawyer's obligation to represent the client with zeal, they possessed different understandings of "zeal" when addressing the issue of representing a defendant in a criminal case.

The most client-centered statement of lawyerly zeal had been uttered in England in 1820 by Lord Henry Brougham in defense of Queen Caroline when King George IV sued for divorce:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.¹³⁹

Field's 1844 essay rejected the "zeal" urged by Lord Brougham, declaring that "a more revolting doctrine scarcely ever fell from any man's lips."¹⁴⁰ A similar sentiment was offered by New York

OF THE PROFESSION OF THE LAW 26 (Philadelphia, T. & J.W. Johnson 1854); GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* (5th ed. 1907), *reprinted in* 32 A.B.A. REP. 1, 83 (1907); *see also* Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 4–8, 17–18 (2005) (assessing Chief Justice John Bannister Gibson's opinion in *Rush v. Cavanaugh*, 2 Pa. 187 (1845), concerning the extent of the lawyer's duty to the client's desires, and arguing that Chief Justice Gibson was correct in asserting that a lawyer has a duty of fidelity to the court as well as the client). In *Rush*, the court held that a lawyer was not required to pursue a claim contrary to the lawyer's professional conscience. *See* Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 7 (2005) ("The key to the case, therefore, was whether Rush had acted appropriately by dismissing the private prosecution against his client's wishes . . ."). Zacharias and Green conclude that Gibson's understanding of professional conscience differed from Hoffman's view of conscience, which focused on the lawyer's individual moral conscience. *Cf. id.* at 4 (noting that Chief Justice Gibson's view of ethics, rather than that of Brougham or Hoffman, spurred the modern understanding of advocacy ethics). David Paul Brown, a Philadelphia lawyer born in 1795 (a generation before Sharswood, born in 1810), adopted Gibson's view of the lawyer's role in a memoir published in 1856, two years after Sharswood's lectures were published. *See* 2 DAVID PAUL BROWN, *THE FORUM; OR, FORTY YEARS FULL PRACTICE AT THE PHILADELPHIA BAR* 29–30 (Philadelphia, Robert H. Small 1856) ("But Chief Justice Gibson places the obligation of counsel upon a much more honorable and conscientious footing . . .").

139. 2 TRIAL OF QUEEN CAROLINE 8 (New York, James Cockcroft & Co. 1874).

140. *The Study and Practice of the Law*, 14 U.S. MAG. & DEMOCRATIC REV. 345, 348 (1844); *cf.* 2 DAVID PAUL BROWN, *THE FORUM; OR, FORTY YEARS FULL PRACTICE AT THE PHILADELPHIA BAR* 27–28 (Philadelphia, Robert H. Small 1856) (noting Brougham's

lawyer Richard Kimball in 1853: “A more monstrous doctrine, I do not hesitate to say, was never broached.”¹⁴¹ Although acknowledging that the lawyer may represent a client he knows to be guilty, Field cautioned: “He may not undertake to show him to be innocent”¹⁴² The oath of attorneys in the 1850 Field Code permitted a lawyer to maintain only legal and just actions, “except the defence of a person charged with a public offence.”¹⁴³ The note by Field following section 511 offers a slightly different view of the lawyer’s zeal in representing a client guilty of criminal conduct: “If he have derived his belief from the confession of the accused, he should pause in assuming his defence.”¹⁴⁴ But, as an “intermediate minister,” the lawyer was “justified if not bound to enforce [the presumption of innocence] to the inconclusiveness of the evidence of guilt.”¹⁴⁵ The lawyer was also permitted to offer

extreme sense of zeal toward a client’s cause as expressed in his speech to the House of Lords while defending Queen Caroline). Before his arranged marriage to Queen Caroline, King George IV had secretly “married” (it was not a lawful marriage) a Catholic widow, Mrs. Fitzherbert, an act that, if publicly disclosed, would have made his position as King untenable because he was also head of the Church of England. Brougham knew this, and his statement suggested a willingness to use this information in the public defense of his client. In addition to Field, other lawyers also rejected Brougham’s view. See 2 DAVID PAUL BROWN, *THE FORUM; OR, FORTY YEARS FULL PRACTICE AT THE PHILADELPHIA BAR* 28 (Philadelphia, Robert H. Small 1856) (declaring that Brougham’s view “can certainly never be approved by any just or reasonable man”); WILLIAM A. PORTER, *THE INTRODUCTORY ADDRESS DELIVERED BEFORE THE LAW ACADEMY OF PHILADELPHIA* 18 (Philadelphia, Edmond Barrington & Geo. D. Haswell 1849) (proposing how the advocate should regulate his relationships with clients by ridiculing Brougham’s charge to “save that client by all expedient means”).

141. RICHARD B. KIMBALL, *THE LAWYER: THE DIGNITY, DUTIES, AND RESPONSIBILITIES OF HIS PROFESSION* 26–27 (New York, George P. Putnam & Co. 1853).

142. *The Study and Practice of the Law*, 14 U.S. MAG. & DEMOCRATIC REV. 345, 348 (1844). Even when the Canons of Ethics were debated in 1908, the issue still rankled at least some members of the profession. Regarding the debate concerning Canon 5, which discussed defending and prosecuting crimes, one ABA member declared that if a man confessed to him his guilt, he was morally bound to make the confession known to the court. See *Transactions of the Thirty-first Annual Meeting of the American Bar Association*, 33 A.B.A. REP. 3, 59–60 (1908) (discussing the moral implications of defending criminals who are guilty); cf. William H. Taft, *Legal Ethics*, 1 B.U. L. REV. 233, 240 (1921) (stating in a lecture to law students at Boston University Law School that a lawyer “is not justified in rising and assuring the jury of the innocence of his client” in a criminal case when a lawyer knows of his client’s guilt).

143. *COMM’RS ON PRACTICE & PLEADINGS, THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW-YORK* 204 (Albany, Weed, Parsons & Co. 1850).

144. *Id.* at 209.

145. *Id.*

evidence of the circumstances of the case and anything that would lessen the gravity of the client's guilt, "[b]ut here the advocate should stop."¹⁴⁶

Hoffman believed the zeal owed to a client by a lawyer in such a situation is even more limited:

When employed to defend those charged with crimes of the deepest dye, and the evidence against them, whether legal, or moral, be such as to leave no just doubt of their guilt, I shall not hold myself privileged, much less obliged, to use my endeavours to arrest, or to impede the course of justice, by special resorts to ingenuity—to the artifices of eloquence—to appeals to the morbid and fleeting sympathies of weak juries, or of temporizing courts Persons of atrocious character, who have violated the laws of God and man, are entitled to no such special exertions from any member of our pure and honourable profession; and indeed, to no intervention beyond securing to them a fair and dispassionate investigation of the *facts* of their cause¹⁴⁷

This quotation may be interpreted less restrictively than it initially appears. Hoffman believed that "[l]aw is a deep science."¹⁴⁸ A lawyer who used his forensic talents to engineer the acquittal of a guilty person betrayed the scientific basis of law. Hoffman argued that "[a]ll reasoning should be regarded as a philosophical process—its object being conviction, by certain known and legitimate means."¹⁴⁹ An advocate who used "loud words," "sarcasm [and] invective" was the antithesis of a lawyer learned in the science of the law.¹⁵⁰ Instead, a lawyer drawing on the "artifices of eloquence" was a common lawyer whose actions

146. *Id.*

147. 2 DAVID HOFFMAN, *A COURSE OF LEGAL STUDY* 755–56 (2d ed. Baltimore, Joseph Neal 1836).

148. *Id.* at 766. Other works have explained the meaning of law as a science in antebellum legal education. *See, e.g.*, WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* 29–38 (1994) (discussing law as a science of principles in antebellum legal education); PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA* 159 (1965) (crediting Hoffman with propounding "American law as a science"). *See generally* Howard Schweber, *The "Science" of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education*, 17 *LAW & HIST. REV.* 421 (1999) (examining the history of American legal science).

149. 2 DAVID HOFFMAN, *A COURSE OF LEGAL STUDY* 772 (2d ed. Baltimore, Joseph Neal 1836).

150. *See id.* at 772–73 (asserting the difference between the law "as a philosophical process" and the law when used as an "assumption of superior knowledge").

failed to meet the standards of an honorable profession—the type of lawyer Hoffman inveighed against in his Resolutions.¹⁵¹ Hoffman's view was intended to create limits on the lawyer's conduct; however, it remained honorable for the lawyer to direct the jury's attention to “a fair and dispassionate investigation of the facts of [the client's] cause.”¹⁵²

Hoffman's unwillingness to press legal claims that “ought not, to be sustained”¹⁵³ represented an ethical view that joins private and public morality—an ethical view consistent with a person comfortable with governance by an elite, including elite lawyers.¹⁵⁴ That view of lawyering was reshaped even as Hoffman wrote it. Even the conservative position taken by David Dudley Field partially modified Hoffman's conclusion. The third oath of the 1850 Field Code modified the duty of the lawyer to maintain only just causes by requiring the lawyer “[t]o counsel or maintain such actions . . . or defences, only as appear to him legal and just, except the defence of a person charged with a public offence.”¹⁵⁵

Sharswood's 1854 *A Compend of Lectures* concluded that zeal required a lawyer to represent a criminally accused client and to demand the client be convicted on the evidence, even when the client had confessed his guilt to the lawyer.¹⁵⁶ Sharswood also

151. *See id.* at 755 (criticizing lawyers who use eloquence in defending those whom the lawyer knows are guilty of the crime charged).

152. *Id.* at 756.

153. *Id.* at 754.

154. *Cf.* Maxwell Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 MD. L. REV. 673, 684–85 (1979) (describing Hoffman's view that attorneys should act within the bounds of conscience, strive for “substantial justice to all parties,” and refrain from advocating solely with loyalty to the client). In an 1855 review of Sharswood's *A Compend of Lectures*, the reviewer commended Sharswood for justifying why a lawyer should not be the judge of his client's cause. *See Sharswood's Professional Ethics*, 3 AM. L. REG. 193, 195 (1855) (reviewing GEORGE SHARSWOOD, A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW (Philadelphia, T. & J.W. Johnson 1854)) (praising Sharswood's focus on tenets of morality and honor). The *American Law Register* was published in Philadelphia and was edited by Asa I. Fish and Henry Wharton. *See generally* 3 AM. L. REG., at i (1855) (listing the editors and location of publication).

155. COMM'RS ON PRACTICE & PLEADINGS, THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW-YORK 204 (Albany, Weed, Parsons & Co. 1850).

156. GEORGE SHARSWOOD, A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW 31–33 (Philadelphia, T. & J.W. Johnson 1854); GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (5th ed. 1907), *reprinted in* 32 A.B.A. REP. 1, 90–92, 105–06 (1907); *see also* PERRY MILLER, THE LIFE OF THE MIND IN AMERICA 205–06 (1965) (noting an 1858 article in the *Southern Literary Messenger*

accepted, in part, the distinction between public and private morality, a distinction Hoffman rejected. While this distinction can be traced from 1839 forward in statements made by Walker, Field, and Chandler, the tipping point came around 1850. In January 1850, a ten-year-old murder case in England became the focal point concerning a lawyer's duty when his client confessed to the lawyer his guilt to a crime. That discussion had barely subsided when the most sensational murder case of the nineteenth century was tried in Boston in March 1850. The conduct of the defendant's lawyers raised again the issue of the zeal a lawyer should give in the defense of a criminally accused person. More broadly, lawyers, particularly northern lawyers, sensed a rising anxiety concerning the rule of law and the legal profession in the 1850s—an anxiety that included Philadelphia lawyers.

D. *Defending the Guilty Client*

In discussing the lawyer's duty to defend a criminally accused person, Sharswood focused on and spoke favorably about the conduct of defense counsel Charles Phillips in the notorious 1840 *Courvoisier* case in England.¹⁵⁷ The defendant, a servant accused of killing his master, Lord William Russell, confessed his guilt to Phillips shortly before the second day of a three-day trial but refused to plead guilty.¹⁵⁸ Phillips continued to defend

concluding a Christian lawyer who defends a criminal he knows is guilty "obeys 'the cardinal rule of love to his neighbour, laid down specifically by the Saviour'"). As a judge, Sharswood heard more civil than criminal cases. His eulogist, George W. Biddle, indicates that he was well-read in criminal law. GEORGE W. BIDDLE, *A SKETCH OF THE PROFESSIONAL AND JUDICIAL CHARACTER OF THE LATE GEORGE SHARSWOOD* 9 (Philadelphia, The Ass'n 1883). When Sharswood gave his lecture in 1854, Philadelphia was in the process of moving from private to public prosecution of crimes. See generally ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE* (1989) (describing this transition).

157. See GEORGE SHARSWOOD, *A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW* 40–43 (Philadelphia, T. & J.W. Johnson 1854) (commending Phillips for continuing to defend a client who had confessed his guilt and reiterating the notion that a person must be convicted based upon the evidence, not a private confession); GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* (5th ed. 1907), reprinted in 32 A.B.A. REP. 1, 103–06 (1907) (same).

158. See DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 132–33 (1973) (indicating *Courvoisier* asked Phillips to defend him despite his confession of guilt); GEORGE SHARSWOOD, *A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW* 40–41 (Philadelphia, T. & J.W. Johnson 1854) (noting that the defendant *Courvoisier* confessed his guilt to Phillips during the trial); GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* (5th ed. 1907), reprinted in 32

Courvoisier after informing one of the two trial judges of Courvoisier's confession.¹⁵⁹ Phillips later publicly stated that he was urged by Baron Parke to defend Courvoisier to the best of his ability, using "all fair arguments arising on the evidence."¹⁶⁰

But during a three-hour peroration after Courvoisier had privately confessed his guilt, Phillips told the jury:

"And, even supposing him guilty of the murder, which indeed is known to the Almighty God alone, and of which for the sake of his eternal soul, I hope he is innocent, it is better far that in the dreadful solitude of exile he should, . . . atone by lingering repentance for the deed, than that he should now be sent in the dawning of his manhood to an ignominious death . . . where the truth is not clear. I say that the proof adduced is not conclusive of murder"¹⁶¹

Sharswood emphatically defended Phillips's actions.¹⁶² One difficulty with Sharswood's report of Phillips's conduct is that Parke's quoted statement appears to have been a command about how to act during the course of the trial, not an after-the-fact commendation.¹⁶³ Further, had Phillips impermissibly stated his

A.B.A. REP. 1, 103 (1907) (same).

159. Cf. DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 135–41 (1973) ("Charles Phillips had addressed the jury, his conscience burdened with the confidential confession of Courvoisier's guilt . . ."). Mellinkoff's book offers an excellent rumination on *Courvoisier*.

160. See *id.* at 139–40 (citing the correspondence between Phillips and Warren in which Phillips urges that Baron Parke encouraged him to represent Courvoisier despite Courvoisier's admission of guilt); Samuel Warren, *The Mystery of Murder, and Its Defence*, reprinted in 2 MISCELLANIES: CRITICAL, IMAGINATIVE, AND JURIDICAL 1, 27 (Edinburgh and London, William Blackwood & Sons 1855) (noting Phillips's report of what Parke told him when representing Courvoisier, and reprinting the correspondence); *Professional Conduct—The Courvoisier Case*, 12 MONTHLY L. REP. 433, 433–36 (1850) (quoting the letter of Charles Phillips to Samuel Warren first published in the *Times* (London) on November 20, 1849). Sharswood repeated Phillips's claim of Parke's statement, but used all capital letters. GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* (5th ed. 1907), reprinted in 32 A.B.A. REP. 1, 107 (1907).

161. DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 120 (1973); see also DAVID J.A. CAIRNS, *ADVOCACY AND THE MAKING OF THE ADVERSARIAL CRIMINAL TRIAL, 1800–1865* app. 3, at 188, 200 (1998) (reprinting, in appendix 3, portions of Phillips's statement to the jury in *Courvoisier*, taken from the June 22, 1840 issue of the *Times* (London), which reported his statement in the third person).

162. See GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* (5th ed. 1907), reprinted in 32 A.B.A. REP. 1, 107 (1907) (arguing that Phillips had "no alternative" except, "as Baron Parke has well expressed it, to use ALL FAIR ARGUMENTS ARISING ON THE EVIDENCE").

163. Sharswood's report of *Courvoisier* is intended to exonerate Phillips from any charges of immoral or unethical behavior. Cf. GEORGE SHARSWOOD, *A COMPEND OF*

belief in Courvoisier's innocence?

After Courvoisier was convicted, he began publicly to confess his guilt, over and over again. In short order, it became known that Courvoisier had confessed his guilt to Phillips before the trial had ended (the timing of the confession was in dispute in published reports). One initial news report opined that "with that honourable zeal which always distinguishes [Phillips] for his clients, he made the best of a very bad cause."¹⁶⁴ A letter to the *Times* (London) published three days later argued that "he who defends the guilty, knowing him to be so, forgets alike honour and honesty."¹⁶⁵ Part of the controversy raged due to Phillips's repeated questions on cross-examination of a maid, Sarah Mancer, over whether she said she saw her employer, Lord Russell, "murdered" in bed.¹⁶⁶ Phillips repeatedly asked whether she had said this. Flustered, Mancer denied saying so. This cross-examination was offered as evidence that Phillips had dishonorably attempted to place blame for Lord Russell's murder upon a poor servant. Two problems complicated this attack on Phillips. First, Sarah Mancer testified during the first day of trial, before Courvoisier's sudden confession.¹⁶⁷ Second, as made clear by

LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW 40–44 (Philadelphia, T. & J.W. Johnson 1854) (noting that attorneys in Phillips's situation have "no alternative, then, but to perform [their] duty"); GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (5th ed. 1907), *reprinted in* 32 A.B.A. REP. 1, 103–07 (1907) (same). He did not quote the statement of Baron Parke until the end of his discussion, and he implied that Phillips used only the arguments based on the evidence. GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (5th ed. 1907), *reprinted in* 32 A.B.A. REP. 1, 107 (1907). But Sharswood knew that critics of Phillips had fastened on to the speech given to the jury after the confession. He dismissed its importance by concluding "[t]he language of counsel, on such occasions, during the excitement of the trial, in the fervor of an address to the jury, is not to be calmly and nicely scanned in the printed report." *Id.* at 104. Sharswood protested too much.

164. DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 141 (1973) (quoting *CHRONICLE* (London), June 22, 1840). The case ended on Saturday, June 20, 1840. *Id.* at 101.

165. *Id.* at 142 (quoting *TIMES* (London), June 25, 1840); *cf. id.* at 193–94 (quoting *License of Counsel*, *CHRONICLE* (London), June 25, 1840, which defended Phillips's action and declared that any failure on Phillips's part to point out discrepancies, contradictions, and omissions in evidence would have been a "gross violation of duty").

166. *See id.* at 73, 192–93 (reporting Ms. Mancer's signed statement that "[she] saw his Lordship . . . murdered in bed" and discussing the controversy surrounding Phillips's vigorous cross-examination of Ms. Mancer on this point).

167. *See* DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 72–73 (1973) (discussing Sarah Mancer's testimony in the chapter "Trial: Opening Day").

David J.A. Cairns, Phillips's repeated questions of Mancer were a consequence of the Prisoners' Counsel Act of 1836.¹⁶⁸ Before the Prisoners' Counsel Act, a person charged with a felony had no right to counsel in England.¹⁶⁹ The Prisoners' Counsel Act also gave to the defendant the right to a copy of any depositions of any witnesses taken before trial.¹⁷⁰ Sarah Mancer had given a deposition at the coroner's inquest, which she had signed. The deposition included the statement, "I saw his Lordship ~~dead~~ murdered in bed."¹⁷¹ Phillips possessed a copy of that deposition, and one goal of his cross-examination was to have Mancer acknowledge the statement made in the deposition. At the very least, if a servant said she saw Russell "murdered," that might cast reasonable doubt on Courvoisier's guilt by shifting it to her or to other servants.¹⁷² But Phillips's procedural difficulty was that he had to obtain this admission from Mancer without referring to the deposition. That was because, as Cairns notes, if Phillips referred to the deposition during the prosecution's case-in-chief, defense counsel gave up the "last word" pursuant to the Prisoners' Counsel Act.¹⁷³ The last word was the privilege of giving the final speech to the jury, a right highly prized and rarely forfeited by English defense counsel.¹⁷⁴ The result of this provision of the Act was that "[t]he jury were treated to the browbeating of a confused housemaid by an experienced criminal barrister, at the end of

168. DAVID J.A. CAIRNS, *ADVOCACY AND THE MAKING OF THE ADVERSARIAL CRIMINAL TRIAL, 1800–1865*, at 120–24 (1998) (noting the ways in which Phillips used the procedures allowed under the Prisoners' Counsel Act in cross-examining Sarah Mancer).

169. *Cf. id.* at 120 (indicating that before the establishment of the Prisoners' Counsel Act, prisoners "had a right to be present when the depositions were taken, and to question the witnesses").

170. *Id.*

171. DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 73 (1973). "Dead" was crossed out in the deposition. *Id.*

172. *Cf. id.* at 191 ("If the peculiarity of Sarah Mancer's early morning responses to the discovery of the corpse had passed unnoticed in Phillips's argument, . . . everyone in the world . . . would have thought the omissions strange."). In his speech to the jury, given after Courvoisier's confession, Phillips informed the jury that his cross-examination of Sarah Mancer should not be understood to "cast the crime upon either of the female servants." DAVID J.A. CAIRNS, *ADVOCACY AND THE MAKING OF THE ADVERSARIAL CRIMINAL TRIAL, 1800–1865* app. 3, at 191 (1998) (reprinting as appendix 3 Phillips's statement to the jury in *Courvoisier*). The other female servant was the cook Mary Hannell.

173. DAVID J.A. CAIRNS, *ADVOCACY AND THE MAKING OF THE ADVERSARIAL CRIMINAL TRIAL, 1800–1865*, at 121 (1998).

174. *Id.*

which they did not have the benefit of either knowing what Sarah Mancer had said before the coroner, or hearing her explanation of it.”¹⁷⁵ As the controversy raged in the press, Phillips, largely vilified for his actions, remained silent.¹⁷⁶

Although Courvoisier was tried and hung in 1840, the ethical propriety of Phillips’s conduct became the subject of renewed interest in England in the late 1840s. In separate murder cases, the press criticized the conduct of defense counsel in suggesting responsibility for the crimes lay elsewhere, and the excessive zeal of those lawyers was linked to Phillips’s allegedly improper behavior years earlier in *Courvoisier*.¹⁷⁷ An editorial in the *Examiner* in November 1849 first noted the conduct of defense counsel Serjeant Wilkins in a recent murder trial; it then excoriated Phillips for his actions in *Courvoisier* and the legal profession for promoting Phillips to the bench.¹⁷⁸ Phillips belatedly defended his conduct in a letter to the editor of the *Times* (London) and in a published pamphlet of correspondence with his friend, the barrister Samuel Warren.¹⁷⁹ Phillips’s claims defending his honor generated a controversy about the ethics of lawyers that spread to the United States.

The attacks against Phillips were published in the United States in the January 26, 1850 issue of *Littell’s Living Age*, which

175. *Id.* at 123.

176. See *Professional Conduct—The Courvoisier Case*, 12 MONTHLY L. REP. 433, 435 (1850) (quoting the letter of Charles Phillips to Samuel Warren first published in the *Times* (London) on November 20, 1849, in which Phillips noted “the contemptuous silence with which for nine years [he] treated the calumnies” he received as a result of the *Courvoisier* trial).

177. See DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 193–203 (1973) (recounting two post-*Courvoisier* cases in which the press, in criticizing defense counsel as overzealous, attributed the conduct to Phillips in *Courvoisier*).

178. *Id.* at 199–203.

179. *Id.* at 203 (quoting EXAMINER (London), Nov. 3, 1849); see also *id.* at 193 (quoting EXAMINER (London), Nov. 24, 1849 and Dec. 8, 1849). Phillips’s response was the publication of correspondence in the *Times* with his friend and barrister Samuel Warren, later printed in Sharswood’s *An Essay on Professional Ethics*. Correspondence between Charles Phillips & Samuel Warren, TIMES (London), Nov. 20, 1849, reprinted in GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* (5th ed. 1907), reprinted in 32 A.B.A. REP. 1 app. at 183–96 (1907); see also Samuel Warren, *The Mystery of Murder, and Its Defence*, reprinted in 2 MISCELLANIES: CRITICAL, IMAGINATIVE, AND JURIDICAL 1, 1–2 (Edinburgh and London, William Blackwood & Sons 1855) (reprinting correspondence between Phillips and Warren as published in the *Times*); *Professional Conduct—The Courvoisier Case*, 12 MONTHLY L. REP. 433, 434–39 (1850) (same).

reprinted articles from the *Examiner*.¹⁸⁰ At the same time, the *Monthly Law Reporter*, in its January 1850 issue, published an essay titled, *Professional Conduct—The Courvoisier Case*.¹⁸¹ After averring, “Mr. Phillips, we are glad to say, has completely vindicated himself,”¹⁸² the *Monthly Law Reporter* published the exchange of letters between Warren and Phillips originally published on November 20, 1849, in the *Times* (London).¹⁸³ At the end of the same issue, in its “Miscellaneous Intelligence,” the editor reprinted a defense of Phillips published in the *London Legal Observer*.¹⁸⁴ The next month’s issue reversed course. *Monthly Law Reporter* editor Stephen H. Phillips reprinted articles from the *Jurist* and the *Examiner*, and while offering them so the reader could make up his own mind, implied that Charles Phillips’s conduct was unprofessional.¹⁸⁵ The March 1850 issue of the *Monthly Law Reporter* continued to charge Phillips with misconduct in his defense of Courvoisier.¹⁸⁶

In late March 1850, Dr. John Webster, a professor at the Harvard Medical School, was tried and convicted of the murder of George Parkman, a Boston Brahmin, and sentenced to die.¹⁸⁷

180. See *Lawyers, Clients, Witnesses, and the Public*, LITTELL’S LIVING AGE, Jan. 26, 1850, at 179 (reproducing articles from the *Examiner* regarding Phillips’s conduct in *Courvoisier*). The February 2, 1850 issue of *Littell’s Living Age* reproduced articles dealing with Phillips’s conduct in *Courvoisier* in *What We Have Not Done, and What Mr. Charles Phillips Has Done*, LITTELL’S LIVING AGE, Feb. 2, 1850, at 230. A third article, *Lawyers, Clients, &c.*, LITTELL’S LIVING AGE, Feb. 16, 1850, at 306, reprinted an article on Phillips which had been published in the *Scottish Press*. Phillips’s conduct had been reported in the United States as early as 1840. Peleg Chandler, *Trial of Courvoisier—License of Counsel*, 3 MONTHLY L. REP. 194 (1840).

181. *Professional Conduct—The Courvoisier Case*, 12 MONTHLY L. REP. 433 (1850). Stephen H. Phillips, the then-editor of the *Monthly Law Reporter*, later became attorney general of the Commonwealth of Massachusetts and was appointed to a similar position in the territory of Hawaii in 1866. See *The Hawaiian Islands and Their New Attorney General*, N.Y. TIMES, Nov. 16, 1866, available at http://query.nytimes.com/mem/archive-free/pdf?_r=1&res=9407EFDC103DE53BBC4E52DFB767838D679FDE&oref=slogin.

182. *Professional Conduct—The Courvoisier Case*, 12 MONTHLY L. REP. 433, 434 (1850).

183. *Id.* at 434–39.

184. See *Miscellaneous Intelligence*, 12 MONTHLY L. REP. 479, 479–81 (1850) (noting the “high commendation” with which the English press spoke of Charles Phillips).

185. *Mr. Charles Phillips and the Courvoisier Case*, 12 MONTHLY L. REP. 553, 553–71 (1850) (reprinting articles from the *Jurist* and the *Examiner* critical of Phillips’s conduct).

186. *Id.* at 553 (prompting the reader to decide “whether such severity [toward the actions of Phillips] was wholly called for”).

187. See SIMON SCHAMA, *DEAD CERTAINTIES (UNWARRANTED SPECULATIONS)* 71–318 (1991) (describing the case in novelistic form). See generally ROBERT SULLIVAN,

The case may have been the most notorious murder case in nineteenth century America.¹⁸⁸ Shortly before he disappeared on November 23, 1849, Parkman visited Webster at the medical school to demand payment of a large outstanding debt Webster owed Parkman. The wealthy Parkman family offered a large reward for information concerning his disappearance. The police learned of Parkman's visit to Webster and arrested Webster after they found dismembered parts of a body in Webster's laboratory. The Commonwealth's star witness at the trial was the Harvard Medical School janitor, Ephraim Littlefield. Littlefield told of an argument between Webster and Parkman on November 23, and also told of his belief that Webster had murdered Parkman as soon as Parkman's disappearance was publicized. After Parkman's disappearance, Littlefield began digging through a wall separating his apartment at the medical school from Webster's laboratory. He led police to a partially dismembered body found there, later identified by experts at trial as that of George Parkman.¹⁸⁹ Littlefield was poorly paid by Harvard Medical School and supplemented his income as a body snatcher (called a "resurrectionist" in Boston). Thus, one possible motive for Littlefield's actions was the reward offered by Parkman's family, which Littlefield later disclaimed on the witness stand. On cross-examination, Webster's lawyers failed miserably in attacking Littlefield's credibility and wholly avoided, contrary to their client's request, Littlefield's resurrectionist work. The prosecution, led by special counsel George Bemis, offered a host of expert witnesses, including the first dental expert and an early handwriting expert, whose testimony was fraught with holes, but

THE DISAPPEARANCE OF DR. PARKMAN (1971) (outlining the case's legal history); HELEN THOMSON, *MURDER AT HARVARD* (1971) (offering popular history). A study of the case is also found in Chapter 7, "Grand Guignol at Harvard Medical School," in RICHARD B. MORRIS, *FAIR TRIAL* 156–203 (1953). In 2003, PBS aired a documentary on the case, titled *Murder at Harvard*. Older accounts of the trial are cited in LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 219 n.52 (1957).

188. Officials estimated that between 55,000 and 60,000 people attended the trial, usually in ten-minute increments. Papers from the Middle Atlantic and Middle West covered the trial, and letter writers from all over the country prayed the Governor set aside Webster's execution.

189. There was, at this time, no reliable scientific manner to determine the identity of a burned, dismembered body lacking a head, and expert testimony identifying the body as Parkman's was criticized by legal commentators writing in the immediate aftermath of the case.

whose credibility again remained unsullied after cross-examination. The case was tried, as a matter of law, by the entire Massachusetts Supreme Judicial Court, including its chief justice, Lemuel Shaw, whose prejudice against Webster was roundly criticized by other lawyers.¹⁹⁰

When at last the prosecution had completed its case, having taken over a week, the defense rose to give its opening statement. The cross-examination of the prosecution's witnesses had been based on the defense that Webster had not murdered Parkman (indeed, part of the defense was that the parts of the body found in Webster's laboratory were not those of Parkman and that Parkman might not be dead). The statement by defense lawyer Edward Sohier began by claiming that Webster was being railroaded due to public opinion. He then changed tack, giving the jury a thorough legal statement of the distinction between murder and manslaughter. This was a fatal error. To argue first that the defendant had committed no murder, and then to argue the difference between manslaughter and murder, was to offer mutually inconsistent defenses. The latter suggested that Webster might have killed Parkman, but had done so with less than malice aforethought. Webster, legally incompetent to testify in Massachusetts, was so distraught at his counsel's conduct of the case that he spent some time during his fifteen minute unsworn statement to the jury attacking the competence of his lawyers. As one anonymous lawyer-commentator concluded, "From the moment we understood that Mr. Sohier was talking to the jury about manslaughter, we gave over Dr. Webster's chance of acquittal. So suicidal a policy was never known in a criminal case."¹⁹¹ "A Member of the Legal Profession" offered the

190. See A MEMBER OF THE LEGAL PROFESSION, A STATEMENT OF REASONS SHOWING THE ILLEGALITY OF THAT VERDICT UPON WHICH SENTENCE OF DEATH HAS BEEN PRONOUNCED AGAINST JOHN W. WEBSTER FOR THE ALLEGED MURDER OF GEORGE PARKMAN 23-33 (New York, Stringer & Townsend 1850) (alleging that Shaw, through his comments to the jury, effectively placed upon Webster the burden of proving himself innocent beyond a reasonable doubt); *The Webster Case*, 13 MONTHLY L. REP. 1, 13-15 (1850) (describing how Justice Shaw suggested in his charge to the jury that Dr. Parkman had been killed by chloroform even though no evidence to that effect had been admitted); cf. LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 218-27 (1957) (addressing the criticisms of Chief Justice Shaw).

191. ROBERT SULLIVAN, THE DISAPPEARANCE OF DR. PARKMAN 117 (1971) (quoting A MEMBER OF THE NEW YORK BAR, A REVIEW OF THE WEBSTER CASE 16 (New York, J.S. Redfield 1850)).

following comment on the conduct of Webster's lawyers:

For the defendant's counsel we feel that pity which forbids all bitter reproof, all harsh denunciation; that pity which all naturally feel for those who, rashly, though it may be with the purest motives, undertake a duty, for the performance of which they are utterly unfitted either by nature or education.¹⁹²

The Webster trial began on March 19 and ended with Webster's conviction just before the end of the month. The *Monthly Law Reporter* was not published in April. In the May 1850 issue, the first since editor Stephen H. Phillips's March 1850 attack on barrister Charles Phillips's conduct in the *Courvoisier* case, Stephen Phillips addressed the *Webster* case.¹⁹³ Stephen Phillips criticized the actions of the presiding judge, Chief Justice Lemuel Shaw, the imputations of Attorney General Clifford against Webster, the lack of reflection by the jury, and the performance of the defense counsel: "The Counsel for the defence manifested great embarrassment in the management of their cause."¹⁹⁴ But, continued Stephen Phillips, the attacks on Webster's lawyers were unjust and unfair. He noted, obliquely referring to Charles Phillips's conduct in *Courvoisier*, "An unscrupulous advocate might, perhaps, have raised a storm of indignation against Littlefield, by perverting and distorting evidence, by stormy ejaculations and protestations before 'the Omniscient God' of his client's innocence."¹⁹⁵ Stephen Phillips then argued more forcefully against the proposition that criminal defense lawyers may act as Charles Phillips did in *Courvoisier*: even had Webster's lawyers done so and obtained Webster's acquittal (which Stephen Phillips favored), "[f]or the honor of our bar, we are glad that they did no such thing."¹⁹⁶

192. A MEMBER OF THE LEGAL PROFESSION, A STATEMENT OF REASONS SHOWING THE ILLEGALITY OF THAT VERDICT UPON WHICH SENTENCE OF DEATH HAS BEEN PRONOUNCED AGAINST JOHN W. WEBSTER FOR THE ALLEGED MURDER OF GEORGE PARKMAN 22 (New York, Stringer & Townsend 1850).

193. See generally *The Webster Case*, 13 MONTHLY L. REP. 1 (1850) (discussing his opinions as to the *Webster* case).

194. *Id.* at 8, 13, 15.

195. *Id.* at 9.

196. *Id.* Writing in 1856, Philadelphia lawyer David Paul Brown noted the *Webster* case and echoed Stephen Phillips's statement. After approving the decision of a lawyer who knew of his client's guilt to defend on grounds of provocation but not on grounds that the client had not committed the murder, he declared: "Which, allow us to say, with great

Sharswood's defense of Charles Phillips's conduct in his *A Compend of Lectures* four years later is, like much of *A Compend*, hedged. Sharswood acknowledges that it would not have been professional for Phillips to bring "down an unjust suspicion upon an innocent person; or even to stand up and falsely pretend a confidence in the truth and justice of his cause, which he did not feel."¹⁹⁷ But "[n]othing seems plainer than the proposition, that a person accused of a crime is to be tried and convicted, if convicted at all, *upon evidence*, and *whether guilty or not guilty*, if the evidence is insufficient to convict him, he has a *legal right* to be acquitted."¹⁹⁸ The appendix to Sharswood's *A Compend of Lectures* begins with Sharswood's summary of *Courvoisier*. He offers a timeline of the trial and Courvoisier's confession, and then oddly speculates that Courvoisier's thinking "was simply to prepare his counsel against the forthcoming evidence."¹⁹⁹ Sharswood notes (but does not include) the *Examiner's* attacks on Phillips in November 1849, and reprints the November 1849 correspondence between Phillips and Warren.²⁰⁰ Despite his hedging, it appears Sharswood is convinced beyond a marrow of the propriety of Phillips's conduct.

E. *Sharswood, Lawyers and Professional Ethics in the 1850s*

As noted by Perry Miller, in the 1850s "the effort to vindicate

respect for those who know more and think differently, would have been the only available reliance for the unhappy Dr. Webster, charged with the murder of Dr. Parkman, of Massachusetts." 2 DAVID PAUL BROWN, *THE FORUM; OR, FORTY YEARS FULL PRACTICE AT THE PHILADELPHIA BAR* 45 (Philadelphia, Robert H. Small 1856).

197. GEORGE SHARSWOOD, *A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW* 42 (Philadelphia, T. & J.W. Johnson 1854); GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* (5th ed. 1907), *reprinted in* 32 A.B.A. REP. 1, 105 (1907).

198. GEORGE SHARSWOOD, *A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW* 43 (Philadelphia, T. & J.W. Johnson 1854); GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* (5th ed. 1907), *reprinted in* 32 A.B.A. REP. 1, 105-06 (1907).

199. GEORGE SHARSWOOD, *A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW* app. at 108 (Philadelphia, T. & J.W. Johnson 1854); GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* (5th ed. 1907), *reprinted in* 32 A.B.A. REP. 1 app. at 185 (1907).

200. GEORGE SHARSWOOD, *A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW* app. at 109-19 (Philadelphia, T. & J.W. Johnson 1854); GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* (5th ed. 1907), *reprinted in* 32 A.B.A. REP. 1 app. at 185-96 (1907).

the ethical conduct of lawyers takes on a concerted vigor, as though to show that while the political situation was deteriorating the lawyers needed some renewed assurances that they were respectable.”²⁰¹ Richard Kimball admitted in 1853 that the actions of some “base advocates and base attorneys” had caused the profession to be held in low repute, and that even though “the true profession” was noble, some difficulties in human nature led to the poor standing of lawyers.²⁰² More portentous were the words of the former Whig Congressman Bellamy Storer of Cincinnati. In a February 20, 1856 speech on the legal profession to law students at the University of Louisville, Storer noted, “We live in perilous times. The passing events are at once startling and terrific. . . . Disintegration, political, moral and religious, so far as systems are concerned, mark with vivid distinctness our epoch.”²⁰³

Sharswood’s lectures to his students on professional ethics were given when the national political situation was deteriorating rapidly, joined by dramatic regional (northern) and local (Philadelphian) events providing an impetus, as Perry Miller stated, “to vindicate the ethical conduct of lawyers.”²⁰⁴ Sharswood’s October 2, 1854 lectures, which became *A Compend of Lectures*, should be understood in light of this political deterioration.

The Compromise of 1850, crafted by lawyer and Senator Henry Clay, and shepherded through the Senate by lawyers Daniel Webster and Stephen A. Douglas, had staved off for some time secession and disunion. It had done so at a terrible price. Webster’s reputation was in tatters in parts of Massachusetts.²⁰⁵

201. PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA* 204 (1965); see also MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776–1876*, at 136–90 (1976) (detailing antebellum efforts to upgrade the image of the legal profession); Philip Gaines, *The “True Lawyer” in America: Discursive Construction of the Legal Profession in the Nineteenth Century*, 45 *AM. J. LEGAL HIST.* 132, 132 (2001) (asserting that the professionalism movement was initiated in part by the advancing industrialism and entrepreneurship of the period).

202. See RICHARD B. KIMBALL, *THE LAWYER: THE DIGNITY, DUTIES, AND RESPONSIBILITIES OF HIS PROFESSION* 21–22 (New York, George P. Putnam & Co. 1853) (“[T]he higher and the more honorable the pursuit, the more despicable and degraded are those who pervert and misuse it.”).

203. BELLAMY STORER, *THE LEGAL PROFESSION: AN ADDRESS DELIVERED BEFORE THE LAW DEPARTMENT OF THE UNIVERSITY OF LOUISVILLE, KENTUCKY* 16–17 (Cincinnati, C. Clark & Co. 1856).

204. PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA* 204 (1965).

205. For some southerners, the work of the lawyers such as Webster, Clay and others

One of the compromises was the adoption of the Fugitive Slave Act of 1850.²⁰⁶ The Act barred testimony from the alleged fugitive, paid the commissioner hearing the matter ten dollars when the commissioner found proof was sufficient that the person was the claimed fugitive slave, and paid the commissioner five dollars when the commissioner found the proof was insufficient.²⁰⁷ It made no provision for a method of proof that the person detained was not a fugitive slave. Almost immediately after its adoption, slave catchers made their way to Boston to use the law's provisions in the heart of the abolitionist movement. An effort in early 1851 to use the rendition proceeding involving a fugitive slave failed when Bostonians rushed the courtroom and freed him.²⁰⁸ When alleged fugitives were captured, and when escape was not possible, lawyers made lawyerly arguments concerning the unconstitutionality of the Act. The arguments were to no avail.²⁰⁹ When Thomas Sims's rendition proceeding in 1851 led literally to a ringing of the Boston courthouse in chains,²¹⁰ supporters of the Fugitive Slave Act rejoiced that the supremacy of the law had been vindicated, while its opponents

in the Compromise of 1850 showed how lawyers protected the Union when others could not: "When the danger comes again, who have we like this illustrious trio, to 'ride upon the whirlwind and direct the storm?' We cannot specify the individual names that will figure when the trial comes on; but we can confidently predict that in its dangers, its labors, its disasters or its glories, the lawyer will have his full share." MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876*, at 155 (1976) (quoting A.O.P. Nicholson, Address Delivered Before the Two Literary Societies of the University of North-Carolina 28 (June 1, 1853)).

206. Fugitive Slave Act of 1850, ch. 60, 9 Stat. 462.

207. Fugitive Slave Act of 1850, ch. 60, §§ 6, 8, 9 Stat. 462, 463-64. *See generally* ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 176-77* (1975) (describing how abolitionist attorneys argued that the difference in fees paid to the commissioner "denied due process to the alleged fugitive, as it made the commissioner an interested party in the outcome").

208. *See* LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 89* (1957) ("But the rescuers had already escorted Shadrach [on trial as a fugitive slave] out of the [courtroom], down the stairs, and into the streets . . . [T]he mob [was] cheering as they departed.").

209. *See* ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 176-77* (1975) (reporting that, despite seemingly valid arguments to issue a writ of habeas corpus, an accused fugitive slave was returned "[b]y dint of military might").

210. *Id.* at 176; *see also* LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 92* (1957) (providing an account of Thomas Sims's rendition proceeding).

exploited the symbolism of Marshal Tukey's action.²¹¹

On May 30, 1854, Congress adopted the Kansas-Nebraska Act, which was another attempt to defuse the slavery issue by calling for a vote by the people on the issue.²¹² Six days before, an alleged fugitive slave named Anthony Burns was arrested in Boston. Burns's lawyer, Richard Henry Dana, Jr., refused to countenance extralegal efforts to free Burns and accepted the course of the Act, even though he believed it unconstitutional.²¹³ The courthouse, where the rendition hearing of Burns took place, was again ringed in chains.²¹⁴ The commissioner, Edward Loring, issued the certificate of removal on June 2, 1854, despite appearing to have grounds to refuse to issue the certificate.²¹⁵ Burns's return to slavery required a force of between 2,000 and 3,000 men to escort him from the courthouse to the wharf.²¹⁶ The rendition of a fugitive slave from Boston was hailed as evidence of adherence to the rule of law.²¹⁷ In March 1855, despite the

211. See LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 104 (1957) (noting that the headline in *National Intelligencer* after rendition of Sims read: "SUPREMACY OF THE LAW SUSTAINED," while recognizing that many in New England "cursed the affair" of the rendition).

212. See Kansas-Nebraska Act, ch. 59, § 14, 10 Stat. 277, 283 (1854) (stating that the Act is not meant "to legislate slavery into any Territory or State, nor to exclude it therefrom, but to leave the people thereof perfectly free to form and regulate their domestic institutions in their own way, subject only to the Constitution of the United States").

213. See Samuel Shapiro, *The Rendition of Anthony Burns*, 44 J. NEGRO HIST. 34, 39, 42-43 (1959) ("Although he believed the Fugitive Slave law unconstitutional, principally because it failed to provide for a jury trial, [Dana] was willing to accept the contrary judgment of state and federal courts.").

214. Paul Finkelman, *Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys*, 17 CARDOZO L. REV. 1793, 1823 (1996); Samuel Shapiro, *The Rendition of Anthony Burns*, 44 J. NEGRO HIST. 34, 39 (1959).

215. See Paul Finkelman, *Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys*, 17 CARDOZO L. REV. 1793, 1796 (1996) ("Despite factual inconsistencies undermining the claim on Burns, . . . Commissioner Loring declared Burns a fugitive slave and ordered him returned to his master."). See generally ALBERT J. VON FRANK, *THE TRIALS OF ANTHONY BURNS* (1998) (describing Burns's proceeding in detail from beginning to end); Samuel Shapiro, *The Rendition of Anthony Burns*, 44 J. NEGRO HIST. 34 (1959) (noting several arguments made in defense of Burns).

216. See ALBERT J. VON FRANK, *THE TRIALS OF ANTHONY BURNS* 198 (1998) (listing the number of military personnel).

217. See Paul Finkelman, *Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys*, 17 CARDOZO L. REV. 1793, 1821 (1996) (quoting a May 27, 1854 letter of United States District Attorney Benjamin Hallett to President Franklin Pierce stating that the proceeding was necessary because "[t]he laws of

testimony of Richard Dana, Loring was recommended for removal from his office as probate judge in the Commonwealth of Massachusetts. The removal of Loring was offered as evidence that the rule of law was slipping away in Massachusetts, for Loring had not violated any law, but only “ha[d] lost the public confidence.”²¹⁸

On September 30, 1850, George Sharswood gave his first lecture at the newly revived Department of Law of the University of Pennsylvania, and his subject was the legal profession.²¹⁹ Lecture I noted that “[p]eace and quiet are what we seek in society.”²²⁰ Both were in short supply nationally and locally in Philadelphia in 1850. The adoption of the Fugitive Slave Act just twelve days before Sharswood’s Lecture I was part of the desperate effort to avoid the violence of disunion. Philadelphia itself remained a violent city in 1850.²²¹ The deadly anti-Catholic riots in 1844 and the volunteer fire company riots of 1849 were but two examples.²²² Sharswood followed his statement on peace and

the land cannot be trampled upon”); Samuel Shapiro, *The Rendition of Anthony Burns*, 44 J. NEGRO HIST. 34, 49 (1959) (noting the return of Burns to Alexandria, Virginia met with “a 100-gun salute . . . ‘in honor of the triumph of the law’”).

218. *The Removal of Judge Loring*, 18 MONTHLY L. REP. 1, 2 (1855). Loring was not actually removed from office until 1858. ALBERT J. VON FRANK, *THE TRIALS OF ANTHONY BURNS* 241 (1998).

219. GEORGE SHARSWOOD, *LECTURES INTRODUCTORY TO THE STUDY OF THE LAW* 37 (Philadelphia, T. & J.W. Johnson & Co. 1870).

220. *Id.* at 17. I do not know whether Sharswood used this exact language in his initial lecture in 1850, or whether some editing took place over the two decades between the lecture and its publication. However, given the manner in which *A Compend of Lectures* was revised between 1854 and his death in 1883, it seems likely that much of the language remained the same over time.

221. See Charles R. Barker, *Philadelphia in the Late 'Forties*, 2 PHILA. HIST. 245, 262 (1931) (noting the “growing spirit of lawlessness” in the 1840s); Elizabeth M. Geffen, *Violence in Philadelphia in the 1840's and 1850's*, 36 PA. HIST. 381, 383 (1969) (“The . . . violence grew steadily stronger, more deadly, and more frequently eruptive, during the early part of the nineteenth century, reaching a horrifying climax of racial and religious warfare in the 1840s.”).

222. Cf. Dennis Clark, *Philadelphia 1876: Celebration and Illusion*, in PHILADELPHIA 1776–2076: A THREE HUNDRED YEAR VIEW 41, 50, 58 (Dennis Clark ed., 1975) (“The first half of the nineteenth century had been disruptive and riotous, but the effects were limited.”). On the riots in 1844, see MICHAEL FELDBERG, *THE PHILADELPHIA RIOTS OF 1844* (1975). See also MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776–1876*, at 191–234 (1976) (describing Philadelphia’s efforts at riot control). On the fire company riots of 1849, see ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE* 147–48 (1989). Additional fire company riots occurred in 1852. *Id.* at 163–64 (“During 1852 there were sixty-nine fire riots.”).

order with a rejection of the right to disobey a “bad law”: “Obedience to [a bad law] is a sacrifice to a higher good. Disobedience or evasion of a bad law, approved or connived at by public opinion, opens the floodgates of wide desolation in the community. Open resistance is treason.”²²³ Sharswood explicitly rejected the calls of abolitionists and anti-slavery supporters to reject the Fugitive Slave Act in favor of a “higher law.” The positive law trumped claims to a higher law found in nature. Sharswood was a devout Presbyterian, and his proclamation of a religious duty to obey even bad laws was consonant with Presbyterian sermons of the time.²²⁴

The Burns rendition of 1854 was a further stark example in the north of the divide between those who demanded enforcement of the Fugitive Slave Act as a matter of the rule of law and those who rejected it on higher law grounds. The adoption of the Kansas-Nebraska Act created a national rule of law problem, for it made slavery an issue of Jacksonian popular sovereignty, a vote in which some people, slaves specifically, were excluded from the polls. As a local matter, the city and county of Philadelphia were consolidated on February 2, 1854, which resulted in the consolidation of its police forces, an attempt in large part to curb the violence in the city. In 1850, 72,312 persons, eighteen percent of the total population of the County of Philadelphia, had been born in Ireland.²²⁵ Forty percent of the workforce of 59,903 persons consisted of German and Irish immigrants, up from just ten percent in 1836.²²⁶ The tumult in Philadelphia in the late 1840s and early 1850s led not only to a professionalized police force in 1854, but also to such social controls as a “temperance

223. GEORGE SHARSWOOD, *LECTURES INTRODUCTORY TO THE STUDY OF THE LAW* 17 (Philadelphia, T. & J.W. Johnson & Co. 1870).

224. *See generally* JOHN C. LORD, “THE HIGHER LAW,” IN ITS APPLICATION TO THE FUGITIVE SLAVE BILL (New York, Union Safety Comm. 1851) (preaching at the Central Presbyterian Church in Buffalo, New York on Thanksgiving Day of 1851); SAMUEL T. SPEAR, *THE LAW-ABIDING CONSCIENCE, AND THE HIGHER LAW CONSCIENCE* (New York, Lambert & Lane 1850) (preaching at the South Presbyterian Church in Brooklyn, New York on December 12, 1850); ICHABOD S. SPENCER, *FUGITIVE SLAVE LAW: THE RELIGIOUS DUTY OF OBEDIENCE TO LAW* (New York, M.W. Dodd 1850) (preaching a sermon at the Second Presbyterian Church in Brooklyn, New York on November 24, 1850, and noting religious duty to obey law even if the law may be unwise and unconstitutional).

225. DENNIS CLARK, *THE IRISH IN PHILADELPHIA* 29, 63 (1973).

226. ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE* 15 (1989).

fever” that raged from 1851 through 1854²²⁷ and the creation of homes for abandoned children (Catholic, Jewish, Negro, etc.) between 1853 and 1856.²²⁸

In the midst of this uproar, on October 2, 1854, the forty-four-year-old Sharswood, a lifelong resident of Philadelphia, opened the academic year at the University of Pennsylvania Department of Law with a lecture on legal ethics to his students.²²⁹ Sharswood graduated from the University of Pennsylvania at eighteen, and he was admitted to the practice of law in December 1831 after a three-year apprenticeship.²³⁰ He was appointed as an associate judge of the district court in 1845, and in 1848 he became president judge of the court. In 1851, all judges had to run for office after the Pennsylvania Constitution was amended. Sharswood, running as a Democrat,²³¹ won unchallenged with the support of all parties, including Whigs and Democrats.²³² In 1852, a faculty of

227. *See id.* at 18 (describing the period in which Philadelphia began to prosecute for the sale of alcohol on Sundays). “In the local politics of 1851, no issue was bigger than temperance.” *Id.* at 157. A vote on prohibition in Pennsylvania failed at the ballot box in 1854, and the temperance movement soon thereafter tempered. *Id.* at 159.

228. Dennis Clark, *Philadelphia 1876: Celebration and Illusion*, in *PHILADELPHIA 1776–2076: A THREE HUNDRED YEAR VIEW* 41, 54 (Dennis Clark ed., 1975).

229. *See* GEORGE SHARSWOOD, *A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW*, at i (Philadelphia, T. & J.W. Johnson 1854) (containing the subtitle *Delivered Before the Law Class of the University of Pennsylvania*); GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* (5th ed. 1907), *reprinted in* 32 *A.B.A. REP.* 1, 7 (1907) (noting that Sharswood read a portion of *A Compend* as he lectured students on October 2, 1854); *see also* Edwin R. Keedy, *George Sharswood—Professor of Law*, 98 *U. PA. L. REV.* 685, 692 (1950) (describing the lecture and its publication history).

230. Samuel Dickson, *George Sharswood*, in 6 *GREAT AMERICAN LAWYERS* 121, 129 (William Draper Lewis ed., 1909) (noting that Sharswood was born in 1810 and graduated from the University of Pennsylvania in 1828, and indicating that Sharswood became an attorney on December 15, 1831).

231. On Sharswood’s political affiliation, *see* Gary B. Nash, *The Philadelphia Bench and Bar, 1800–1861*, 7 *COMP. STUD. SOC’Y & HIST.* 203, 208 (1965), describing Sharswood as “[a] man of middle-class background and a Democrat in politics.” *See also* Sidney George Fisher, *The Diary of Sidney George Fisher Covering the Years 1834–1871*, in *A PHILADELPHIA PERSPECTIVE* 1, 402 (Nicholas B. Wainwright ed., 1967) (characterizing Sharswood as a Democrat on all party issues). In Samuel Dickson, *George Sharswood*, in 6 *GREAT AMERICAN LAWYERS* 121, 123 (William Draper Lewis ed., 1909), Dickson’s biography of Sharswood, no mention of Sharswood’s political affiliation is given, apparently due to the attempt to de-politicize judges and judging in the late nineteenth and early twentieth centuries.

232. *See* Samuel Dickson, *George Sharswood*, in 6 *GREAT AMERICAN LAWYERS* 121, 132 (William Draper Lewis ed., 1909) (noting that Sharswood was nominated by all parties and won the election unanimously); *see also* Francis S. Philbrick, *Sharswood*,

law was instituted, and Sharswood was named dean and professor of the Institutes of Law.²³³ Unlike most elite Philadelphia lawyers in the mid-nineteenth century, who were from the upper class, Sharswood was a member of the middle class.²³⁴ Like many of them, he was a Presbyterian,²³⁵ and from all accounts devout.

Sharswood's lecture *On the Aims and Duties of the Profession of the Law* began with the assertion that, due to the "pitfalls and man-traps" found in the legal profession, a young lawyer must learn that "[h]igh moral principle is his only safe guide; the only torch to light his way amidst darkness and obstruction."²³⁶ It closed with the religious injunction, "Let us beware then of raising these objects of ambition, wealth, learning, honor, and influence, worthy though they be, into a factitious importance; nor in the too ardent pursuit of what are only means, lose sight of the great end of our being."²³⁷

Sharswood's *A Compend of Lectures* declaimed that "[g]ood men of all parties prefer to live in a country, in which justice

George, in 17 *DICTIONARY OF AMERICAN BIOGRAPHY* 28 (Dumas Malone ed., 1943) ("In 1851 [Sharswood] was indorsed by five political parties . . ."). On Sharswood's political career, see generally GEORGE W. BIDDLE, *A SKETCH OF THE PROFESSIONAL AND JUDICIAL CHARACTER OF THE LATE GEORGE SHARSWOOD* (Philadelphia, The Ass'n 1883), reprinted in 102 PA. ST. REP. app. at 601 (1884).

233. Margaret Center KlingelSmith, *History of the Department of Law, in UNIVERSITY OF PENNSYLVANIA: OPENING OF THE NEW BUILDING OF THE DEPARTMENT OF LAW* 213, 222 (1900); Edwin R. Keedy, *George Sharswood—Professor of Law*, 98 U. PA. L. REV. 685, 687 (1950). The other two professorships were in "Practice, Pleading and Evidence" and the law of "Real Estate, Conveyancing and Equity Jurisprudence." Edwin R. Keedy, *George Sharswood—Professor of Law*, 98 U. PA. L. REV. 685, 687 (1950).

234. Gary B. Nash, *The Philadelphia Bench and Bar, 1800–1861*, 7 *COMP. STUD. SOC'Y & HIST.* 203, 207–08 (1965).

235. See THOMAS L. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER* 59 (1981) ("George Sharswood . . . was a Presbyterian Sunday-school teacher all during the most turbulent and exciting years of the revival of 1840–57."); cf. Gary B. Nash, *The Philadelphia Bench and Bar, 1800–1861*, 7 *COMP. STUD. SOC'Y & HIST.* 203, 215 (1965) (noting that lawyers in Philadelphia in both 1800–1805 and 1860–1861 were predominantly "Protestants, and especially Presbyterians and Episcopalians").

236. GEORGE SHARSWOOD, *A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW* 9 (Philadelphia, T. & J.W. Johnson 1854). The second edition, published in 1860, revises the beginning, and these remarks are not present in that edition. GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* (2d ed. Philadelphia, T. & J.W. Johnson & Co. 1860) (1854).

237. GEORGE SHARSWOOD, *A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE LEGAL PROFESSION* 106 (Philadelphia, T. & J.W. Johnson 1854).

according to law is impartially administered.”²³⁸ Like his 1850 statement declaiming the duty of Americans to obey a “bad law,” this statement fit both the positivistic Democratic understanding of law in the crucible of the 1850s and the professionalizing project of lawyers of the time. As Sharswood stated more specifically in his *Lectures Introductory to the Study of the Law*, the law was “the embodiment of the will of the people.”²³⁹ Sharswood was also a strong defender of property rights,²⁴⁰ a topic pro-slavery antebellum Democrats increasingly harped on in the 1850s.²⁴¹ His politics were critically viewed in a September 2, 1861 diary entry by one Philadelphia lawyer: “He is an able lawyer, of unquestioned integrity & long experienced . . . but he is a Democrat and on all party questions most intolerant & bigotted. He is supposed to be unsound on the subject of the war and no doubt has fully sympathized with the South.”²⁴² Although Sharswood urged obedience to the positive law, not the higher law, he quoted the English philosopher William Whewell that the law “most perpetually and slowly tends towards the idea of justice.”²⁴³ Sharswood’s hedging on the extent of zeal owed the client, and his hedging on other issues of ethics, such as contingent fees,²⁴⁴ suggests a dividedness in Sharswood. As noted by Maxwell

238. *Id.* at 15.

239. GEORGE SHARSWOOD, *LECTURES INTRODUCTORY TO THE STUDY OF THE LAW* 17 (Philadelphia, T. & J.W. Johnson & Co. 1870).

240. See GEORGE SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* (5th ed. 1907), reprinted in 32 A.B.A. REP. 1, 21–22 (1907) (noting preeminent importance of protecting property rights); GEORGE SHARSWOOD, *LECTURES INTRODUCTORY TO THE STUDY OF THE LAW* 24–27 (Philadelphia, T. & J.W. Johnson & Co. 1870) (arguing that the legislature should not have the power of eminent domain). Sharswood’s views on private property are more strongly evident in the revised editions of his *Essay* than in the 1854 *A Compend of Lectures*.

241. See Norman W. Spaulding, *The Discourse of Law in Time of War: Politics and Professionalism During the Civil War and Reconstruction*, 46 WM. & MARY L. REV. 2001, 2041 (2005) (“Pro-slavery Democrats . . . insisted that Congress could not impinge the property rights of citizens entering a territory from any state.”).

242. Sidney George Fisher, *The Diary of Sidney George Fisher Covering the Years 1834–1871*, in *A PHILADELPHIA PERSPECTIVE* 1, 402 (Nicholas B. Wainwright ed., 1967).

243. GEORGE SHARSWOOD, *LECTURES INTRODUCTORY TO THE STUDY OF THE LAW* 20 (Philadelphia, T. & J.W. Johnson & Co. 1870).

244. See GEORGE SHARSWOOD, *A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW* 85–91 (Philadelphia, T. & J.W. Johnson 1854) (declaring contingent fees “indefensible, at least in all ordinary cases,” and noting that he was less interested in the lawfulness of contingent fees than in “the policy and morality of the practice”).

Bloomfield, by the early 1850s, “Democrats of Philadelphia now represented proslavery, proimmigrant, and Catholic interests, while the Whigs and Nativists were identified as old-stock Protestant and pro-Abolitionist.”²⁴⁵ Whigs gained some popular strength in Philadelphia in mid-1854 by “campaigning against the Kansas-Nebraska Act,” allowing them to win the mayoralty that year.²⁴⁶ Sharswood remained a Democrat, but was “old-stock Protestant.” Sympathetic to the South, he had little in common with abolitionists, and little in common with “Catholic interests.” He was allegedly on “all party questions intolerant & bigotted,” but dedicated his *A Compend of Lectures* to his Whig preceptor Joseph R. Ingersoll, for whom he held a great deal of reverence and respect. As the title of his *A Compend* changed to *An Essay on Professional Ethics* in the second edition published in 1860, he remained wedded to the belief that a lawyer’s personal honor and character were central to his ethical practice of law.²⁴⁷ Two years after Sharswood’s 1854 lecture on professional ethics, his fellow Pennsylvanian and Democrat James J. Buchanan was elected President.

Substituting law for war made eminent sense for lawyers steeped in a tradition of reason.²⁴⁸ And some lawyers may have believed that an adherence to proper conduct and the rule of law would allow a peaceful and legal resolution of the issue of slavery.

245. MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776–1876*, at 233 (1976).

246. Michael P. McCarthy, *The Philadelphia Consolidation of 1854: A Reappraisal*, 110 PA. MAG. HIST. & BIOGRAPHY 531, 538 (1986).

247. I agree with Professor Norman Spaulding that “Sharswood’s endorsement of moral activism is far more circumspect than Hoffman’s.” Norman W. Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 FORDHAM L. REV. 1397, 1423 (2003). I disagree with his conclusion that “Sharswood’s bifurcated scheme [providing for a different role for the lawyer in civil and criminal cases] is internally inconsistent.” *Id.* However, I am not convinced that Sharswood ever “reconciled the lawyer’s republican and adversarial roles by creating an ethical system which valued both.” Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 257 (1992). In my view, Sharswood’s *A Compend* was not internally inconsistent as a matter of professional consensus, but his understanding of Charles Phillips’s defense of Courvoisier did not reconcile the lawyer’s dual roles.

248. See Norman W. Spaulding, *The Discourse of Law in Time of War: Politics and Professionalism During the Civil War and Reconstruction*, 46 WM. & MARY L. REV. 2001, 2040–42 (2005) (noting that the Civil War was not a “legal” cause even though the events that led to the war represented “constitutional failure”).

President James J. Buchanan, also a lawyer, noted at his inaugural address on March 4, 1857, the pending case of *Dred Scott v. Sandford*.²⁴⁹ Buchanan urged on Americans their duty to obey the law. Whether the people of a territory may decide the issue of the legality of slavery was:

[H]appily, a matter of but little practical importance. Besides, it is a judicial question, which legitimately belongs to the Supreme Court of the United States, before whom it is now pending, and will, it is understood, be speedily and finally settled. To their decision, in common with all good citizens, I shall cheerfully submit, whatever this may be.²⁵⁰

Buchanan was ready to submit cheerfully because he already knew the result, which would be delivered publicly two days later, and knew that the Court's decision would not upset his southern Democratic supporters. *Dred Scott* did not settle the issue,²⁵¹ and law and lawyers could not save the nation from a civil war. It was unclear to lawyers of the time whether it was the law or the Supreme Court that failed in *Dred Scott*. But neither a devotion to ethics nor the rule of law was enough to avoid massive bloodshed.

F. *David Dudley Field and Professional Honor*

As noted above, the ABA's Canons of Ethics were drawn heavily from the 1887 Alabama Code of Ethics.²⁵² A side-by-side comparison of the two, found in *Gilded Age Legal Ethics*,²⁵³ shows this reliance. For example, provision 8 of the Code of Ethics required lawyers to "uphold the honor, maintain the dignity, and promote the usefulness of the profession."²⁵⁴ Canon 29 asked lawyers to "uphold the honor and to maintain the dignity of the profession and to improve not only the law but the

249. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

250. DON E. FEHRENBACHER, THE DRED SCOTT CASE 313 (1978) (quoting 4 MESSAGES AND PAPERS OF THE PRESIDENTS 2962 (James D. Richardson ed., 1913)).

251. See BRIAN MCGINTY, LINCOLN AND THE COURT 59 (2008) (noting Lincoln's willingness to allow a Supreme Court decision to serve as policy only when "fully settled" and concluding that *Dred Scott* was not "fully settled").

252. James Altman argues that the ABA Canons were more heavily influenced by the Alabama Code of Ethics than Sharswood's *Essay*. James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2430-33 (2003).

253. GILDED AGE LEGAL ETHICS: ESSAYS ON THOMAS GOODE JONES' 1887 CODE app. 3, at 110-32 (Carol Rice Andrews et al. eds., 2003).

254. *Id.* at 116.

administration of justice.”²⁵⁵ Provision 18 of the Code and ABA Canon 19, on the propriety of a lawyer testifying as a witness for his client, are nearly identical in wording.²⁵⁶

In addition to the Canons, the ABA also adopted in 1908 the Field Code’s oath of attorneys, although it changed several provisions in the oath.²⁵⁷ For example, the 1850 Field Code oath spoke of the duty to maintain actions “only as appear to him legal and just, except the defence of a person charged with a public offence.”²⁵⁸ This provision of the oath was also found in an oath of attorneys of the State of Washington, which was the version of the Field Code oath the ABA Committee reprinted in 1907.²⁵⁹ The oath adopted by the ABA was framed in the negative (“I will not counsel or maintain”), and the exception language was “except such as I believe to be honestly debatable under the law of the land.”²⁶⁰ The ABA’s amended oath explicitly distanced itself from Hoffman’s certainty as sole judge of law, acknowledging the uncertainty of much of law. The fourth oath of attorneys concerned the propriety of maintaining causes, which the Field Code required be “consistent with truth.”²⁶¹ The ABA Canons added additional duties to two of the Field Code oaths: In addition to preserving confidences and secrets, the lawyer was not permitted to obtain compensation for legal services to a client without the client’s “knowledge and approval,” and a lawyer was

255. *Canons of Ethics*, 33 A.B.A. REP. 575, 583 (1908).

256. GILDED AGE LEGAL ETHICS: ESSAYS ON THOMAS GOODE JONES’ 1887 CODE app. 3, at 120 (Carol Rice Andrews et al. eds., 2003). For additional examples, see James M. Altman, *Considering the A.B.A.’s 1908 Canons of Ethics*, 71 *FORDHAM L. REV.* 2395, 2453–60 (2003), which highlights the similarities between the Canons of Ethics and the Alabama Code of Ethics.

257. See *Canons of Ethics*, 33 A.B.A. REP. 575, 584–85 (1908) (providing an oath of admission).

258. *COMM’RS ON PRACTICE & PLEADINGS, THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW-YORK* 204 (Albany, Weed, Parsons & Co. 1850).

259. See *Report of the Committee on Code of Professional Ethics*, 31 A.B.A. REP. 676 app. D, at 714–15 (reprinting the oath of attorneys of the State of Washington in appendix D).

260. *Canons of Ethics*, 33 A.B.A. REP. 575, 585 (1908). The ABA Code amended the Field Code oath to require attorneys to maintain actions only as “consistent with truth and honor,” an addition consonant with the views of southern lawyers prominent in the drafting of the Canons. *Id.*

261. *COMM’RS ON PRACTICE & PLEADINGS, THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW-YORK* 204 (Albany, Weed, Parsons & Co. 1850).

prohibited from delaying “any man’s cause for lucre or malice.”²⁶²

ABA Canon 30 declared that a lawyer who accepts an engagement has a “duty to insist upon the judgment of the [c]ourt as to the legal merits of his client’s claim.”²⁶³ That appeared to resolve the debate between Hoffman and Sharswood (and others) on the permissibility of making ethically dubious but legally available claims in civil matters. Similarly, ABA Canon 5, which permitted the criminal defense lawyer to “present every defense that the law of the land permits,”²⁶⁴ inclined to Sharswood’s position. On the whole, however, the remarkable aspect of the ABA Canons was their consonance with mid-nineteenth century views of legal ethics.²⁶⁵

Whether lawyers *in fact* behaved in 1900 as they claimed to behave in 1850 is in some doubt. In 1868, David Dudley Field represented the robber barons Daniel Drew, Jay Gould, and “Diamond” Jim Fisk in the battle with Cornelius Vanderbilt for control of the Erie Railway.²⁶⁶ When the courtroom “dustup” was settled, “[t]he forty-one lawyers who had defended the Erie and its directors received fees totaling \$334,416, of which Field’s firm of four lawyers received \$48,289.”²⁶⁷ In mid-1869, Gould and Fisk attempted to use the Erie Railway to gain control of the

262. *Canons of Ethics*, 33 A.B.A. REP. 575, 585 (1908). In addition, one of the Field Code’s oaths was absent from both the Washington oath and the ABA Code: the Field Code lawyer swore “[n]ot to encourage either the commencement or the continuance of an action or proceeding, from any motive of passion or interest.” *COMM’RS ON PRACTICE & PLEADINGS, THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW-YORK* 205 (Albany, Weed, Parsons & Co. 1850). This was instead addressed by the ABA in Canon 18. See *Canons of Ethics*, 33 A.B.A. REP. 575, 580 (1908) (discussing the limitations on the conduct of attorneys and clients with regard to one another).

263. *Canons of Ethics*, 33 A.B.A. REP. 575, 583 (1908).

264. *Id.* at 576.

265. See Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1442 (2004) (stating that the ABA Canons were similar to the 1887 Alabama Code of Ethics and largely conformed with the “substance [and] form of the existing standards of conduct”).

266. A popular history of the Erie takeover war is JOHN STEELE GORDON, *THE SCARLET WOMAN OF WALL STREET* (1988). The classic and contemporaneous account, written by Charles F. Adams, Jr., is found in *The Erie Railroad Row*, 3 AM. L. REV. 41 (1868) and Charles Francis Adams, *A Chapter of Erie*, 109 N. AM. REV. 30 (1869). *A Chapter of Erie* and other articles, including an article by Henry Adams, *The New York Gold Conspiracy*, were collected and published as CHARLES F. ADAMS, JR. & HENRY ADAMS, *CHAPTERS OF ERIE, AND OTHER ESSAYS* (Boston, James R. Osgood & Co. 1871).

267. GEORGE MARTIN, *CAUSES AND CONFLICTS* 8 (1997).

Albany and Susquehanna Railroad.²⁶⁸ In the fall, Gould attempted to corner the gold market.²⁶⁹ Field, continuing to act as a lawyer to both (but not, as Field later defended himself, as either the sole counsel or even official counsel in all instances), was loudly condemned for his actions.²⁷⁰ In October 1870, members of the Association of the Bar of the City of New York—called the “Committee of Seventy”—began their efforts to initiate the prosecution of William “Boss” Tweed, the notorious leader of Tammany Hall in New York.²⁷¹ Field privately offered to represent the Committee of Seventy without charge. After being rebuffed by the Committee, in part due to his tarnished reputation, Field accepted Tweed’s renewed request to represent him, a decision that again made Field anathema.²⁷²

Shortly thereafter, Samuel Bowles, the editor of the Springfield (Mass.) *Republican*, published an article criticizing Field’s “avarice and meanness” and noting his reputation as “king of the pettifoggers.”²⁷³ When Field complained to Bowles about the

268. See generally *An Erie Raid*, 112 N. AM. REV. 241 (1871) (providing an account of the events).

269. See generally Henry Adams, *The New York Gold Conspiracy*, in CHARLES F. ADAMS, JR. & HENRY ADAMS, CHAPTERS OF ERIE 100, 100–34 (Boston, James R. Osgood & Co. 1871) (providing an account of the New York gold conspiracy). This essay was originally published in 1870 in the *Westminster Review*.

270. See, e.g., Michael Schudson, *Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles*, 21 AM. J. LEGAL HIST. 191, 196–97 (1977) (listing some criticisms, including that of Judge E. Darwin Smith, that Field and Thomas Shearman engaged in conspiracy to elect directors by use and abuse of legal process, and an editorial by the *New York Times* implying Field was not an honest lawyer). Criticisms made at the time are cited below.

271. On Tweed, see generally KENNETH D. ACKERMAN, BOSS TWEED (2005). See also GEORGE MARTIN, CAUSES AND CONFLICTS 65–66 (1997) (highlighting the actions of the “Committee of Seventy” in their effort to oust Tweed).

272. GEORGE MARTIN, CAUSES AND CONFLICTS 66–67 (1997). Most of Tweed’s \$1,000,000 bail was posted by Jay Gould, another notorious Field client. *Id.* at 65.

273. DAVID DUDLEY FIELD, DUDLEY FIELD & SAMUEL BOWLES, THE LAWYER AND HIS CLIENT 1 (Springfield, (Mass.), Republican Office 1871); see also ANDREW L. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 424 (2d ed. Little, Brown & Co. 1984) (reprinting the statement from the Springfield *Republican* which noted the nickname given to Field by James T. Brady and discussing whether Field was “avaricious” or “mean”). The article was republished in the *New York Times* in December 1870. The entire correspondence can be found at *The Bar and the Press*, N.Y. TIMES, Jan. 30, 1871, at 1, available at <http://query.nytimes.com/mem/archive-free/pdf?res=9C02E1DE173AE63BBC4850DFB766838A669FDE>. See also Michael Schudson, *Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles*, 21 AM. J. LEGAL HIST. 191, 197 n.10 (1977) (noting that the *New York Times* published the correspondence between Field and Bowles). Calling Field “king of the pettifoggers” was

characterization, Bowles wrote back and included a copy of an editorial in the paper accusing Field of “prostituting the law.”²⁷⁴ Bowles had some history with one of Field’s most famous clients, Jim Fisk. Two years before Bowles attacked Field, Fisk had sued Bowles for libel in New York. Waiting until after the courts were closed, Fisk had Bowles, then visiting New York City, arrested and sent to jail for the night.²⁷⁵ Although Field had not effected Bowles’s arrest and his son Dudley Field had assisted in Bowles’s release from jail, Bowles had personal reasons for his antipathy toward Field.

Three points are most intriguing about the Field-Bowles debate, later printed in pamphlet form in different versions by the correspondents.²⁷⁶ First, Field’s debating points both attempt to

about as insulting as Bowles could be to someone who became a lawyer in the 1820s. See Emory Washburn, *On the Legal Profession in New England*, 19 AM. JURIST & L. MAG. 49, 52 (1838) (noting in 1838 the legal profession faced the choice between “an enlightened, educated, independent body of men, or a host of self-constituted, noisy and narrow-minded pettifoggers”); see also PERRY MILLER, *THE LIFE OF THE MIND IN AMERICA* 135–36 (1965) (noting the claim by elite lawyers in the 1830s that pettifoggers brought the profession “into contempt by their avarice and incompetence”); GEORGE SHARSWOOD, *A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW* 80 (Philadelphia, T. & J.W. Johnson 1854) (“A horde of pettifogging, barratrous, custom-seeking, money-making lawyers, is one of the greatest curses, with which any state or community can be visited.”); TIMOTHY WALKER, *INTRODUCTION TO AMERICAN LAW* 662–63 (2d ed. Cincinnati, Derby, Bradley & Co. 1846) (1837) (“Were I to concentrate in a single word whatever I can conceive of despicable in our profession, it would be pettifogging.”).

274. DAVID DUDLEY FIELD, *DUDLEY FIELD & SAMUEL BOWLES, THE LAWYER AND HIS CLIENT* 2 (Springfield, (Mass.), Republican Office 1871); see also ANDREW L. KAUFMAN, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY* 425–26 (2d ed. Little, Brown & Co. 1984) (reprinting the statement from the *Springfield Republican*); Michael Schudson, *Public, Private, and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles*, 21 AM. J. LEGAL HIST. 191, 197 (1977) (noting the article published in the *Republican* that accused Field of “prostituting the law”).

275. See JOHN STEELE GORDON, *THE SCARLET WOMAN OF WALL STREET* 221 (1988) (“When [Bowles’s] friends attempted to make bail for him, not a judge could be found, for they were all off at a party in honor of the newly elected Mayor of New York, A. Oakey Hall, where Fisk as well was enjoying himself.”).

276. DAVID DUDLEY FIELD, *DUDLEY FIELD & SAMUEL BOWLES, THE LAWYER AND HIS CLIENT* (Springfield, (Mass.), Republican Office 1871). Bowles’s version is found at *The Bar and the Press*, N.Y. TIMES, Jan. 30, 1871, at 1, available at <http://query.nytimes.com/mem/archive-free/pdf?res=9C02E1DE173AE63BBC4850DFB766838A669FDE>. A version presented by Field was published in the February 4, 1871 edition of the *Albany Law Journal*. See generally ANDREW L. KAUFMAN, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY* 424–44 (2d ed. Little, Brown & Co. 1984) (reprinting an edited version of the letters); *The Duties and Rights of Counsel*, 3 ALB. L.J. 81 (1871) (publishing the correspondence between Field and Bowles).

replicate his statement of professional duty in his 1844 essay *The Study and Practice of the Law* and elide the limitations on a lawyer's conduct given by Field in that essay. Field argued "[i]t is lawful to advocate what it is lawful to do."²⁷⁷ However, that did not mean that "the lawyer should know nobody but his client," thus echoing his rejection in 1844 of Lord Brougham's ethic of advocacy.²⁷⁸ For Field, giving a client what lawfully was available to him and "knowing" only your client were easily distinguished. Relatedly, a point of contention between Field and Bowles was whether a lawyer was responsible for the conduct of his client. For Field, "the lawyer is responsible, not for his clients, nor for their causes, but for the manner in which he conducts their causes."²⁷⁹ This, of course, clearly differed from his view in 1844 that "[t]he true lawyer . . . never prostitutes [his knowledge and eloquence] to a bad cause."²⁸⁰ In an apparent attempt to craft consistency in his thought, Field asserted that the American lawyer took matters in a manner similar to the English barrister. The English barrister took matters through a "cab rank" system—a first-come, first-served system of representation. Charles Phillips defended Courvoisier in 1840 against the charge of murder based on this cab rank system. What made Courvoisier's case even more difficult for Phillips was not only the solicitor-barrister method of handling cases (the brief was prepared by the solicitor but tried by the barrister, who met the client just before trial commenced), but also the fact that defendants in felony cases had enjoyed a right to counsel only

277. DAVID DUDLEY FIELD, DUDLEY FIELD & SAMUEL BOWLES, *THE LAWYER AND HIS CLIENT* 9 (Springfield, (Mass.), Republican Office 1871) (reprinting the letter of David Dudley Field to Samuel Bowles dated January 5, 1871); see also ANDREW L. KAUFMAN, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY* 434 (2d ed. Little, Brown & Co. 1984) (reprinting the letter of January 5, 1871, from David Dudley Field to Samuel Bowles).

278. Compare DAVID DUDLEY FIELD, DUDLEY FIELD & SAMUEL BOWLES, *THE LAWYER AND HIS CLIENT* 9 (Springfield, (Mass.), Republican Office 1871) (reprinting the letter of David Dudley Field to Samuel Bowles dated January 5, 1871, and including the statement "I do not assent to the theory of BROUGHAM that the lawyer should know nobody but his client"), with *The Study and Practice of the Law*, 14 U.S. MAG. & DEMOCRATIC REV. 345, 347–48 (1844) ("[T]o our view a more revolting doctrine [Brougham's view that the lawyer should know no one but his client] scarcely ever fell from any man's lips. We think it unsound in theory and pernicious in practice.").

279. DAVID DUDLEY FIELD, DUDLEY FIELD & SAMUEL BOWLES, *THE LAWYER AND HIS CLIENT* 9 (Springfield, (Mass.), Republican Office 1871).

280. *The Study and Practice of the Law*, 14 U.S. MAG. & DEMOCRATIC REV. 345, 351 (1844).

since the passage of the Prisoners' Counsel Act in 1836.²⁸¹ Field defended his representation of Fisk and Gould by declaring, "I know no better general rule than this: that the lawyer, being intrusted by government with the exclusive function of representing litigants before the courts, is bound to represent any person who has any rights to be asserted or defended."²⁸² In 1844, Field wrote, "It has been said . . . that a lawyer is not at liberty to refuse any one his services, and that when engaged he may properly do all he can for his client."²⁸³ Field followed that statement with a rejection of the latter proposition: the advocate was forbidden "to overlook the moral aspects of the claim."²⁸⁴ Bowles did not call out Field's misstatement of the lawyer's duty of representation with regard to *civil* matters, though others did. Instead, he responded by acknowledging that Field's "technical" defense meant that "I will not undertake to say, even, that you have violated any prescript of the code professional."²⁸⁵ Bowles's lack of expertise led most lawyers, as George Martin notes, to conclude that "Field won the exchange."²⁸⁶

Second, the Field-Bowles debate was the beginning, not the end,

281. See DAVID J.A. CAIRNS, *ADVOCACY AND THE MAKING OF THE ADVERSARIAL CRIMINAL TRIAL, 1800–1865* app. at 181 (1998) (reprinting the Prisoners' Counsel Act of 1836 in appendix 1.1).

282. ANDREW L. KAUFMAN, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY* 434 (2d ed. Little, Brown & Co. 1984) (reprinting the letter of January 5, 1871, from David Dudley Field to Samuel Bowles).

283. *The Study and Practice of the Law*, 14 U.S. MAG. & DEMOCRATIC REV. 345, 347 (1844). George Sharswood made the similar claim with regard to criminal defense in his 1854 *A Compend of Lectures*: "The courts are in the habit of assigning counsel to prisoners who are destitute, and who request it; and counsel thus named by the court, cannot, with professional propriety, decline the office." GEORGE SHARSWOOD, *A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW* 31 (Philadelphia, T. & J.W. Johnson 1854).

284. *The Study and Practice of the Law*, 14 U.S. MAG. & DEMOCRATIC REV. 345, 348 (1844).

285. DAVID DUDLEY FIELD, *DUDLEY FIELD & SAMUEL BOWLES, THE LAWYER AND HIS CLIENT* 10 (Springfield, (Mass.), Republican Office 1871); see also ANDREW L. KAUFMAN, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY* 434 (2d ed. Little, Brown & Co. 1984) (reprinting letter of January 10, 1871, from Samuel Bowles to David Dudley Field).

286. GEORGE MARTIN, *CAUSES AND CONFLICTS* 56 (1997); see, e.g., Albert Stickney, *The Lawyer and His Clients*, 112 N. AM. REV. 392, 396 (1871) ("And it must, it would seem, be admitted that Mr. Bowles does not make a very strong case."); *More About Legal Morality*, *THE NATION*, Feb. 2, 1871, at 70, 71 ("Mr. Bowles, being a layman, and not conversant with the facts, is forced to fire at long range, or, in other words, deal largely in generalities, and fall back on common reports as his authority.").

of the charges against Field. Shortly after the pamphlet publication of the Field-Bowles debate, several lawyers and others challenged Field's conduct as counsel for Gould and Fisk in widely circulated publications. *The Nation* criticized Field's conduct in a January 26, 1871 article.²⁸⁷ Francis Barlow, a thirty-six-year-old lawyer, wrote three long letters printed in Horace Greeley's *New York Tribune* from March 7–9, 1871, which were later published in pamphlet form as *Facts for Mr. David Dudley Field*.²⁸⁸ Albert Stickney, just twenty-eight years old, wrote a thirty-page article published in the April 1871 *North American Review* critically reviewing the published correspondence between Field and Bowles, and strongly criticizing Field's professional conduct.²⁸⁹ In a January 19, 1871 letter to Bowles, Field claimed that “[a]ll the persons to whom I have shown the correspondence, and all the letters I have received concerning it, give me the assurance, that my course is approved. Please get, if you can, one respectable lawyer or judge to say that I am wrong.”²⁹⁰ Barlow took up the challenge. In his closely reasoned letters, he offered a number of facts that suggested Field had engaged in fraudulent conduct on behalf of his clients. In his third letter (written March 3, 1871 and published March 9), Barlow also noted that published letters to the editor “from writers on legal ethics” were written at a level of abstraction that made them irrelevant to any conclusion regarding

287. *Forensic Ethics*, THE NATION, Jan. 26, 1871, at 56, 56 (examining the proper roles and responsibilities of attorneys in the aftermath of the Erie Railroad scandal). Additional articles in *The Nation* were published as *More About Legal Morality*, THE NATION, Feb. 2, 1871, at 70, *Bench and Bar of New York*, THE NATION, Feb. 9, 1871, at 91, and *Our “Upright Judiciary,”* THE NATION, Mar. 2, 1871, at 140. A response to these articles, *Some Facts for the Nation*, was written by Field's co-counsel Thomas Shearman and published in the March 10, 1871 issue of the *Albany Law Journal*. See generally T.G. Shearman, *Some Facts for the Nation*, 3 ALB. L.J. 217 (1871) (providing a response).

288. FRANCIS C. BARLOW, *FACTS FOR MR. DAVID DUDLEY FIELD* (Albany, Weed, Parsons & Co. 1871). A subtitle was *Supplement to Field's and Bowles' Correspondence*. Barlow was a major general in the Civil War. See GEORGE MARTIN, *CAUSES AND CONFLICTS* 57 (1997) (describing the letters written by Barlow, as well as his role as major general during the Civil War).

289. See generally Albert Stickney, *The Lawyer and His Clients*, 112 N. AM. REV. 392 (1871) (providing a critical review of Field and his correspondence with Bowles). In the same issue was Charles F. Adams's *An Erie Raid*. See generally *An Erie Raid*, 112 N. AM. REV. 241 (1871) (providing an account of the Erie raid).

290. DAVID DUDLEY FIELD, *DUDLEY FIELD & SAMUEL BOWLES, THE LAWYER AND HIS CLIENT* 18 (Springfield, (Mass.), Republican Office 1871).

the propriety of Field's actions.²⁹¹ Field's lengthy response, written on March 11, began with a defense of professional consensus, claiming that "three counsel of unquestionable ability, integrity and honor" had all agreed that Judge Smith's conclusion that the parties in the Albany and Susquehanna litigation had engaged in fraudulent conduct was "erroneous in every material part, either in fact or in law."²⁹² Field went so far as to suggest an expert on legal ethics validated his role, publishing a letter from George Sharswood intended to justify his conduct.²⁹³ In May of 1871, George Ticknor Curtis published a defense of Field's conduct. Curtis's lengthy (over 100 printed pages) and turgid defense of all of Field's actions concerning the attempted takeover of the Albany and Susquehanna led to his conclusion that "no just imputation of professional impropriety rests upon [Field or his partners] on account of any such act or advice."²⁹⁴ Curtis initiated his investigation after an April 10, 1871 request of "an intimate friend of Mr. David Dudley Field."²⁹⁵ His introductory note to the published defense is dated May 10, 1871. What is astonishing about the Field-Barlow debate is that a sixty-five-year-old lawyer, possessed of an extraordinary income and well regarded for his professional acumen (if not his personal demeanor), would find it necessary to defend himself from charges made by young lawyers not by standing on his personal honor, but by justifying his actions through professional consensus. Field was well-known for responding to any perceived slight, which was in part why he corresponded with both Bowles and Barlow. But it wasn't sufficient merely to respond; Field wanted professional

291. FRANCIS C. BARLOW, *FACTS FOR MR. DAVID DUDLEY FIELD* 24 (Albany, Weed, Parsons & Co. 1871).

292. *Id.* at 34–35.

293. *Cf. id.* at 70 (noting the publication of the letter by George Sharswood, but not providing its location or date). I have not found the published letter, and the reference by Barlow does not indicate the extent to which Sharswood's letter exculpated Field.

294. GEORGE TICKNOR CURTIS, *AN INQUIRY INTO THE ALBANY & SUSQUEHANNA RAILROAD LITIGATIONS OF 1869, AND MR. DAVID DUDLEY FIELD'S CONNECTION THEREWITH* 101 (New York, D. Appleton & Co. 1871); *see also* GEORGE MARTIN, *CAUSES AND CONFLICTS* 60 (1997) (noting the almost "unreadable" article, which was likely part of the point).

295. GEORGE TICKNOR CURTIS, *AN INQUIRY INTO THE ALBANY & SUSQUEHANNA RAILROAD LITIGATIONS OF 1869, AND MR. DAVID DUDLEY FIELD'S CONNECTION THEREWITH* 2 (New York, D. Appleton & Co. 1871). There is no indication that Curtis was intentionally biased, *see* GEORGE MARTIN, *CAUSES AND CONFLICTS* 60 (1997), but all inferences made by Curtis favored Field.

corroboration and vindication.

George Sharswood's 1854 *A Compend of Lectures* equated personal honor with professional honor: "Let it be remembered and treasured in the heart of every student, that no man can ever be a truly great lawyer, who is not, in every sense of the word, a good man."²⁹⁶ Field's defense of his actions was premised on a division of personal honor and professional honor. Even if Field was charged with not being a good man, he believed he met the test of being a great lawyer because his actions met the standard of professional honor, as evidenced by the clean bill given him by Curtis and others. The Field-Barlow debate thus offers evidence of a transformation in legal ethics from an issue of personal honor to one of the peculiarities and particularities of professional duty. As a matter of professional duty, it would no longer do to read Hoffman's fifty "Resolutions in Regard to Professional Department," and even George Sharswood's references to honor were largely irrelevant.

The third important aspect of the debate about Field's conduct is found near the close of the Field-Barlow exchange. Barlow noted in a March 20, 1871 letter that "[a]s concerns Mr. Field, I shall take care that his conduct is investigated before a body of men who cannot be deceived by small tricks and petty evasions."²⁹⁷ Field understood this to mean an investigation before the Association of the Bar of the City of New York. Barlow apparently did complain of Field's conduct with the committee of grievances, but, as George Martin notes, no record of its action was made then.²⁹⁸ But Barlow and others persisted, and in an extraordinary meeting of the Association in December 1872, Field demanded a hearing and then defended his conduct "in what was one of the longest and certainly one of the liveliest speeches ever heard at an Association meeting."²⁹⁹ He defended himself on two grounds: first, his accusers were both ignorant and corrupt; second, his actions were justified as professionally proper

296. GEORGE SHARSWOOD, *A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW* 94 (Philadelphia, T. & J.W. Johnson 1854).

297. FRANCIS C. BARLOW, *FACTS FOR MR. DAVID DUDLEY FIELD* 68 (Albany, Weed, Parsons & Co. 1871).

298. GEORGE MARTIN, *CAUSES AND CONFLICTS* 91-92 (1997).

299. *Id.* at 92.

by “twelve lawyers and judges.”³⁰⁰ After Field finally finished, the chairman of the grievance committee noted that the opinions of the lawyers and judges “were just worth what was paid for them.”³⁰¹ Both sides demanded a report from the committee, and in early 1873, the Association “exonerated Field.”³⁰² Just over a decade later, the Association asserted the authority to investigate the conduct of “all lawyers practicing in New York City whether members of [the Association] or not.”³⁰³

The effort to continue to “professionalize”³⁰⁴ the legal profession assisted the movement from personal to professional honor. The adoption in 1887 by the Alabama State Bar Association of the first code of ethics of an organized bar association was an acknowledgment of that shift. The references to Sharswood (and to a lesser extent Hoffman) in the Alabama Code (and later in the ABA’s Canons of Ethics) as the basis for the rules of ethics also attempted to reflect as banal the dynamic changes to the legal profession from the end of the Civil War. Thomas Goode Jones, the draftsman of the Alabama Code, was an attorney for the powerful Louisville & Nashville Railroad before his political career. Railroads, powerful corporations that could buy the best legal services available throughout the South, were a type of client largely unknown to lawyers in the antebellum era.³⁰⁵ With admission standards to the practice of law exceptionally modest in most states even in the 1880s, and with the opportunity for some lawyers to make large incomes through counseling and litigation on behalf of powerful interests, the professional elite needed some manner to justify the power lawyers were exercising in the United States during the last two decades of the nineteenth century. A code of ethics, particularly one that asserted continuity

300. *Id.* at 92–95, 97.

301. *Id.* at 99.

302. *Id.* at 100. Martin notes that the body at the next meeting moved to re-open the issue, and it took yet another meeting for the members to reverse themselves and put the charges against Field to rest. GEORGE MARTIN, *CAUSES AND CONFLICTS* 100–01 (1997).

303. MICHAEL J. POWELL, *FROM PATRICIAN TO PROFESSIONAL ELITE* 144 (1988).

304. See generally Stephen Lilley, *The Hard Work of “Hard Work”: The Legal Elite’s Rhetoric of Diligence and the Professionalization of the Law, 1850–1920*, 17 *WIDENER L.J.* 145 (2007) (discussing generally the “professionalization” of the practice of law in the United States from 1850 to 1920).

305. See WILLIAM G. THOMAS, *LAWYERING FOR THE RAILROAD* 7–8 (1999) (noting Jones’s position and the rise of corporate railroad lawyering in the South in the 1880s).

in the history of the profession, was one approach.

When the Alabama State Bar Association adopted its Code of Ethics in 1887, it adopted in section 13 a variant of the cab rank rule in criminal cases: “An attorney can not reject the defense of a person accused of a criminal offense, because he knows or believes him guilty. It is his duty by all fair and lawful means to present such defenses as the law of the land permits”³⁰⁶ This was asserted by Sharswood in 1854 as part of the duty of an honorable attorney.³⁰⁷ But when the 1908 Canons were adopted, Canon 5 stated: “It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense.”³⁰⁸ Within the space of twenty years, the lawyer’s role in criminal cases changed from a *duty* to defend even those the lawyer believed or knew were guilty of a crime to a *right* of the lawyer to represent an accused, apparently to avoid the conviction of the innocent. Charles Phillips had no choice but to represent Courvoisier. Even if Field’s 1871 defense of his actions by analogizing to the cab rank policy was insincere, he may have believed it might persuade the public. But though Alabama draftsman Judge Thomas Goode Jones was a member of the ABA Committee on Code of Professional Ethics, a significant reinterpretation of the duty of the lawyer in criminal cases had occurred by the early twentieth century. The focus of the ABA was on the lawyer’s right to decide whether to represent a person accused of a crime, which obliterated the duty to represent the criminally accused. Canon 5 re-framed the relationship between lawyer and criminally accused client, and the unintended consequence was its impact on the concept of zealous representation. Sharswood and the Alabama Code (and maybe Field) assumed that zealous representation of a person charged with a crime was undertaken as part of one’s duty to a properly functioning legal

306. Thomas Goode Jones, *Code of Ethics*, in GILDED AGE LEGAL ETHICS: ESSAYS ON THOMAS GOODE JONES’ 1887 CODE 45, 50–51 (Carol Rice Andrews et al. eds., 2003).

307. See GEORGE SHARSWOOD, A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW 31, 44 (Philadelphia, T. & J.W. Johnson 1854) (noting the duty of an appointed lawyer to defend his client in criminal cases and offer “all fair arguments arising on the evidence”).

308. *Canons of Ethics*, 33 A.B.A. REP. 575, 576 (1908).

system.³⁰⁹ The Canons accepted zealous representation of a client after the lawyer chose to take that person on as a client. These were two very different matters. The latter approach, making it the lawyer's choice, more closely entwined lawyer and client, for if a lawyer chose to represent a "bad man," he did so voluntarily. The older foundation, based on duty, avoided that difficulty, which may be why Field made such an effort to couch his representation of Boss Tweed, Jay Gould, and other repellent characters as a matter of duty, not of right.

Even as Field's understanding of the lawyer's duty to his client ("It is lawful to advocate what it is lawful to do") became commonplace in the last half of the nineteenth century, complaints about the shift of law from a profession to a business were regularly published at the turn of the century.³¹⁰ A number of lawyers writing at the end of the nineteenth and beginning of the twentieth centuries emphasized the duty of the lawyer to remain independent of the client, which was a consequence of the lawyer's status as an "officer of the court."³¹¹ Additionally, a number of lawyers wrote books and articles assailing the shift of law from a profession to a business, and they looked toward a return to that golden age.³¹² Despite the efforts of lawyers to claim a continued professionalism from the end of the Civil War to the turn of the century, the deepest cut was the statement attributed to Jay Gould, Field's former client: "[B]rains were the cheapest meat in the market."³¹³ The materialistic conduct of lawyers was criticized in a June 1905 speech at Harvard University by President Theodore Roosevelt³¹⁴ and by Louis D. Brandeis in a speech

309. Cf. *Forensic Ethics*, THE NATION, Jan. 26, 1871, at 56, 56 (noting the duty of a lawyer both to his client and to the administration of justice).

310. See generally George F. Shelton, *Law As a Business*, 10 YALE L.J. 275 (1901) (detailing the perceived shift of the practice of law from a profession to a business).

311. See Michael Ariens, *Know the Law: A History of Legal Specialization*, 45 S.C. L. REV. 1003, 1013 n.46 (1994) (citing sources indicating that a lawyer is an "officer of the court").

312. See *id.* at 1022–25 (listing sources that present a shift of law from a profession to a business).

313. George F. Shelton, *Law As a Business*, 10 YALE L.J. 275, 276 (1901) (quoting Jay Gould).

314. See Theodore Roosevelt, Address at Harvard University (June 28, 1905), in 4 THEODORE ROOSEVELT, PRESIDENTIAL ADDRESSES AND STATE PAPERS 407, 419–20 (1910) (criticizing lawyers for aiding the wealthy at the expense of the public interest).

given in May.³¹⁵ Later that year, the life insurance scandal in New York drew more unwanted attention to the conduct of lawyers.³¹⁶ Outgoing ABA President Henry St. George Tucker's address in August 1905 to the members used Roosevelt's speech to urge creation of a code of ethics,³¹⁷ and after the address a motion was made and adopted to create a committee, chaired by Tucker, to report on "the advisability and practicability of the adoption of a code of professional ethics by this Association."³¹⁸ In August 1906, the Committee reported that a code of ethics was advisable and practical.³¹⁹ Two years later, the ABA had joined the bar associations of ten states by crafting provisions of ethics meeting the profession's conscious need to justify itself.³²⁰

III. THE MARCH TO MODERNITY

Our canons of ethics for the most part are generalizations designed for an earlier era.

Harlan F. Stone, *The Public Influence of the Bar*³²¹

315. See *The Opportunity in the Law*, 39 AM. L. REV. 555, 555–63 (1905) (publishing a May 4, 1905 speech by Louis Brandeis to the Harvard Ethical Society that criticizes the materialistic conduct of lawyers).

316. See MORTON KELLER, *THE LIFE INSURANCE ENTERPRISE, 1885–1910*, at 245–64 (1963) (detailing the scandal, the ensuing investigation, and the legislative response). The legal counsel for the Armstrong Committee investigating the scandal was Charles Evans Hughes, later both an Associate Justice and Chief Justice of the Supreme Court. On Hughes's assessment of the scandal, see *THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES* 121–27 (David J. Danelski & Joseph S. Tulchin eds., 1973). As George Martin notes, "The problem for the legal profession in this [scandal] was exemplified by [Elihu] Root, who was a director of Mutual Life." GEORGE MARTIN, *CAUSES AND CONFLICTS* 198 (1997).

317. Henry St. George Tucker, *Address of the President*, 28 A.B.A. REP. 299, 383–88 (1905).

318. *Transactions of the Twenty-eighth Annual Meeting of the American Bar Association*, 28 A.B.A. REP. 3, 132 (1905).

319. *Report of the Committee on Code of Professional Ethics*, 29 A.B.A. REP. 600, 600–04 (1906).

320. *Canons of Ethics*, 33 A.B.A. REP. 575, 575–85 (1908).

321. Harlan F. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 10 (1934); see also K.N. Llewellyn, *The Bar's Troubles, and Poultrices—and Cures?*, 5 LAW & CONTEMP. PROBS. 104, 115 (1938) ("The canons of ethics on business-getting are still built in terms of a town of twenty-five thousand (or, much more dubiously, even fifty thousand) . . .").

Justice Stone's criticism of the Canons in 1934 reflected a popular sentiment of the time. A 1927 article in *Harper's Magazine* noted a "popular lack of faith in the honesty and the integrity of the legal profession"³²² in part because the Canons were "largely a manual of polite behavior for lawyers."³²³ Lawyer Morris Gisnet, in a critical survey of the legal profession published in 1931, concluded, "As for the Canons of Ethics, they certainly have no relation whatever to business and to the life of the community within which the lawyer functions."³²⁴ Journalist Alexander Schlosser noted that Canon 12, which required attorneys to charge reasonable fees, "gives members of the bar all the justification they require to charge almost any fee they choose."³²⁵ The investigation by Samuel Seabury from 1930 to 1932 of the magistrates' courts in New York City and the attorneys who practiced there indicated an extraordinarily corrupt system, implicating police officers, bail bondsmen, lawyers and judges.³²⁶ The discontent was serious enough to prompt the following statement in 1936 from the ABA's largely quiescent Standing Committee on Professional Ethics and Grievances: "It is our belief that the Canons as a whole should be restudied. A few of them are probably in need of substantial change; several need clarification. Any changes, however, that may be made should have as their purpose the more faithful reflection of the prevailing views among

322. Newman Levy, *Lawyers and Morals*, HARPER'S MONTHLY MAG., Feb. 1927, at 288, 288. Levy was a New York lawyer.

323. *Id.* at 289. Levy also argued that the Canons' "emphasis is on manners rather than morals." *Id.*

324. MORRIS GISNET, A LAWYER TELLS THE TRUTH 125 (1931); *see also* Norman Thomas, *Introduction* to MORRIS GISNET, A LAWYER TELLS THE TRUTH 14 (1931) ("I do not know any profession, not excepting the Christian ministry, in which the gap between its ethical canons and the practice of its members is so wide and hypocrisy so great."). Thomas was a famous (or notorious) Socialist of this time.

325. ALEXANDER L. SCHLOSSER, "LAWYERS MUST EAT" 21 (1933); *see also id.* at 52 (citing that nearly half of complaints filed against attorneys by clients dealt with financial issues).

326. *See generally* IN THE MATTER OF THE INVESTIGATION OF THE MAGISTRATES' COURTS IN THE FIRST JUDICIAL DEPARTMENT AND THE MAGISTRATES THEREOF, AND OF ATTORNEYS-AT-LAW PRACTICING IN SAID COURTS: FINAL REPORT OF SAMUEL SEABURY, REFEREE (1932), *reprinted in* CRIMINAL JUSTICE IN AMERICA (Arno Press 1974) (detailing the investigation by Samuel Seabury). On Seabury and his investigations of the magistrate's court, and of the Tammany Hall-supported District Attorney and Mayor Jimmy Walker, *see generally* HERBERT MITGANG, THE MAN WHO RODE THE TIGER: THE LIFE AND TIMES OF JUDGE SAMUEL SEABURY (1963), which details the largest political corruption investigation in American municipal history.

right-thinking lawyers.”³²⁷

At the same time, the ABA’s Special Committee on Canons of Ethics, in recommending its own abolition, noted the “substantially universal approval”³²⁸ of the Canons within the profession. In 1937, with the adoption of Canon 47 and amendments to a number of Canons, the Standing Committee concluded: “The Canons of Ethics, now adopted in most of the states but sometimes with slight modifications, are generally believed to be satisfactory.”³²⁹

This schizophrenic attitude regarding the Canons of Ethics and legal professionalism was common within the legal profession during the 1930s. The successful adoption of the Canons as of 1920 by most voluntary bar associations and state courts only made more prominent the defects in the system of lawyer regulation. Newman Levy urged a return by lawyers to professional ideals because a society’s ethical standards could “never rise above that of its lawyers.”³³⁰ Gisnet and Schlosser criticized corruption in the profession. Professors Karl Llewellyn and Adolf Berle criticized the large law firm, deriding it as a law factory that made a lawyer “the paid servant of his client.”³³¹ Members of the ABA urged greater professionalism through the

327. *Report of the Standing Committee on Professional Ethics and Grievances*, 61 A.B.A. REP. 699, 703 (1936).

328. *Report of the Special Committee on Canons of Ethics*, 61 A.B.A. REP. 797, 799 (1936).

329. *Report of the Standing Committee on Professional Ethics and Grievances*, 62 A.B.A. REP. 754, 759 (1937) (recommending amendments to Canons 27, 34, and 43).

330. Newman Levy, *Lawyers and Morals*, HARPER’S MONTHLY MAG., Feb. 1927, at 288, 294. Levy’s comment echoed a statement made by David Dudley Field in his 1844 essay *The Study and Practice of the Law*: “The most intimate relation, in fact, subsists between the character of the community and the character of the bar. An unscrupulous bar could not exist among an upright, high-minded community; and if you find anywhere a corrupt legal profession, you find it in the midst of a corrupt and corrupting people.” *The Study and Practice of the Law*, 14 U.S. MAG. & DEMOCRATIC REV. 345, 346 (1844); see also Orrin N. Carter, *Ethics of the Legal Profession*, 9 ILL. L. REV. 297, 303 (1914) (“While it may be true, as sometimes charged, that an unscrupulous bar cannot exist in a high-minded community, and is only found in the midst of a corrupt people, proper ethical standards for the legal profession are far more readily obtained if the bar is composed of persons of high character.”). Carter’s three-part essay was published in book form under the same title in 1915.

331. A.A. Berle, Jr., *Modern Legal Profession*, in 9 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 340, 343 (Edwin R.A. Seligman et al. eds., 1933); K.N. Llewellyn, *The Bar Specializes—With What Results?*, 167 ANNALS AM. ACAD. POL. & SOC. SCI. 177, 178 (1933).

teaching of legal ethics in law schools,³³² and recommended that states include legal ethics as a bar examination topic.³³³

In 1920, applicants to the bar found relatively few hurdles to licensure, and mandatory bar associations were nonexistent. Alfred Z. Reed reported that, as of 1917, thirty-six of forty-nine jurisdictions required some period of study before applying for admission to the bar, with twenty-eight states requiring three years of preparation.³³⁴ The states, by requiring some years of study before an applicant took the bar, had not resolved the problem of the “superficial” bar examination given by most states. The bar examination of the 1910s, in Reed’s view, failed “to weed out either the more poorly prepared applicants from good law schools of any type, or applicants who are unfit to practice because they have been prepared in bad law schools.”³³⁵ And, once a member of the bar, the absence of any mandatory bar associations in 1920 made difficult the process of disbarment.³³⁶ The ABA noted the

332. See *Association’s Work at Memphis Summarized*, 15 A.B.A. J. 740, 740 (1929) (reporting approval of proposal “making Professional Ethics part of compulsory course in law schools”); *Report of the Standing Committee on Professional Ethics and Grievances*, 54 A.B.A. REP. 397, 397 (1929) (recommending legal ethics be a required law school course but noting no agreement to such by the Association of American Law Schools); see also SUSAN K. BOYD, *THE ABA’S FIRST SECTION: ASSURING A QUALIFIED BAR* 41 (1993) (noting that 79% of AALS schools offered some ethics instructions and that 85% of non-AALS schools offered some instruction in legal ethics by 1931). The call for the teaching of legal ethics in law school was also made nearly two generations earlier. See Charles F. Chamberlayne, *The Soul of the Profession*, 18 GREEN BAG 396, 401 (1906) (“With good reason have repeated committees of the American Bar Association recommended that legal ethics be made part of each law school curriculum.”); *Report of the Committee on Legal Education and Admission to the Bar*, 20 A.B.A. REP. 349, 377 (1897) (“[Y]our Committee has under consideration the desirability of instruction in the legal and moral duties of lawyers”); *Teaching Legal Ethics in Law Schools*, 2 AM. L. SCH. REV. 377, 377–78 (1910) (listing thirty-two law schools where legal ethics was taught as part of a regular course of study and twenty-eight schools where legal ethics was taught in one or more lectures). See generally Bernard C. Gavit, *Legal Ethics and the Law Schools*, 18 A.B.A. J. 326 (1932) (discussing the drive to make legal ethics a subject of instruction in law schools).

333. See *Proceedings of the Fifty-sixth Annual Meeting of American Bar Association*, 58 A.B.A. REP. 41, 94 (1933) (urging bar examiners to make legal ethics a bar examination topic). This topic, like the topic of teaching legal ethics in law schools, was also a subject of debate a generation earlier. See generally *Should Candidates for Admission to the Bar Be Examined on the Subject of Legal Ethics and Professional Deportment?*, 2 AM. L. SCH. REV. 251 (1909) (offering largely affirmative replies of well-known members of the bar).

334. ALFRED ZANTZINGER REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* 91–92 (1921).

335. *Id.* at 409.

336. The first mandatory bar association was formed in North Dakota in 1921. *North*

difficulty of disbaring lawyers for violations of the Canons, and suggested the dominant reason for the apparent increase in ethical lapses by attorneys was “an economic one,” due to the large increase in the number of lawyers.³³⁷ Ten years later, the situation was largely unchanged. Columbia Law School Dean Young B. Smith noted that from 1929 to 1930, “only 45 of the 100 part-time and mixed [law] schools required as much as two years of college work,” and that 43,989 students were in law schools in 1930, compared with 24,503 in 1920 and 19,498 in 1910.³³⁸

By 1924, the ABA’s Standing Committee on Professional Ethics and Grievances noted that the Canons of Ethics had been “approved and adopted by almost all of the state and local bar associations of the country, and have been approved or quoted with approval by many of the courts having jurisdiction of disciplinary proceedings against lawyers.”³³⁹ Even so, it urged the ABA leadership to appoint a special committee to investigate the

Dakota Bar Takes Lead, 5 J. AM. JUDICATURE SOC’Y 15, 15 (1921). The American Judicature Society ceaselessly proselytized for mandatory bar associations during its first quarter-century. See, e.g., *Brief Survey of the Bar Integration Movement*, 20 J. AM. JUDICATURE SOC’Y 202, 202 (1937) (listing seventeen states with mandatory bar associations and another eighteen states where members of the bar were advocating mandatory bar associations); see also M. LOUISE RUTHERFORD, *THE INFLUENCE OF THE AMERICAN BAR ASSOCIATION ON PUBLIC OPINION AND LEGISLATION* 33 (2004) (describing the incorporation of bar associations in several states). The ABA’s Section on Professional Ethics and Grievances sent a questionnaire to judges in 1919 concerning “the ethical standards of the profession in the United States.” *Report of the Committee on Professional Ethics and Grievances*, 45 A.B.A. REP. 270, 275 (1920). The Committee noted that in “discipline cases the Bench is divided into two classes”: those reluctant to discipline lawyers, and those, using the Canons, more willing to say what was proper and what was not. *Id.* at 282.

337. *Report of the Committee on Professional Ethics and Grievances*, 45 A.B.A. REP. 270, 280 (1920). The absence of a disciplinary mechanism in the Canons was noted at its creation. See Charles A. Boston, *A Code of Legal Ethics*, 20 GREEN BAG 224, 225 (1908) (“The one further thing noticeable about the Codes of the various [s]tate [b]ar [a]ssociations, is their complete silence as to sanctions.”). The Association of the Bar of the City of New York, a private, exclusive bar organization, had been ceded disciplinary authority by the New York courts over all New York City lawyers as early as 1884. See MICHAEL J. POWELL, *FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION* 144 (1988) (outlining this assertion of power).

338. Young B. Smith, *Law Schools and Lawyers*, 18 A.B.A. J. 480, 481 (1932).

339. *Report of the Standing Committee on Professional Ethics and Grievances*, 49 A.B.A. REP. 466, 467 (1924); see also *Report of the Committee on Professional Ethics and Grievances*, 45 A.B.A. REP. 270, 280 (1920) (citing cases basing discipline of lawyers on violations of the Canons).

supplementation and amendment of the Canons of Ethics.³⁴⁰ The 1924 call for amendments and supplements to the Canons of Ethics led to the adoption by the ABA in 1928 of thirteen additional Canons.³⁴¹ With the exception of Canon 37 concerning the duty of lawyers to maintain the confidences of client, most concerned issues of the economics of the profession, including the use of partnership names (33), dividing fees (34), control of the lawyer's work by a lay intermediary (35), accepting compensation from others without the client's consent (38), and the impropriety of a lawyer paying for the expenses of the litigation (42). The ABA's supplemental Canons used ethical strictures to bar particular business methods. These methods of obtaining business were adopted more often by non-elite lawyers and law firms than by the elite lawyers who comprised most of the ABA's membership. Maintaining this sense of legal professionalism required the adoption of Canons attacking any perceived encroachments of business methods (not "business") in the profession of the law.

Between 1928 and the call for a new Code of Ethics in 1964, only two Canons were added to the Canons of Ethics by then-ABA President Lewis F. Powell. In 1933, the ABA added Canon 46, titled "Notice to Local Lawyers," and amended several original Canons.³⁴² In 1937, Canon 47 was adopted, barring lawyers from aiding others in the unauthorized practice of law, along with a number of additional amendments to existing Canons.³⁴³ Other

340. *Report of the Standing Committee on Legal Ethics and Grievances*, 49 A.B.A. REP. 466, 468 (1924).

341. *See Proceedings of the Fifty-first Annual Meeting of American Bar Association*, 53 A.B.A. REP. 29, 119-20 (1928) (proposing the adoption of thirteen supplemental Canons); *Report of the Special Committee on Supplements to the Canons of Professional Ethics*, 53 A.B.A. REP. 495, 495 (1928) (proposing fourteen supplemental Canons and noting discussion of the first proposed supplementary Canon, "Bonding the Integrity of a Lawyer," was deferred).

342. *See Proceedings of the Fifty-sixth Annual Meeting of American Bar Association*, 58 A.B.A. REP. 41, 155-78 (1933) (reporting the debate and vote on amendments and adoption of Canon 46); *Report of the Special Committee on Canons of Ethics*, 58 A.B.A. REP. 428, 428-30 (1933) (listing recommended changes to the Canons of Ethics).

343. *See Proceedings of the House of Delegates*, 62 A.B.A. REP. 216, 352 (1937) (adopting the "entire supplementary report of the Committee," which included the addition of Canon 47); *Supplementary Report of the Standing Committee on Professional Ethics and Grievances*, 62 A.B.A. REP. 761, 761-67 (1937) (listing amendments to the Canons of Ethics and recommending the adoption of Canon 47).

than repeated amendments of Canon 27 concerning “law lists,”³⁴⁴ the ABA largely left alone the Canons of Ethics. Even though the ABA left the Canons intact, debate about the ethical precepts of the legal profession regularly arose from the 1930s through the 1960s. But if the Canons were an anachronism by the 1930s, how did they last through the 1960s?

The profession’s elite concluded that the reason why so many lawyers in the 1930s behaved unprofessionally was not due to the “anachronistic” Canons; it was because too many persons had been allowed into the profession. Consequently, despite the call by Justice Stone and others, it wasn’t the Canons that needed to be reformed; it was entry into the profession. Beginning in 1928, well before the onset of the Great Depression, lawyers began complaining about the “overcrowded” bar.³⁴⁵ In a 1932 speech to the Alabama State Bar, Robert H. Jackson, the future Supreme Court Justice, urged reformation of bar associations for the betterment of society and the profession. The failure to do so, he suggested, might lead to “economic demoralization” in the legal profession: “It takes no delirious vision to see that increasing numbers and decreasing income may produce such competition as will overrule all ethical restraints as it has in some lines and in some localities already.”³⁴⁶ The formation of the National Conference of Bar Examiners (NCBE) in 1931 was intended in part to use the bar examination to control “overcrowding” in the profession.³⁴⁷ In the first issue of the *Bar Examiner*, a publication

344. See, e.g., *Report of the Special Committee to Study the Matter of Amendment to Canon 27*, 76 A.B.A. REP. 437, 437 (1951) (recommending the amendment of Canon 27).

345. See Lloyd K. Garrison, *A Survey of the Wisconsin Bar*, 10 WIS. L. REV. 131, 134 (1935) (noting the history of the claim).

346. Robert H. Jackson, *An Organized American Bar*, 18 A.B.A. J. 383, 386 (1932). Jackson’s allusion was particular to New York City, where lawyer Samuel Seabury’s investigations had made a major impact. In a 1954 study of American lawyers, Albert Blaustein and Charles Porter noted the correlation between complaints of unethical lawyer conduct and economic conditions. ALBERT P. BLAUSTEIN & CHARLES O. PORTER, *THE AMERICAN LAWYER* 258 (1954). Blaustein and Porter compared the number of complaints to the Chicago Bar Association in the 1920s with complaints in the 1930s and 1940s. *Id.* They found that complaints rose from an average of 375 in the 1920s to a high of 952 during 1933 and 1934 and retreated to an average of 174 during 1942 to 1948. *Id.*

347. See *Editorial*, 1 B. EXAMINER 211, 211 (1932) (“The present situation emphasizes the overcrowded condition of the bar.”); Philip J. Wickser, *Ideals and Problems for a National Conference of Bar Examiners*, 1 B. EXAMINER 4, 7 (1931) (“We know, for instance, that the Bar, today, is overcrowded, and is becoming more so.”);

of the NCBE, an article arguing that an increase of 31% in the number of lawyers between 1920 and 1930, compared with an increase of just 16% of the population during the same time, proved the bar was overcrowded.³⁴⁸ In 1933, Professor Herschel Arant, in his foreword to his *Cases and Materials on the American Bar and Its Ethics*,³⁴⁹ wrote:

The editor has assumed that the legal profession is overcrowded and is of the opinion that most of the problems which confront the profession and most of the legitimate complaint against it result from this fact. He also believes that the solution of the problem is a decrease in the ratio of lawyers to population.³⁵⁰

Columbia Law School Dean Young B. Smith linked a lack of ethical behavior of attorneys to the fact that “about twice as many new lawyers [are] admitted annually as are needed.”³⁵¹ When University of Wisconsin Law School Dean Lloyd Garrison suggested in 1935 that an empirical study of Wisconsin lawyers indicated that the bar was not overcrowded,³⁵² the response of several bar associations was to point to surveys suggesting

Editorial, *Overcrowded Occupations*, SAT. EVENING POST, July 15, 1933, reprinted in 2 B. EXAMINER 267, 267–68 (1933) (lamenting the overcrowded legal profession); see also SUSAN K. BOYD, THE ABA'S FIRST SECTION: ASSURING A QUALIFIED BAR 38 (1993) (quoting former chairman of NCBE that “the main emphasis of the bar [in 1931] was on limitation, on overcrowding”).

348. *Some Random Thoughts About the Lawyer-Population Tables*, 1 B. EXAMINER 255, 255 (1932).

349. HERSCHEL WHITFIELD ARANT, *CASES AND MATERIALS ON THE AMERICAN BAR AND ITS ETHICS* (1933).

350. *Id.* at iii–iv. As noted in the *Bar Examiner*, the percentage of successful bar examinees declined from 52.7% in 1928 to 46.4% in 1930. Will Shafroth, *Bar Examiners and Examinees*, 1 B. EXAMINER 1, 4 (1931). By 1932, the overall passing rate nationwide was down to 45%, which the author called “severe.” Will Shafroth, *The 1932 Bar Examination Statistics*, 2 B. EXAMINER 210, 210 (1933).

351. Young B. Smith, *Law Schools and Lawyers*, 18 A.B.A. J. 480, 481 (1932).

352. Lloyd K. Garrison, *Results of the Wisconsin Bar Survey*, 8 AM. L. SCH. REV. 116, 118 (1936); Lloyd K. Garrison, *A Survey of the Wisconsin Bar*, 10 WIS. L. REV. 131, 147 (1935) (“The general conclusion . . . is that in Wisconsin since 1880 the volume of legal business and the opportunities for lawyers have increased much more rapidly than the increase either of the lawyers or of the population, and . . . the need of the community for his services is more favorable than at any time prior to 1932.”). See generally Lloyd K. Garrison, *The Problem of Overcrowding: A Call for Imagination, Experimentation and Organization*, 16 TENN. L. REV. 658 (1941) (detailing the conditions of the legal profession at that time). Francis M. Shea wrote a trenchant analysis attacking the overcrowded thesis on grounds of ethnic discrimination and as contrary to the democratization of the bar in Francis M. Shea, *Overcrowded?—The Price of Certain Remedies*, 39 COLUM. L. REV. 191 (1939).

overcrowding had caused lawyer income to fall precipitately.³⁵³

The claim that the legal profession was overcrowded was the trigger used to increase standards in legal education and admissions to the bar. In 1929, the nationwide passing rate on the bar examination was 51%.³⁵⁴ From 1930 through 1938, the nationwide passing rate on the bar examination ranged from a low of 45% (1932) to a high of 48% (four separate years). The national passing rate finally reached more than half (51%) in 1939.³⁵⁵ In New York, the state with by far the greatest number of bar examinees, the passing rate during the 1930s ranged from a low of 32% in 1932 to a high of 47% in 1939.³⁵⁶ Nationally, the percentage of persons admitted to the bar through the diploma privilege exceeded 10% only twice during the 1930s, and ordinarily ranged from 5%–9%.³⁵⁷ By successfully attacking the diploma privilege and reducing the passing rate for bar examinees, the annual absolute number of new members of the profession declined from 9,860 in 1930 to 7,942 in 1940, even as the total population increased by nearly nine million.³⁵⁸

During the same time, the route to eligibility to the bar narrowed, as bar admission standards were transformed. By 1939, nine states had abolished preparation for the bar through law

353. See *Report of the Special Committee on the Economic Condition of the Bar*, 62 A.B.A. REP. 869, 872 (1937) (repeating the conclusion of the 1936 report of the New York County Lawyers Association that “[o]vercrowding is largely responsible for” the low pay of lawyers). The Special Committee was initially chaired by Garrison, who sought to create a survey manual to be used by local bar associations to determine the economic situation of its lawyers. See *id.* at 869 (recommending that “the plan for preparing, publishing and distributing a manual . . . be approved”). Garrison left the Committee, and by 1940 the Committee noted that its feeble efforts were indefinitely stalled by the eruption of World War II.

354. Will Shafroth, *Bar Examiners and Examinees*, 1 B. EXAMINER 1, 4 (1931).

355. *Percentages—1937 to 1939*, 9 B. EXAMINER 40, 40 (1940).

356. *Id.*; *Recent Bar Examination Results*, 1 B. EXAMINER 260, 260 (1932). Part of the variation in bar passage rates may be attributed to varying degrees of discrimination against Jews, who between 1930 and 1934 made up 80% of new bar admissions in New York City, and made up 50% of new bar admissions for the remainder of the decade. Robert W. Gordon, *The American Legal Profession, 1870–2000*, in 3 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA* 73, 78 (Michael Grossberg & Christopher Tomlins eds., 2008).

357. These data were assembled from annual reports on bar examination statistics published in volumes 1–10 of the *Bar Examiner*.

358. These data were assembled from annual reports on bar examination statistics published in volumes 1–10 of the *Bar Examiner*.

office study,³⁵⁹ and in twenty-three jurisdictions, graduates of law schools not approved by the ABA were ineligible to take the bar examination.³⁶⁰ In 1925, just two states required an applicant to the bar to possess a minimum of two years of college study before entering law school.³⁶¹ By 1939, thirty-eight states, the District of Columbia, and the territory of Hawaii had adopted laws requiring applicants to the bar to have completed two years of college work before entering law school.³⁶² Eliminating the apprenticeship system, declaring ineligible for the bar exam graduates of law schools not approved by the ABA, and requiring two years of college all raised the financial barriers to entry to the legal profession and caused a substantial drop in student enrollment in law schools. The total student enrollment in law schools in 1928 was 46,397. Of that total, 31,319 were part-time or evening division law students.³⁶³ By 1939, total enrollment in law schools

359. *Progress in Admission Standards*, 8 B. EXAMINER 15, 15 (1939); see also RICHARD L. ABEL, *AMERICAN LAWYERS* 42 (1989) (noting forty-four jurisdictions allowed applicants to the bar to prepare for the profession through law office study).

360. *Progress in Admission Standards*, 8 B. EXAMINER 15, 15 (1939). The states lacking a requirement of college study were South Dakota, Oklahoma, Arkansas, Louisiana, Mississippi, Kentucky, Florida, Georgia, and South Carolina. *Id.* at 16 (showing map of states). Maryland adopted a two-year requirement later in 1939, which was effective for students entering law school on June 1, 1941, or later. *Id.* at 57. By 1947, only Arkansas, Georgia, Mississippi, and Louisiana did not require two years of pre-law college work. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 217 n.9 (John D. Cushing et al. eds., 1983). At least fifteen jurisdictions barred entry to the legal profession through an apprenticeship by 1947. *Id.*

361. See Alfred Z. Reed, *Legal Education, 1925-1928*, U.S. OFF. EDUC. BULL., No. 31 (1929), reprinted in 6 AM. L. SCH. REV. 765, 773 (1930) (noting two states required two years of college work before entering law school in 1925 and five did so in 1928). The two-year pre-law requirement was a proposal of the ABA's Root Committee in 1921. See *Report of the Special Committee to the Section of Legal Education and Admissions to the Bar of the American Bar Association*, 46 A.B.A. REP. 679, 683 (1921) ("We . . . advocate requiring at least two years of study in a college."). An early proponent of the two-year requirement was Northwestern University Law School Dean John H. Wigmore, as apparent in John H. Wigmore, *Should the Standard of Admission to the Bar Be Based on Two Years or More of College-Grade Education? It Should*, 4 AM. L. SCH. REV. 30 (1915).

362. *Progress in Admission Standards*, 8 B. EXAMINER 15, 15-16 (1939); see, e.g., *Maryland Is the Forty-First State*, 8 B. EXAMINER 57, 57 (1939) (noting adoption by Maryland of two years of study in college, or thirty-six credit hours, for students entering law school on June 1, 1941, or later).

363. ALFRED Z. REED, *CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, REVIEW OF LEGAL EDUCATION IN THE UNITED STATES AND CANADA FOR THE YEAR 1932*, at 29 (1933). Alfred Z. Reed was also the author of *Training for the Public Profession of the Law*.

was 34,539,³⁶⁴ a decline of over 25%. The decline in the number of law students reflected in part the decline of the unapproved law schools. In 1928, sixty-six law schools met the standards set forth in 1921 by the ABA's Root Committee, just 38% of the total number of law schools.³⁶⁵ In 1937, the majority of law students were enrolled in ABA-approved schools.³⁶⁶ Six years earlier, just 44% of all law students had been enrolled in law schools that met ABA standards.³⁶⁷ The number of law schools appears to have peaked at 204 in 1934, of which eighty-eight met ABA standards.³⁶⁸ In 1939, 180 law schools existed, of which 102 met ABA standards.³⁶⁹

Finally, by 1939, forty states had adopted the Root Committee recommendation that training in law be three years of full-time education.³⁷⁰ The adoption of this standard for all applicants to the bar negated any savings in time for those choosing to enter the bar through an apprenticeship; concomitantly, it implicitly suggested that those not attending law school were at a disadvantage in terms of preparing for the bar examination. In 1938, Arthur Vanderbilt linked the increasing standards of legal education and admission to the bar with the initial movement to formulate the Canons of Ethics.³⁷¹ Both avenues increased legal professionalism, and one could be used in place of the other to achieve that professionalism.

364. *Continued Decrease in Law School Enrollment*, 10 B. EXAMINER 11, 11 (1941).

365. ALFRED Z. REED, CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, *REVIEW OF LEGAL EDUCATION IN THE UNITED STATES AND CANADA FOR THE YEAR 1932*, at 29 (1933).

366. James Grafton Rogers, *Address of the Chairman of the Section on Legal Education*, 8 AM. L. SCH. REV. 919, 919 (1937) (“[T]he majority of law students in the United States [are] in schools approved by the American Bar Association.”).

367. ALFRED Z. REED, CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, *REVIEW OF LEGAL EDUCATION IN THE UNITED STATES AND CANADA FOR THE YEAR 1932*, at 29 (1933).

368. ANNUAL REVIEW OF LEGAL EDUCATION FOR 1935, at 31 (Will Shafroth ed., 1935). The 1934 *Annual Review* listed 199 law schools, but the count by a different editor a year later indicated five schools were inadvertently omitted. *Id.*

369. ANNUAL REVIEW OF LEGAL EDUCATION FOR 1938, at 11 (Supp. 1940).

370. John Kirkland Clark, *Standards of Bar Admission*, 8 B. EXAMINER 13, 14 (1939); see *Report of the Special Committee to the Section of Legal Education and Admissions to the Bar of the American Bar Association*, 46 A.B.A. REP. 679, 684 (1921) (“A three years full-time course, then, is the desideratum.”).

371. Arthur T. Vanderbilt, *The Chief Problems Confronting the Bar and the Responsibilities of Our Law Schools with Respect Thereto*, 8 AM. L. SCH. REV. 1031, 1033 (1938).

The onset of American entry into World War II beginning in early 1942 rapidly emptied American law schools of their students. The ABA's Special Committee on the Economic Condition of the Bar, created in January 1937 in response to the cry of overcrowding,³⁷² did very little after Dean Lloyd Garrison left the Committee. It finally went out of business in 1945, because lawyers no longer seriously claimed that the bar was overcrowded.³⁷³ As of March 1, 1948, only 159 law schools were in business, of which 111 were ABA-approved.³⁷⁴ Just 6,782 persons were admitted to the bar in the United States in 1947, and while that number doubled to over 13,000 during the following three years, the number of newly admitted attorneys fell below 10,000 by 1954.³⁷⁵ Finally, fifteen jurisdictions prohibited law office study to prepare for admission to the bar by 1947.³⁷⁶

IV. FROM A GOLDEN AGE TO AN AGE OF ANXIETY

We locate this golden age in the period of the late 1950s and the early 1960s—let us call it “circa 1960”—when big firms were prosperous, stable, and untroubled.

MARC GALANTER & THOMAS PALAY,
TOURNAMENT OF LAWYERS³⁷⁷

372. *Summary of Proceedings of the Second Meeting of the House of Delegates*, 62 A.B.A. REP. 1026, 1030 (1937).

373. *House of Delegates Proceedings*, 70 A.B.A. REP. 119, 119 (1945). As late as August 1942, the Committee warned that “unless a solution can be found for the economic problems of the bar, the leadership which this country should have will be seriously imperiled.” *Report of the Special Committee on the Economic Condition of the Bar*, 67 A.B.A. REP. 248, 250 (1942).

374. RICHARD L. ABEL, *AMERICAN LAWYERS* 278 tbl.21 (1989); SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS'N, *LAW SCHOOLS AND BAR ADMISSION REQUIREMENTS IN THE UNITED STATES* 26 (1948).

375. RICHARD L. ABEL, *AMERICAN LAWYERS* 278 tbl.21 (1989). The post-World War II high was 13,641 in 1950. *Id.*

376. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 217 n.9 (1983).

377. MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS* 20 (1991). Galanter and Palay were well aware of the shortcomings of the legal profession in 1960, including the paucity of minority and female lawyers. *Id.* at 25; see also MARY ANN GLENDON, *A NATION UNDER LAWYERS* 22 (1st paperback ed. 1996) (1994) (quoting Galanter and Palay and agreeing with their “golden age” conclusion); RICHARD A. POSNER, *OVERCOMING LAW* 60 (1995) (“With the benefit of hindsight, 1960 can be identified as the highwater mark of the American legal profession’s cartel, and hence of jurisprudence as a guild ideology.”).

A. *Introduction*

Not only were big law firms untroubled in 1960, the ordinary American lawyer prospered despite complaints from lawyers then that doctors earned substantially more money than lawyers.³⁷⁸ Lawyers were confident that they had a leading role to play in American society, and others told them so.³⁷⁹ The 1958 effort creating Law Day was one example of this confidence, as was the ABA's effort to create World Peace through Law.³⁸⁰ Lawyers dismissed critics of the legal profession as either misguided or envious, and reacted with surprise at expressions of mistrust of the profession by a minority of the public. The profession's sense of role and status was comfortable and comforting.

"Between 1961, when [Ingrid] Beall became Baker, McKenzie's first woman partner, and 1988, when the door of the inner sanctum was slammed in her face, an entire network of professional understandings had fallen apart."³⁸¹ One of the things that fell apart in the American legal profession was the role of codes of ethics, both internally and externally. Internally, the understanding of an ethics code shifted from an expression of ethical norms based on a moral tradition to one of regulatory

378. See, e.g., John C. Satterfield, *The American Bar Association Takes a Look at the Economic Status of the Legal Profession*, 44 A.B.A. J. 156, 156 (1958) ("The alarming failure of the legal profession to maintain an economic status comparable to that of other professions . . . has caused President Charles S. Rhyne to appoint a Special Committee to study the economic condition of the Bar in the United States and the business phases of the practice of law . . .").

379. See TALCOTT PARSONS, *A Sociologist Looks at the Legal Profession*, in *ESSAYS IN SOCIOLOGICAL THEORY* 371 (3d ed. 1963) (reprinting a paper given at the University of Chicago Law School symposium on December 4, 1952). Parsons's essay was a largely favorable assessment of the profession. *Id.* at 371–72.

380. The first Law Day was May 1, 1958, pursuant to a Presidential Proclamation dated February 3, 1958, by Dwight D. Eisenhower at the behest of ABA President Charles S. Rhyne. Jason Krause, *Charlie Rhyne's Big Idea*, A.B.A. J., May 2008, at 65; *The President's Proclamation*, 44 A.B.A. J. 343, 343 (1958). Law Day became law in 1961. Pub. L. No. 87-20, 75 Stat. 43 (1961) (codified as amended at 36 U.S.C. § 113 (1998)). See generally Charles S. Rhyne, *World Peace Through Law*, 83 A.B.A. REP. 624 (1958) (printing President Rhyne's annual address espousing world peace through law). The Special Committee on World Peace Through Law was created by ABA President Rhyne that year. Nearly two decades later, Rhyne was still involved in this movement, although it no longer was a special committee of the ABA. See generally Charles S. Rhyne, *World Peace Through Law: What's Happening*, 63 A.B.A. J. 224 (1977) (discussing the World Peace Through Law Center's activities).

381. MARY ANN GLENDON, *A NATION UNDER LAWYERS* 24 (1st paperback ed. 1996) (1994).

prohibitions inscribed in law or a law-like manner. Externally, the legal profession abandoned its effort to use a code of legal ethics as a bulwark against charges of mercenary and materialist behavior. This section assesses the changes in the legal profession from the late 1940s through the late 1980s that contributed to this transformation.

B. *The Golden Age*

Harold Hyman's magisterial biography of the Houston law firm of Vinson and Elkins (V&E)³⁸² offers insight into the history of promotion to partner path in the firm. Founding partner "Judge" James Elkins controlled who became a partner and when from V&E's creation in 1917 to the early 1960s. Although the partnership "track" averaged about ten years during Elkins's reign, some associates waited more than two decades for the call, and in the late 1950s Elkins halted the promotion of associates to partner.³⁸³ It was not until after a showdown with Elkins in 1965 that the senior partners managed to promote longstanding associates to partner. By 1970, V&E had moved to a seven-year partnership track.³⁸⁴ In other cities the length of time to partnership in large law firms was about ten years during the 1950s, but shortened to about seven years by the end of the 1960s.³⁸⁵ Robert Nelson's study of Chicago lawyers found that the partnership track lessened in the postwar era. He found the length of time to partner ranged from 7.5 years during the 1950s to 5.64 years in the late 1970s, although that shorter time frame may be a bit misleading. Chicago law firms, more so than most other large law firms, had adopted a dual partnership track by 1980, meaning lawyers spent two to three years as non-equity partners before obtaining an ownership percentage in the firm.³⁸⁶ Bar admissions reached 13,641 in 1950, but declined to 10,976 in 1953.

382. HAROLD M. HYMAN, CRAFTSMANSHIP AND CHARACTER: A HISTORY OF THE VINSON & ELKINS LAW FIRM OF HOUSTON, 1917-1997 (1998).

383. *Id.* at 290-93.

384. *See id.* at 346 (noting the long-awaited 1965 promotions of associates to partners, and indicating that the "'class of '63' became partners within seven years . . . by 1970").

385. MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS 27 (1991) (citing ERWIN SMIGEL, THE WALL STREET LAWYER 79 (1964)).

386. *See* ROBERT L. NELSON, PARTNERS WITH POWER 141 (1988) (noting both the length of time necessary to make partner in Chicago law firms and the dual partnership structure started in the 1980s).

It wasn't until 1964 that more persons were admitted to the bar.³⁸⁷ A study in 1965 indicated that billable hours for associates ranged from 1400 to 1600 and billable hours for partners ranged from 1200 to 1400.³⁸⁸

The golden age for lawyers ran for about a quarter-century, roughly from shortly after the end of World War II to the early 1970s.³⁸⁹ During this time, the demand for the work lawyers performed outstripped supply.³⁹⁰ In the 1940s, the demand for legal services increased 86%, while supply increased 12%.³⁹¹ In the 1950s, demand increased by 76% and supply by 35%.³⁹² Lawyer income rose.³⁹³ Economist B. Peter Pashigian, while noting the limitations of historical data, concluded that actual earnings of lawyers in the 1960s and early 1970s significantly exceeded his calculation for equilibrium earnings.³⁹⁴ There is some evidence that, as earnings rose, the number of hours billed by lawyers declined during the 1960s through the early 1970s.³⁹⁵

By the mid-1970s, however, a slowing economy and a rapidly increasing supply of lawyers reduced the surplus capital held by lawyers.³⁹⁶ Partner income stalled, with one survey indicating

387. RICHARD L. ABEL, *AMERICAN LAWYERS* 278–79 (1989) (indicating the number of bar admissions for 1931–1986 in table 21).

388. WILLIAM G. ROSS, *THE HONEST HOUR* 2–3 (1996).

389. See RICHARD L. ABEL, *AMERICAN LAWYERS* 160 (1989) (discussing the history of the economic status of American lawyers).

390. *Id.*

391. *Id.*

392. *Id.* B. Peter Pashigian suggests that the number of lawyers in the 1950s was “close to long-run equilibrium,” and that as a result, the real income of lawyers did not substantially exceed the equilibrium income during that time. B. Peter Pashigian, *The Number and Earnings of Lawyers: Some Recent Findings*, 1978 *AM. B. FOUND. RES. J.* 51, 73. Pashigian concluded that demand outstripped supply in the 1960s. See *id.* (comparing three independent tests for legal earning, depreciation rates and numbers of lawyers over time).

393. RICHARD L. ABEL, *AMERICAN LAWYERS* 160 (1989).

394. B. Peter Pashigian, *The Number and Earnings of Lawyers: Some Recent Findings*, 1978 *AM. B. FOUND. RES. J.* 51, 62–63, 67.

395. MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS* 56 (1991) (citing PAUL HOFFMAN, *LIONS IN THE STREET: THE INSIDE STORY OF THE GREAT WALL STREET FIRMS* 130–31 (1973)).

396. See Thomas D. Morgan, *Economic Reality Facing 21st Century Lawyers*, 69 *WASH. L. REV.* 625, 628 (1994) (updating Pashigian's data and suggesting excess supply of lawyers was not found until the late 1980s); see also Thomas D. Morgan, *Creating a Life As a Lawyer*, 38 *VAL. U. L. REV.* 37, 42 (2003) (estimating an excess supply of lawyers of 20%); Thomas D. Morgan, *Real World Pressures on Professionalism*, 23 *U. ARK. LITTLE ROCK L. REV.* 409, 410 (2001) (suggesting an oversupply of lawyers of 15% by 2000).

that, although large law firm partners earned 78% more in 1986 than in 1976, inflation rose 93% during that time.³⁹⁷ Partners also billed more hours just to maintain their income.³⁹⁸ A 1995 survey reported that associates in fifteen metropolitan areas billed an average of between 1649 and 1907 hours, and partners averaged from a range of 1513 hours in Indianapolis to 1847 hours in Houston.³⁹⁹ A 1985 survey of 150 medium and large law firms indicated that the length of time to partner increased by 20% since 1975.⁴⁰⁰ The percentage of lawyers in large law firms who made partner decreased beginning in the late 1970s, and by the end of the 1980s, further decreases in the percentage of associates becoming partner were predicted by large law firm partners.⁴⁰¹ As noted in a 1982 article in *Fortune* magazine, “margins in the legal business are under severe pressure.”⁴⁰²

The drafting of the Code of Professional Responsibility during the mid-1960s occurred at a time when the American legal profession remained largely unbuffeted by competitive pressures, allowing it to draft a code that included both what was prohibited, and a code expressing a “morality of aspiration.”⁴⁰³ The fatal flaw of the Code was that it framed as ethical issues several minor threats to the economics of the profession, making the Code vulnerable to an attack as protecting lawyers rather than the public. When the ABA’s Model Rules of Professional Conduct were drafted in the late 1970s, the competition for lawyer services had increased, leading to a legal ethics code premised on a very different structure. As noted by Professor Murray L. Schwartz

397. See MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS* 52–53 (1991) (citing Rita Henley Jensen, *Partners Work Harder to Stay Even*, *NAT’L L.J.*, Aug. 10, 1987, at 12) (according to research by Altman & Weil, partners billed 8% more hours than they billed ten years earlier).

398. *Id.* at 52.

399. WILLIAM G. ROSS, *THE HONEST HOUR* 3 (1996).

400. RICHARD L. ABEL, *AMERICAN LAWYERS* 195 (1989).

401. See MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS* 63–64 (1991) (noting lower promotion rates among Chicago law firms in the 1980s and predicting that fewer incoming associates were expected to make partner).

402. Peter W. Bernstein, *Profit Pressures on the Big Law Firms*, *FORTUNE*, Apr. 19, 1982, at 84, 86. Bernstein also noted that gross income at twelve large New York law firms “adjusted for inflation, grew by only 12% over the five years ending in 1980.” *Id.*

403. See LON L. FULLER, *THE MORALITY OF LAW* 3 (rev. ed. Yale Univ. Press 1969) (noting two moralities: “the morality of aspiration and the morality of duty”). See generally ROBERT S. SUMMERS, *LON L. FULLER* 10 (1984) (discussing Fuller’s approach to the two moralities).

when the Model Rules were still in draft phase, “As a whole, the Model Rules deliberately eschew references to ethics; they are at least in form more a set of detailed requirements for a regulated industry than a set of ethical principles.”⁴⁰⁴ The drafting of the Code, then, was a lost opportunity for the profession; the golden age, like Camelot, was gone, and seen only in the mists of time.

C. *Surveying the Legal Profession*

In 1946, the ABA approved a *Survey of the Legal Profession*, a wide-ranging effort studying “the functioning of lawyers in a free society.”⁴⁰⁵ The *Survey* included approximately 175 reports concerning six major areas of inquiry: professional services by lawyers; public service by lawyers; judicial service; professional competence and integrity, which included legal education, admission to the bar and professional ethics; economics of the profession; and the organized bar.⁴⁰⁶ The reports on professional ethics were ten in number by September 1949.⁴⁰⁷ One *Survey* report on professional ethics, published in 1951 in the *Virginia Law Review*, evaluated responses to a questionnaire about the adherence to the Canons by lawyers.⁴⁰⁸ It concluded: “The very definite impression made upon the mind of one reading the replies to these questionnaires is that the Bar of the United States, with comparatively rare exceptions, maintains a strict observance of the ethical standards set forth in the Canons.”⁴⁰⁹ The author, a

404. Murray L. Schwartz, *The Death and Regeneration of Ethics*, 1980 AM. B. FOUND. RES. J. 953, 953 (commenting on the January 30, 1980 discussion draft of the Model Rules).

405. *Proceedings of the House of Delegates*, 71 A.B.A. REP. 310, 310 (1946). The initial *Survey* was approved by the ABA in 1944 and was limited to the “study of legal education and admissions to the bar.” *Proceedings of the House of Delegates*, 69 A.B.A. REP. 456, 456 (1944); see also Reginald Heber Smith, *Survey of the Legal Profession: Its Scope, Methods and Objectives*, 39 A.B.A. J. 548, 548 (1953) (recognizing the limitations on the scope of the initial survey). Although the ABA funded the *Survey* in part, the regular progress reports emphasized the independence of the Council from the ABA. Reginald Heber Smith, *Survey of the Legal Profession: Its Scope, Methods and Objectives*, 39 A.B.A. J. 548, 548 (1953).

406. See Reginald Heber Smith, *Survey of the Legal Profession: Its Scope, Methods and Objectives*, 39 A.B.A. J. 548, 549–50 (1953) (evaluating more than 150 reports).

407. *Id.* at 550.

408. Robert T. McCracken, *Report on Observance by the Bar of Stated Professional Standards*, 37 VA. L. REV. 399, 399 (1951).

409. *Id.* at 425. McCracken also noted, “[m]ost of the Canons here dealt with seem to be faithfully observed by an overwhelming majority of the lawyers of the United

practicing lawyer for over forty years, believed that the number of violations of the Canons was less than fifty or even twenty-five years earlier.⁴¹⁰ The *Survey* also fostered a 1952 book, *Conduct of Judges and Lawyers: A Study of Professional Ethics*, by Orie Phillips and Philbrick McCoy.⁴¹¹ Phillips and McCoy cautiously urged a re-examination of the “Canons to determine whether they adequately define for the benefit of the bar and the public alike the duties which both the lawyer and the judge owe to the commonwealth. Perhaps the time has come for a public reaffirmation of the standards of the profession with more adequate emphasis on their significance.”⁴¹²

Unrelated to the *Survey* was the publication in 1953 of Henry S. Drinker's book *Legal Ethics*.⁴¹³ Drinker was a longtime chairman of the ABA's Standing Committee on Professional Ethics and Grievances, and *Legal Ethics* was trumpeted as the first book on legal ethics since Sharswood's 1854 *A Compend of Lectures*.⁴¹⁴ *Legal Ethics* did not call for the restructuring of the Canons of Ethics. Although new problems in legal ethics might require amendments and supplements to the Canons, “the basic standards of professional conduct which [the Canons] embody have never

States.” *Id.* at 400. Chapter 5 of Phillips and McCoy's *Conduct of Judges and Lawyers* restates McCracken's conclusions. ORIE L. PHILLIPS & PHILBRICK MCCOY, CONDUCT OF JUDGES AND LAWYERS 59–84 (1952); *see also* ALBERT P. BLAUSTEIN & CHARLES O. PORTER, THE AMERICAN LAWYER 240–80 (1954) (reviewing the data and accepting the conclusions of McCracken, Phillips and McCoy).

410. Robert T. McCracken, *Report on Observance by the Bar of Stated Professional Standards*, 37 VA. L. REV. 399, 423 (1951) (“It is doubtful if [violations of the Canons] are as prevalent today as they were a half century, or even a quarter of a century, ago.”).

411. ORIE L. PHILLIPS & PHILBRICK MCCOY, CONDUCT OF JUDGES AND LAWYERS 59–84 (1952). A second book, Reginald Heber Smith's *Complaints Against Lawyers*, was to be published in revised form (first published in mimeograph form in 1949) by Little, Brown in 1953 according to a 1953 report of the *Survey*. I have been unable to find that work.

412. *Id.* at 20.

413. John W. Davis, *Foreword* to HENRY S. DRINKER, LEGAL ETHICS, at vii, vii–viii (1953). The book was published under the auspices of the William Nelson Cromwell Foundation. *Id.*

414. *See id.* at vii (noting that at the time, Judge Sharswood's published lectures were among the few available works on the subject of legal ethics). Davis ignored George Warvelle's *Legal Ethics*, Orrin Carter's *Ethics in the Legal Profession*, and casebooks on the subject by George Costigan, Jr., Eliot Cheatham, Frederic Hicks and Herschel Arant. Drinker was aware of these books. *See* HENRY S. DRINKER, LEGAL ETHICS, at ix (1953) (observing that the available books and treatises on the subject of legal ethics did not address important Canon amendments).

been materially relaxed or the essential provisions altered; nor need they be.”⁴¹⁵ Finally, a summary of the work of the *Survey* was published by the University of Chicago Press in 1954, titled *The American Lawyer*.⁴¹⁶ This summary echoed Phillips and McCoy, and like them, quoted Harlan Fiske Stone’s 1934 complaint that the Canons were “generalizations designed for an earlier era.”⁴¹⁷

In May 1956, a special committee of the American Bar Foundation was asked to study the Canons of Ethics.⁴¹⁸ The Foundation created this Special Committee at the behest of the ABA, and its chairman was Philbrick McCoy, the author of the 1952 *Survey* book suggesting a general revision of the Canons.⁴¹⁹ The final report of the Special Committee was issued on June 30, 1958.⁴²⁰ The report concluded that “the present Canons of Professional Ethics of the American Bar Association do not provide adequate standards of professional conduct for members of the Bar,”⁴²¹ and recommended a sweeping revision of the Canons.⁴²² The American Bar Foundation *Report* was not widely distributed. It was not reported in the *ABA Journal* during either 1958 or 1959, and was neither discussed nor mentioned in the annual *Report* of the American Bar Association for either of those years. The membership in the American Bar Foundation Committee was listed in the ABA’s annual *Report* in 1957; the Committee disappeared in the 1958 edition.⁴²³ It is unclear why

415. HENRY S. DRINKER, *LEGAL ETHICS* 3 (1953).

416. ALBERT P. BLAUSTEIN & CHARLES O. PORTER, *THE AMERICAN LAWYER* 251 (1954).

417. *Id.* (quoting Harlan F. Stone, *The Public Influence of the Bar*, 48 *HARV. L. REV.* 1, 10 (1934)).

418. Philbrick McCoy, *The Canons of Ethics: A Reappraisal by the Organized Bar*, 43 *A.B.A. J.* 38, 38 (1957). The American Bar Foundation Special Committee was initially charged in early 1955 to prepare a plan of study of the Canons. *Id.*

419. *Id.* (noting alterations in the legal profession in light of modern circumstances that suggested a need for Canon revision).

420. *REPORT OF THE SPECIAL COMMITTEE OF THE AMERICAN BAR FOUNDATION ON CANONS OF ETHICS*, at ix (June 30, 1958).

421. *Id.* at 96.

422. *See id.* at 97 (recommending six areas for revision of the Canons).

423. *See Other Groups and Organizations*, 83 *A.B.A. REP.* 96, 96–98 (1958) (listing all special committees of the American Bar Foundation, which does not include a committee on Canons of Ethics); *Other Groups and Organizations*, 82 *A.B.A. REP.* 90, 91 (1957) (listing members of the American Bar Foundation Special Committee on Canons of Ethics). The publication of the Special Committee’s *Report* in June 1958 is likely the

the Special Committee's *Report* was largely buried by the ABA. James Shepherd suggested in a private December 31, 1959 letter that nothing came of the Special Committee's *Report* because the project ran out of money and the Special Committee reached an impasse over Canon 35.⁴²⁴ As will be noted below, the proscription of the use of "intermediaries" (such as unions) to arrange legal services for its members found in Canon 35 continued to haunt the ABA during the drafting of the Code of Professional Responsibility during the 1960s. In addition to the Canon 35 problem, another reason for the disappearance of the American Bar Foundation's *Report* may be the release two weeks later of the *Report of the Joint Conference on Professional Responsibility*.⁴²⁵

D. *Joint Conference on Professional Responsibility*

The Joint Conference *Report*, released on July 14, 1958, and published in the December 1958 issue of the *ABA Journal*,⁴²⁶ is written in a tone wholly dissimilar to Drinker, Phillips and McCoy, and the American Bar Foundation Special Committee's *Report*. As noted by Professor Robert Lawry, the *Report*, while "inadequate in many ways," formed "the best single expression" of the "central moral tradition within which American lawyers ought to live and dwell."⁴²⁷ The Joint Conference *Report* mentions the Canons briefly at the beginning, only to inform the reader that a lawyer "must realize that a letter-bound observance of the Canons is not equivalent to the practice of professional responsibility."⁴²⁸

reason why the committee was disbanded.

424. Letter from Ja[me]s L. Shepherd, Jr., Chairman, Standing Comm. on Prof'l Ethics, to William P. Roberts (Dec. 31, 1959), in A. James Casner Papers, Box 3, Folder 8, Harvard Law School Library (on file with author).

425. Lon L. Fuller & John D. Randall, *Professional Responsibility: A Statement*, 11 S.C. L.Q. 306, 306 (1959) (reporting that the statement "was released on July 14, 1958"). The *Report* was first published in the December 1958 issue of the *ABA Journal*. See Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1159 (1958) (reporting on the Joint Conference on Professional Responsibility of the American Bar Association and the Association of American Law Schools).

426. Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958). It was also published as Lon L. Fuller & John D. Randall, *Professional Responsibility: A Statement*, 11 S.C. L.Q. 306 (1959).

427. Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 HOFSTRA L. REV. 311, 311 (1990).

428. Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint*

Professionalism requires that the lawyer “cannot rest content with the faithful discharge of duties assigned to him by others. His work must find its direction within a larger frame.”⁴²⁹ To practice law in the 1950s, given the increasing importance of the lawyer’s role in American society, a lawyer must understand not just the “established standards of professional conduct, but the reasons underlying these standards.”⁴³⁰ The Joint Conference *Report* then divided the lawyer’s role into three areas: (1) as advocate and counselor; (2) as designer of a framework giving direction and form to collaborative effort; and (3) as servant to the public.⁴³¹

Not only was the Joint Conference *Report* different in tone from other reports, its origins were seemingly quite modest: the Joint Conference was an undertaking suggested in early 1952 by the ABA’s Standing Committee on the Unauthorized Practice of the Law. John D. Randall, an Iowa lawyer and, since 1946, chairman of the Unauthorized Practice of the Law Committee, recommended the ABA’s House of Delegates approve the committee’s recommendation to form a joint conference with the Association of American Law Schools (AALS) on the topic of professional responsibility.⁴³² The Joint Conference was not related to the ABA’s ongoing *Survey of the Legal Profession* and was not connected to the later American Bar Foundation study of the Canons. It had no wide-ranging authority to consider the roles of the American lawyer and was portrayed as a minor effort by the ABA to lessen the perceived tension between the practicing bar and the law professorate. But its proponents were consummate ABA insiders. In addition to serving as chairman of the Unauthorized Practice Committee, Randall had served as the Iowa delegate to the ABA since 1948, and eventually served as ABA president in 1959–1960.⁴³³ The other powerful ABA insider was

Conference, 44 A.B.A. J. 1159, 1159 (1958).

429. *Id.*

430. *Id.*

431. *Id.* at 1160.

432. See *Proceedings of the House of Delegates*, 77 A.B.A. REP. 425, 437 (1952) (approving recommendations of the Standing Committee on Unauthorized Practice of the Law to form a joint conference on professional responsibility with the Association of American Law Schools); see also *Report of the Standing Committee on Unauthorized Practice of the Law*, 77 A.B.A. REP. 567, 567 (1952) (outlining the recommendations that were adopted by the House of Delegates at the mid-year meeting).

433. See *State Delegates*, 73 A.B.A. REP. 13, 13 (1948) (listing Randall as a state delegate from Iowa). Each state then had one ABA delegate. One interested in

Harvard Law School Professor A. James Casner, who joined the Unauthorized Practice Committee in 1949 and was a member of the Joint Conference.⁴³⁴ Randall served as co-chairman of the ABA half of the Joint Conference. Five members representing the AALS were appointed to the Joint Conference, joining the five ABA members. The first co-chairman was Joseph Rarick, who served for three years. In 1955, Lon L. Fuller, professor at Harvard Law School, replaced Rarick as co-chairman.⁴³⁵

The initial draft statement of the professional responsibilities of the lawyer was written in late September 1953 by Elliott Cheatham, a Columbia Law School professor known for his work on legal ethics.⁴³⁶ Fuller looked at Cheatham's draft and began anew.⁴³⁷ His "second revised draft," dated August 5, 1954, was an incomplete draft but similar in many ways to the finished product published in 1958.⁴³⁸ One important statement of the second revised draft that survived through the finished product was Fuller's explanation of the value of representing "unpopular causes."⁴³⁹ This draft was sent to the members of the Joint Conference shortly after the conclusion of the Senator Joseph

becoming president of the ABA began his campaign as a delegate, for the delegates determined who became president. Delegates served three-year terms, but they could serve more than one term.

434. See *Standing Committees of the Association*, 77 A.B.A. REP. 27, 41 (1952) (listing Casner as one of five members appointed by the ABA to the Joint Conference); *Standing Committees of the Association*, 74 A.B.A. REP. 27, 38 (1949) (listing Casner as member of the Standing Committee on the Unauthorized Practice of Law).

435. See *Other Groups and Organizations*, 80 A.B.A. REP. 90, 93 (1955) (listing Fuller as co-chairman and listing Rarick as a member of the Joint Conference). Rarick was a professor of Indian, property, and water law at the University of Oklahoma from 1953 to 1989. David L. Swank, *Preface* to 43 OKLA. L. REV., at x, x-xi (1990).

436. See Letter from Elliott E. Cheatham, Professor, Columbia Law Sch., to Lon L. Fuller, Professor, Harvard Law Sch. & Harry W. Jones, Professor, Columbia Law Sch. (Sept. 21, 1953), in Lon L. Fuller Papers, Box 2, Folder 8, Harvard Law School Library (on file with author) (submitting an incomplete draft of a Statement of Professional Responsibility to the Joint Conference). Cheatham was not a member of the Joint Conference, although his Columbia colleague Harry Jones was.

437. Letter from Elliott E. Cheatham, Professor, Columbia Law Sch., to Lon L. Fuller, Professor, Harvard Law Sch. & Harry W. Jones, Professor, Columbia Law Sch. (Sept. 21, 1953), in Lon L. Fuller Papers, Box 1, Folder 1, Harvard Law School Library (on file with author) (asking Fuller to review his draft and then "tear it up or re-write it").

438. Lon L. Fuller, *Professional Responsibility: A Statement* (Aug. 5, 1954), in Lon L. Fuller Papers, Box 1, Folder 1, Harvard Law School Library (on file with author) (second revised draft).

439. *Id.* at 16; Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1216 (1958).

McCarthy-led hearings investigating alleged protection of communists in the Army, hearings at which the protection by lawyers of the rights and reputations of witnesses and others subject to vicious and scurrilous attacks became publicly prominent.⁴⁴⁰ Fuller's second revised draft explained that, even when a cause was unpopular for a good reason, "[i]t is essential for a sound and wholesome development of public opinion that the disfavored cause have its full day in court, which includes, of necessity, representation by competent counsel."⁴⁴¹ Otherwise, "confidence in the fundamental processes of government is diminished."⁴⁴² Fuller additionally explained that zeal as a courtroom advocate on behalf of clients' interests was necessary because "partisan advocacy is essential to the integrity of the adjudicative process itself."⁴⁴³ It was "an indispensable part of a larger ordering of human affairs."⁴⁴⁴

On May 2, 1955, Fuller's proposed final draft was sent to the

440. See 2 WILLIAM MANCHESTER, *THE GLORY AND THE DREAM: A NARRATIVE HISTORY OF AMERICA, 1932-1972*, at 700-16, 868, 877 (1975) (offering popular history of the Army-McCarthy hearings). The Army's counsel, Joseph Welch of the Boston firm of Hale and Dorr, was shocked into reprimanding McCarthy after McCarthy publicly alleged that a young lawyer in Welch's firm might have ties to the Communist Party. *Id.* at 700-16. Welch concluded his statement, "Let us not assassinate this lad further, Senator. You have done enough. Have you no sense of decency, sir, at long last? Have you no sense of decency?" *Id.* at 877.

441. Lon L. Fuller, *Professional Responsibility: A Statement* (Aug. 5, 1954), in Lon L. Fuller Papers, Box 1, Folder 1, at 17-18, Harvard Law School Library (on file with author) (second revised draft). The language is identical to the published version. Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1216 (1958).

442. Lon L. Fuller, *Professional Responsibility: A Statement* (Aug. 5, 1954), in Lon L. Fuller Papers, Box 1, Folder 1, at 18, Harvard Law School Library (on file with author) (second revised draft); Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1216 (1958).

443. See Lon L. Fuller, *Professional Responsibility: A Statement* (Aug. 5, 1954), in Lon L. Fuller Papers, Box 1, Folder 1, at 4-5, Harvard Law School Library (on file with author) (second revised draft) (positing that a successful adjudication system requires interested parties). This language was rephrased in the published version as, "[i]n a very real sense it may be said that the integrity of the adjudicative process itself depends upon the participation of the advocate." Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1160 (1958).

444. Lon L. Fuller, *Professional Responsibility: A Statement* (Aug. 5, 1954), in Lon L. Fuller Papers, Box 1, Folder 1, at 6, Harvard Law School Library (on file with author) (second revised draft); see Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1161 (1958) (using identical language to that employed in the second revised draft).

members of the Joint Conference.⁴⁴⁵ Unlike Fuller's second revised draft, the proposed final draft mentioned the Canons of Ethics, including the language that a lawyer "must realize that a letter-bound observance of the Canons is not equivalent to the practice of professional responsibility."⁴⁴⁶ The demands of modern legal practice required the lawyer to understand "not merely the established standards of professional conduct, but the reasons that lie back of these standards."⁴⁴⁷ The proposed final draft then explained the reasons behind the obligations attendant to the profession of law.

With the exception of an expanded explanation of "The Lawyer's Role as Advocate in Open Court,"⁴⁴⁸ the proposed final draft of May 2, 1955 is nearly identical to the second proposed final draft of October 1, 1957, which became the published *Joint Conference Report* in 1958. The reason for the extensive delay in completing the work of the Joint Conference lay at the feet of Homer Crotty, a lawyer with the Los Angeles law firm of Gibson, Dunn & Crutcher, and the only dissenter to Fuller's proposed final draft.⁴⁴⁹ Crotty had both valid and odd suggestions on the issue of

445. Lon L. Fuller, *Professional Responsibility: A Statement* (May 2, 1955), in A. James Casner Papers, Box 37, Folder 5, at 1, Harvard Law School Library (on file with author) (proposed final draft).

446. *Id.*

447. *Id.* at 2; Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1159 (1958).

448. Compare Lon L. Fuller, *Professional Responsibility: A Statement* (May 2, 1955), in A. James Casner Papers, Box 37, Folder 5, at 3-5, Harvard Law School Library (on file with author) (proposed final draft) (outlining the limitations on the scope of a lawyer's function as an advocate in open court), with Lon L. Fuller, *Professional Responsibility: A Statement* (Oct. 1, 1957), in Lon L. Fuller Papers, Box 1, Folder 1, at 3-8, Harvard Law School Library (on file with author) (second proposed final draft) (setting forth an expansive interpretation of the role of the attorney as an advocate in the second proposed final draft of October 1, 1957, as compared to the proposed final draft of May 2, 1955). The only other significant difference between the two drafts is that Fuller added two paragraphs on the role of the lawyer as legislator to the second proposed final draft, absent from the proposed final draft. See Lon L. Fuller, *Professional Responsibility: A Statement* (Oct. 1, 1957), in Lon L. Fuller Papers, Box 1, Folder 1, at 23-24, Harvard Law School Library (on file with author) (second proposed final draft) (discussing special fiduciary obligations by which an attorney who is also a legislator is bound).

449. JANE WILSON, GIBSON, DUNN & CRUTCHER LAWYERS 26-28 (1990); see Letter from Homer Crotty to L.L. Fuller, Co-Chairman, Joint Conference on Prof'l Responsibility (May 20, 1955), in A. James Casner Papers, Box 37, Folder 9, Harvard Law School Library (on file with author) (dissenting from the proposed final draft in a ten page letter); see also Letter from Lon L. Fuller, Co-Chairman, Joint Conference on Prof'l Responsibility, to Maurice T. Van Hecke (Oct. 10, 1956), in Lon L. Fuller Papers, Box 8,

professional responsibility, which led to a two-year delay in obtaining an agreement of the Joint Conference.⁴⁵⁰

The *Report* suggested a re-orientation of the approach to issues of professional responsibility: Instead of endless debates on the particularities of the Canons, such as Canon 35, on the role of intermediaries, or labor unions hiring counsel for their members, more effort should be spent on understanding the varied and various roles played by the lawyer in the administrative regulatory state. The *Report* also drew attention to the relationship between the lawyer and society, argued through both reason and passion of the morality of the adversarial system, and, as noted above, reflected on the importance of defending an unpopular cause even when “unfavorable public opinion of the client’s cause is in fact justified.”⁴⁵¹ In discussing the importance of representing a client whose cause was “in fact unjustified,” Fuller noted that the English cab rank system was not available to remove the possible taint of association for an American lawyer. Thus, a lawyer’s decision to

Folder 7, Harvard Law School Library (on file with author) (“[The] draft I sent you represents about the fourth revision, and it was accepted by everyone except Homer Crotty.”). Crotty was orphaned as a teen and spent his years while attending the University of California as the “custodian” at the Chabot Observatory. See JANE WILSON, GIBSON, DUNN & CRUTCHER LAWYERS 426 (1990) (noting that Crotty personally marked out the word “janitor” in favor of the word “custodian” to describe his position). He spent a year at Harvard as a graduate law student before joining the firm in 1923. See *id.* at 425–28 (discussing Crotty’s background).

450. See Homer Crotty, *Proposed Objects for the Joint Conference on Professional Responsibility* (Jan. 28, 1953), in A. James Casner Papers, Box 37, Folder 1, at 4, Harvard Law School Library (on file with author) (urging better disciplinary measures and greater continuing legal education, as well as “eliminat[ing] bad moral risks” in part through fingerprinting law students). In Crotty’s May 20, 1955 letter to Lon Fuller, he noted that Fuller’s draft “gives the impression that in partisan activity ‘no holds are barred,’” to which Crotty objected. Letter from Homer Crotty to L.L. Fuller, Co-Chairman, Joint Conference on Prof’l Responsibility (May 20, 1955), in A. James Casner Papers, Box 37, Folder 9, Harvard Law School Library (on file with author). In the published *Report*, this paragraph is modestly edited. Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1161 (1958); Lon L. Fuller, *Professional Responsibility: A Statement* (May 2, 1955), in A. James Casner Papers, Box 37, Folder 5, at 6–7, Harvard Law School Library (on file with author) (proposed final draft).

451. See Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1216 (1958) (“The legal profession has, therefore, a clear moral obligation to see to it that those already handicapped do not suffer the cumulative disadvantage of being without proper legal representation, for it is obvious that adjudication can neither be effective nor fair where only one side is represented by counsel.”).

represent a client with an unpopular cause remained “a matter for individual conscience.”⁴⁵² But the legal profession as a whole possessed “a clear moral obligation with respect to this problem.”⁴⁵³

As noted by Professor John DiPippa, “we see Fuller’s concern for process and the morality embodied in it”⁴⁵⁴ throughout the *Report*. Fuller’s distinction between a morality of duty and a morality of aspiration, later made famous in his 1963 Storrs Lectures at Yale Law School,⁴⁵⁵ is also prominent in the *Report*. Shortly after the proposed final draft was sent to the other members of the Joint Conference, Fuller gave a speech to the American Institute of Electrical Engineers on *The Philosophy of Codes of Ethics*.⁴⁵⁶ Fuller noted that a code of ethics required both “an understanding of those general principles of social organization that must be observed in order that men may live in harmony” and “an understanding of the peculiar function which the profession in question performs in the total processes of society.”⁴⁵⁷ A necessary but not sufficient condition of a code of ethics was a “sense of mission”; it was just as important for a code of ethics to “set forth in detail those conditions—including social arrangements and standards of individual behavior—that must be respected if these goals are to be achieved.”⁴⁵⁸ In addition, a code

452. *Id.*

453. *Id.* at 1217.

454. John M.A. DiPippa, *Lon Fuller, the Model Code, and the Model Rules*, 37 S. TEX. L. REV. 303, 328 (1996).

455. See LON L. FULLER, *THE MORALITY OF LAW* 5 (rev. ed. Yale Univ. Press 1969) (“Where the morality of aspiration starts at the top of human achievement, the morality of duty starts at the bottom.”).

456. L.L. Fuller, *The Philosophy of Codes of Ethics*, 74 ELECTRICAL ENGINEERING 916, 916 (1955). The speech was given on June 27, 1955, about seven weeks after he completed the proposed final draft (May 2, 1955), and was published in the October 1955 issue of the journal *Electrical Engineering*. At this time Fuller was also working on his essay *The Forms and Limits of Adjudication*, which concerned the broad issue of social ordering. See generally Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (discussing “adjudication in the very broadest sense”). Although Fuller was working on *The Forms* at this time, it was only published posthumously. Fuller presented parts of *The Forms* in 1957. See ROBERT S. SUMMERS, LON L. FULLER 10 (1984) (“Fuller worked on drafts of his most important single essay dealing with the process of social ordering—‘The Forms and Limits of Adjudication.’”). Echoes of *The Forms* course throughout the 1955 proposed final draft and the 1957 second proposed final draft which became the 1958 *Report*.

457. L.L. Fuller, *The Philosophy of Codes of Ethics*, 74 ELECTRICAL ENGINEERING 916, 916 (1955).

458. *Id.* at 917.

had to avoid totalizing ethics, or face the banality of declaring a “mush of platitudes.”⁴⁵⁹

After drawing the attention of delegates to the *Report* at the 1958 annual meeting of the ABA, John Randall proposed that the House of Delegates approve the Joint Conference *Report* at the mid-year meeting of the ABA in February 1959, over Fuller’s objections.⁴⁶⁰ It did so.⁴⁶¹ The Joint Conference *Report* offered an alternate perspective on the structure of a code of ethics. It was the last word on professional responsibility until the ABA began to draft a code of professional responsibility in 1964.

E. *The Code of Professional Responsibility*

But the fact remains that legal ethics centers about a problem of how to secure a larger income for lawyers.

Felix S. Cohen, *Modern Ethics and the Law*⁴⁶²

In mid-1964 ABA President Lewis F. Powell appointed the Special Committee on the Evaluation of Ethical Standards (“Wright Committee”) to draft rules intended to replace the Canons.⁴⁶³ The reasons for the call remain elusive. One reason

459. *See id.* (“A code that attempts to take the whole of right and wrong for its province breaks down inevitably into a mush of platitudes.”).

460. *See* Letter from Lon L. Fuller, Co-Chairman, Joint Conference on Prof’l Responsibility, to John D. Randall, Co-Chairman, Joint Conference on Prof’l Responsibility (July 10, 1958), in A. James Casner Papers, Box 37, Folder 10, Harvard Law School Library (on file with author) (objecting to the ABA’s adoption of the *Report*); Letter from Lon L. Fuller, Co-Chairman, Joint Conference on Prof’l Responsibility, to A. James Casner, Member, Joint Conference on Prof’l Responsibility (Oct. 15, 1958), in A. James Casner Papers, Box 37, Folder 10, Harvard Law School Library (on file with author) (stating opposition to the ABA adoption of the *Report*).

461. *Proceedings of the House of Delegates*, 84 A.B.A. REP. 541, 542 (1959) (noting that Mr. Randall moved “[t]hat the House of Delegates approve the final draft of the report of the Joint Conference on Professional Responsibility” and that this report was adopted without debate). Randall became president-elect of the ABA in August 1958 and its president in August 1959.

462. FELIX S. COHEN, *Modern Ethics and the Law*, in THE LEGAL CONSCIENCE 17, 18 (Lucy Kramer Cohen ed., 1960).

463. *See Proceedings of the House of Delegates*, 89 A.B.A. REP. 365, 381–83 (1964) (noting appointment of the Special Committee on the Evaluation of Ethical Standards); *see also* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL 195 (1994) (noting Powell “called for comprehensive reform of legal ethics” in his incoming address on August 14, 1964). The Wright Committee’s initial charge was to report “on the adequacy and effectiveness of the present Canons of Professional Ethics.” *Report of the Board of*

may have been the drafting of amendments in 1962 to the Code of Trial Conduct of the American College of Trial Lawyers, of which Powell was a member and later its president.⁴⁶⁴ A second reason may have been the insular world of elite practitioners at the time. John Randall, the co-chairman of the Joint Conference with Lon Fuller, was a member of the committee that drafted amendments to the Code of Trial Conduct.⁴⁶⁵ Randall considered but did not act on a suggestion that he focus on ethics in his term as ABA president. Sherman Welpton,⁴⁶⁶ the chief draftsman of the original Code of Trial Conduct and the chairman of the committee proposing amendments to it, was a partner at Gibson, Dunn & Crutcher with Homer Crotty, who had been a member of the Joint Conference. A. James Casner was a colleague of Fuller's at

Governors, 89 A.B.A. REP. 414, 421 (1964). Powell initially declared, "There is certainly no thought of starting out to rewrite *de novo* the ethical standards of the legal profession." A study of Wall Street lawyers published that same year suggested that the increase in large firm lawyers would lead to the question of "whether the canons of ethics designed for a different day are adequate for the current and the future practice of the law." ERWIN O. SMIGEL, *THE WALL STREET LAWYER* 353 (1964). Smigel's book was written before Powell's president's address, but I have not found any evidence that Powell's call was influenced by Smigel's book.

464. The American College of Trial Lawyers adopted a Code of Trial Conduct in August 1956, and amendments to the Code were adopted in early 1963. See Sherman S. Welpton, Jr., *Genesis of the Code of Trial Conduct*, 58 A.B.A. J. 709, 709 (1972) (noting that the Code of Trial Conduct was adopted in 1956 and amendments "which explained and revised the original code" were adopted in 1963); see also Interview by Olavi Maru with Sherman S. Welpton, Jr., in L.A., Cal. (Nov. 3, 1976), in American Bar Foundation Program on Oral History 8 (on file with author) (noting that Lewis Powell became president of the ABA in 1964).

465. See Interview by Olavi Maru with Sherman S. Welpton, Jr., in L.A., Cal. (Nov. 3, 1976), in American Bar Foundation Program on Oral History 7 (on file with author) (acknowledging Randall's presence on the committee).

466. Welpton graduated from the University of Nebraska College of Law in 1931. See Interview by Olavi Maru with Sherman S. Welpton, Jr., in L.A., Cal. (Nov. 3, 1976), in American Bar Foundation Program on Oral History 1 (on file with author) (outlining Welpton's education and background). Before being named as a member of the Special Committee, Welpton had helped draft the initial Code of Trial Conduct for the American College of Trial Lawyers in the late 1950s. See *id.* at 3 ("I just moved ahead in connection with it and turned out drafts of various provisions and rules that I thought would be good for the conduct of trial lawyers. And in due course that code was adopted."); Sherman S. Welpton, Jr., *Genesis of the Code of Trial Conduct*, 58 A.B.A. J. 709, 709 (1972) (discussing his role in the drafting of the Code of Trial Conduct); see also Scarlet: For the Record (Feb. 7, 2002), <http://www.unl.edu/scarlet/v12n04/v12n04record.html> (online edition of University of Nebraska School of Law Scarlet alumni publication) (noting that Welpton helped draft the Code of Trial Conduct for the American College of Trial Lawyers).

Harvard Law School and the only person to serve on both the Joint Conference and the Wright Committee. In 1960, he was a member of the ABA Standing Committee on Professional Ethics.⁴⁶⁷ The chairman of that committee, James L. Shepherd, Jr., noted that the American Bar Foundation was then considering a revision of the Canons.⁴⁶⁸ The interconnectedness of many of the lawyers who played major roles in the development by the ABA of the rules of ethics may have made the issue one that was “in the air.” A third reason may have been, as noted by President Powell in his comments to the House of Delegates, “The recent events in Dallas, familiar to all of us, have stimulated a new and intense interest in the Canons, particularly those designed to prevent prejudicial publicity and to ensure a fair trial.”⁴⁶⁹ Finally, the decision of the Supreme Court in *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*,⁴⁷⁰ issued four months before Powell’s call, may have been the catalyst for Powell’s decision. The Brotherhood aided injured railroad workers and their families by recommending lawyers who would sue the railroad for damages. It did so through its department of legal counsel.⁴⁷¹ The Brotherhood was, in ABA parlance, an “intermediary,” and the ABA, through Canon 35, looked with trepidation at the possibility that an intermediary might influence the lawyer-client relationship. The Virginia state bar urged a state court to enjoin this practice as the unauthorized practice of law in Virginia. It did. The Supreme Court, in an opinion by Justice Black, held the injunction violated the First Amendment rights of

467. *Standing Committees of the Association*, 85 A.B.A. REP. 20, 30 (1960).

468. See Letter from Ja[me]s L. Shepherd, Jr., Chairman, ABA Standing Comm. on Prof'l Ethics, to William P. Roberts (Dec. 31, 1959), in A. James Casner Papers, Box 3, Folder 8, Harvard Law School Library (on file with author) (noting the American Bar Foundation “will possibly attempt a complete rewriting of the two sets of canons”).

469. *Proceedings of the House of Delegates*, 89 A.B.A. REP. 365, 381 (1964). The events in Dallas included the assassination in late November 1963 of President John F. Kennedy and the murder of his assassin Lee Harvey Oswald. Powell was somewhat fixated on the issue of prejudicial pretrial publicity. See Letter from Lewis F. Powell, President, Am. Bar Ass'n, to Edward L. Wright, Chairman, Special Comm. on Evaluation of Ethical Standards (Sept. 9, 1964), in A. James Casner Papers, Box 25, Folder 1, Harvard Law School Library (on file with author) (offering a “thinking out loud” letter suggesting the Committee assess the “fair trial-free press” issue).

470. *Bhd. of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1 (1964). The opinion was released on April 20, 1964. *Id.*

471. *Id.* at 2.

the Brotherhood.⁴⁷² It did not help Virginia's cause that it had been taken to task a year earlier by the Court for using its unauthorized practice of law statute and regulations barring members of the legal profession from soliciting legal business to attempt to restrict the litigation activities of the NAACP, part of its "massive resistance" against the civil rights movement.⁴⁷³ Powell, then a lawyer practicing in Richmond, would have been well aware of the Virginia state bar's actions and the response of the Supreme Court.

Even as the members of the Wright Committee, chaired by Arkansas lawyer Edward Wright, met to discuss how to approach their task, they worried about the Court's *Brotherhood* decision, none more so than A. James Casner. Casner was a former member of the ABA's Committee on the Unauthorized Practice of Law and was appointed in 1960 to the ABA's Standing Committee on Professional Ethics. He was a strong believer in a robust use of unauthorized practice statutes to protect the business of lawyers and was the prime mover behind ABA Ethics Opinion 297, issued on February 24, 1961 by the Standing Committee on Professional Ethics.⁴⁷⁴ Opinion 297 prohibited a lawyer-accountant from practicing both law and accountancy, on the ground that holding oneself out as qualified to practice both was an impermissible form of "self-touting." The ABA then dug a deeper hole when it issued Opinion 305 the next year, justifying Formal Opinion 297 but allowing a lawyer-accountant to perform all tasks related to accounting.⁴⁷⁵ For Casner, maintaining the divide between lawyers and accountants and lawyers and trust officers was important and needed to be reflected in the Code.⁴⁷⁶ Indeed, one

472. *Id.* at 8.

473. *NAACP v. Button*, 371 U.S. 415, 416–18 (1963); see LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 219 (2000) ("[I]t strains credulity to believe that in the Virginia of 'Massive Resistance' the state was really concerned about protecting African-American litigants from the overbearing NAACP.").

474. ABA Comm. on Prof'l Ethics and Prof'l Responsibility, Formal Op. 297 (1961).

475. See ABA Comm. on Prof'l Ethics and Prof'l Responsibility, Formal Op. 305 (1962) ("[Opinion 297] was not intended to preclude certified public accountants who are also lawyers but are holding themselves out only as accountants from engaging in activities permitted under the Statement of Principles.").

476. See *Meeting of Special Committee on Evaluation of Ethical Standards, American Bar Association* (Dec. 3–4, 1964), in A. James Casner Papers, Box 102, at 5, Harvard Law School Library (on file with author) (reporting in a transcript letter of A. James Casner to John F. Sutton, Jr. of November 29, 1965).

of the nine axiomatic principles of the completed Code, Canon 3, was “[a] Lawyer Should Assist in Preventing the Unauthorized Practice of Law.” To his credit, Casner was also a prime mover to frame a code of ethics in a positive fashion, away from the “thou-shalt-not” character of the Canons.⁴⁷⁷

Members of the twelve-man Wright Committee agreed at their organizational meeting on October 15, 1964 to present their ideas to revise the Canons. Glenn Coulter, Sherman Welpton, and A. James Casner all presented lengthy detailed proposals in November 1964.⁴⁷⁸ Casner’s particular approach was to restructure the Canons by dividing them in ten parts, from forty-seven Canons of Ethics. By October 1965, the “second draft” of Reporter John F. Sutton, Jr. contained twelve Canons,⁴⁷⁹ which were subsequently whittled to ten. At that time, Edward Wright, the chairman of the Wright Committee, concluded:

I simply was not going to be a party to the remarks that could be made by critics of the Code that the Twelve Apostles came out with the Ten Commandments. So I said, if we can without sacrificing substance, let’s cut this down to nine or expand it back up to 11. We compressed it to nine.⁴⁸⁰

477. See Memorandum Regarding Work of Special Committee on Evaluation of Ethical Standards (Nov. 16, 1964), in A. James Casner Papers, Box 25, Folder 1, at 3–4, Harvard Law School Library (on file with author) (“The present Canons produce a heavy negative effect. Thou shall not do this and thou shall not do that.”). Casner went on to argue: “Is not there a need in the standards of conduct set up for members of the legal profession of a more positive responsibility to reach out and act in an affirmative manner with respect to matters of general public interest and concern?” *Id.*

478. *Id.* at 2–5; see also Interview by Olavi Maru with John Floyd Sutton, Jr., in Houston, Tex. (Dec. 20, 1976), in American Bar Foundation Program on Oral History 3 (on file with author) (noting that after Wright Committee members sent in their suggestions they realized they needed “professional help,” at which point he became involved). The members of the Special Committee were also inundated with letters from interested practitioners. *Id.*

479. See Interview by Olavi Maru with John Floyd Sutton, Jr., in Houston, Tex. (Dec. 20, 1976), in American Bar Foundation Program on Oral History 5 (on file with author) (“The second form I prepared, which was the one I preferred, began with the short canons—at that time I had 12 in number—followed by what is now labeled the ethical considerations.”).

480. Interview by Olavi Maru with Edward L. Wright, in Little Rock, Ark. (Oct. 28, 1976), in American Bar Foundation Program on Oral History 8 (on file with author); see also Interview by Olavi Maru with Sherman S. Welpton, Jr., in L.A., Cal. (Nov. 3, 1976), in American Bar Foundation Program on Oral History 13 (on file with author) (noting the Special Committee decided in late 1968 that ten Canons seemed too much like the Ten Commandments and so combined two Canons to make nine).

Those Canons served as the basis for the Code. They would eventually be joined by the aspirational Ethical Considerations and the mandatory Disciplinary Rules, creating a three-tiered structure of professional ethics.

The proposals by members of the Wright Committee were made before the appointment of University of Texas Law School Professor John F. Sutton, Jr., in early 1965.⁴⁸¹ Their enthusiasms were tempered after a letter was sent by Geoffrey Hazard,⁴⁸² then executive director of the American Bar Foundation, to Wright indicating that the Special Committee's "role vis-a-vis the Reporter is to provide commentary and guide lines for his research effort which in turn will be used to illuminate the Committee's deliberations."⁴⁸³ After that, Sutton presented drafts, which the Special Committee then discussed and amended in great detail.

Working, at the behest of Wright, largely out of sight,⁴⁸⁴ the Wright Committee first presented a tentative draft in October 1968 to a select group of 550 lawyers, and a preliminary draft on January 15, 1969 to 20,000 lawyers.⁴⁸⁵ After receiving "hundreds" of comments, a final draft, altered in some respects from the preliminary draft, was presented on July 1, 1969. The ABA

481. See Letter from Edward L. Wright, Chairman, Special Comm. on Evaluation of Ethical Standards, to All Committee Members (Jan. 5, 1965), in A. James Casner Papers, Box 25, Folder 2, Harvard Law School Library (on file with author) (identifying Professor John F. Sutton, Jr. as the reporter for the committee).

482. Hazard was also at this time a professor of law at the University of Chicago. He is well known for his work in legal ethics, including his work as the reporter for the Kutak Commission, which replaced the Code of Professional Responsibility with the ABA's Model Rules of Professional Conduct.

483. Letter from Geoffrey C. Hazard, Jr., Executive Dir., Am. Bar Found., to Edward L. Wright, Chairman, Special Comm. on Evaluation of Ethical Standards (Feb. 26, 1965), in A. James Casner Papers, Box 25, Folder 3, at 2, Harvard Law School Library (on file with author).

484. *Accord* Interview by Olavi Maru with Sherman S. Welpton, Jr., in L.A., Cal. (Nov. 3, 1976), in American Bar Foundation Program on Oral History 16 (on file with author) (discussing Wright's refusal to release parts of the draft until the preliminary draft was complete); see Interview by Olavi Maru with Edward L. Wright, Chairman, Special Comm. on Evaluation of Ethical Standards, in Little Rock, Ark. (Oct. 28, 1976), in American Bar Foundation Program on Oral History 10 (on file with author) (explaining the reason Wright convinced the committee to delay the distribution of parts of the draft until the preliminary draft was complete).

485. *Report of the Special Committee on Evaluation of Ethical Standards*, 94 A.B.A. REP. 728, 728 (1969); see also Judith L. Maute, *Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 TUL. L. REV. 91, 118 n.151 (2002) (listing the different drafts worked on by the members of the Wright Committee).

adopted the proposed Code of Professional Responsibility without amendment at its meeting in 1969, supplanting the Canons.⁴⁸⁶

The Code of Professional Responsibility was deeply influenced by the Joint Conference *Report*. It cited the Joint Conference *Report* twenty times. Echoing the Joint Conference *Report*, the Code's preamble stated, "The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor."⁴⁸⁷ The Code was divided into three parts in the following order: "axiomatic" Canons, ethical considerations "aspirational in character," and disciplinary rules "mandatory in character."⁴⁸⁸ Including in the Code both aspirational and mandatory elements embodied Fuller's understanding of the dual understanding of the morality of duty and the morality of aspiration.⁴⁸⁹ Avoidance of a stress upon "peremptory rules" as

486. See *Report of the Special Committee on Evaluation of Ethical Standards*, 94 A.B.A. REP. 728, 728 (1969) (recommending the proposed Code of Professional Responsibility be adopted by the House of Delegates); see also *Proceedings of the 1969 Annual Meeting of the House of Delegates*, 94 A.B.A. REP. 378, 389-92 (1969) (approving adoption of the Code).

487. *Report of the Special Committee on Evaluation of Ethical Standards, Preamble to Code of Professional Responsibility*, 94 A.B.A. REP. 729, 731 (1969); see also Letter from John F. Sutton, Jr., Reporter, Am. Bar Found., to Wright Committee Members (Oct. 14, 1965), in A. James Casner Papers, Box 25, Folder 5, at 2, Harvard Law School Library (on file with author) (commending the members of the Joint Conference *Report*).

488. See *Report of the Special Committee on Evaluation of Ethical Standards, Preamble to Code of Professional Responsibility*, 94 A.B.A. REP. 729, 731-32 (1969) (explaining the division of the code into three parts). After the black-letter disciplinary rules were footnotes offering support for the propositions in the ethical considerations and disciplinary rules.

489. See Interview by Olavi Maru with John Floyd Sutton, Jr., Reporter, Am. Bar Found., in Houston, Tex. (Dec. 20, 1976), in American Bar Foundation Program on Oral History 4 (on file with author) (describing the tripartite format communicated to the Wright Committee shortly after appointment and not mentioning Fuller); see also John M.A. DiPippa, *Lon Fuller, the Model Code, and the Model Rules*, 37 S. TEX. L. REV. 303, 333 (1996) (stating that the law needed both aspirational ideals and disciplinary minimums). It is unclear but unlikely that Fuller played any direct role in the Code. He was not a member of the Wright Committee, although his Harvard Law School colleague Casner was. David Warrington, Director of Special Collections at Harvard Law School, informed me that Fuller's office, on the ground floor, and Casner's office, on the second floor, were directly above and below one another and immediately adjacent to a stairwell. See E-mail from David Warrington, Dir. of Special Collections, Harvard Law Sch., to Michael S. Ariens, Professor of Law, St. Mary's Univ. Sch. of Law (May 30, 2008, 10:37 AM) (on file with author) (stating that Casner's office was directly above Fuller's). Thus, private conversations between the two could have taken place on a regular basis. *Id.* No correspondence between the two on the Code exists in either's papers, and I found no evidence in their papers through other letters or materials that they discussed the

“the truly ethical level” in favor of placing first the “indicative principles” was urged by Reporter John F. Sutton, Jr. when he sent the members the second draft.⁴⁹⁰ However, the committee voted in 1967 to eliminate the “Ethical Considerations” from the Code of Professional Responsibility, but agreed to allow Sutton to continue to work on “Ethical Considerations” to be printed as a separate document.⁴⁹¹ It was this draft of the Code that was sent to approximately 550 lawyers in October 1968, along with a separate document called “Ethical Considerations Underlying the Code of Professional Responsibility.” The response from those lawyers was that “it was awkward to have the two parts separated,” and the “Ethical Considerations” were returned to the Code by a unanimous vote of the Wright Committee by the end of the year.⁴⁹² The specific idea for including the “Ethical Considerations” as part of the Code may have been Sherman Welpton’s.⁴⁹³

proposed Code at any time. Professor William Simon suggests that Fuller created the categorical restrictions of the Code. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1091 n.23 (1988). This is highly unlikely based on my review of the Fuller Papers, the Casner Papers, and the American Bar Foundation oral history interviews of members of the Special Committee, including Wright, Casner, Welpton and Gambrell.

490. Letter from John F. Sutton, Jr., Reporter, Am. Bar Found., to Wright Committee Members (Oct. 14, 1965), in A. James Casner Papers, Box 25, Folder 5, at 2, Harvard Law School Library (on file with author); see also Interview by Olavi Maru with John Floyd Sutton, Jr., Reporter, Am. Bar Found., in Houston, Tex. (Dec. 20, 1976), in American Bar Foundation Program on Oral History 4 (on file with author) (noting the tripartite format was suggested by him at the first meeting with the Wright Committee in early 1965).

491. See Interview by Olavi Maru with John Floyd Sutton, Jr., Reporter, Am. Bar Found., in Houston, Tex. (Dec. 20, 1976), in American Bar Foundation Program on Oral History 13 (explaining that the committee voted against including “Ethical Considerations” but allowed Sutton to continue working on them in a separate document).

492. *Id.* at 14.

493. See Interview by Olavi Maru with Sherman S. Welpton, Jr., Special Comm. on Evaluation of Ethical Standards, in L.A., Cal. (Nov. 3, 1976), in American Bar Foundation Program on Oral History 13–14 (on file with author) (“I recall that Ed Wright and John Sutton were all in favor, initially, of putting in the ethical considerations over into a separate document I was very much in favor of putting the whole thing into one composite picture because I thought if you took the ethical considerations away and just had the disciplinary rules alone it just wouldn’t be a good format at all.”); cf. Interview by Olavi Maru with John Floyd Sutton, Jr., Reporter, Am. Bar Found., in Houston, Tex. (Dec. 20, 1976), in American Bar Foundation Program on Oral History 4 (on file with author) (“My third point was that the Code should not be reduced to a mere set of criminal rules, but it should contain ethical guidance for the lawyer Those statements

In justifying placing first the ten or twelve indicative principles of ethics, Sutton quoted federal Judge Charles Breitel that “[i]n short, as happens so often in every area of the law, if one probes a problem deeply enough it becomes one in jurisprudence”⁴⁹⁴

The Joint Conference *Report* was heavily cited in Canon 7: “A Lawyer Should Represent a Client Zealously [w]ithin the Bounds of the Law.” Ethical Consideration 7-1 stated in part, “In our government of law, and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law.”⁴⁹⁵ The drafters then cited the Joint Conference *Report*, and particularly noted the safeguards for resolving any controversy in a “truly informed and dispassionate” manner would be unavailing if “the man with an unpopular cause is unable to find a competent lawyer courageous enough to represent him.”⁴⁹⁶

The Code made clear the connection between the rule of law and the actions of lawyers. As noted in the Joint Conference *Report*, a government of laws and not of men could not prosper without lawyers accepting, most importantly, the unpopular cause “where the unfavorable public opinion of the client’s cause is in fact justified.”⁴⁹⁷ As the *Report* noted, “For the lawyer the insidious dangers contained in the notion that ‘the end justifies the means’ is not a matter of abstract philosophic conviction, but of direct professional experience.”⁴⁹⁸ Canon 7 of the 1969 Code of Professional Responsibility also reflected an understanding of zealousness traceable to Timothy Walker’s 1839 address to his law students. The duty of zeal allowed a lawyer to advocate a client’s bad cause because “a lawyer is not accountable for the moral

ought to be completely separated from, and not be any part of, the enforceable penal provisions.”).

494. Letter from John F. Sutton, Jr., Reporter, Am. Bar Found., to Wright Committee Members (Oct. 14, 1965), in A. James Casner Papers, Box 25, Folder 5, at 3, Harvard Law School Library (on file with author).

495. *Report of the Special Committee on Evaluation of Ethical Standards*, 94 A.B.A. REP. 729, 774 (1969) (discussing the value of representing clients zealously within the bounds of the law in Ethical Consideration 7-1 of the proposed Code of Professional Responsibility).

496. *Id.* at 774 n.5 (quoting *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1216 (1959)).

497. See Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1216 (1959) (stating that it is essential that lawyers represent clients with unfavorable causes).

498. *Id.*

character of the cause he prosecutes, but only for the manner in which he conducts it.”⁴⁹⁹ That view was adopted successively by Sharswood and, following Sharswood, in Canon 10 of the 1887 Code of Ethics of the Alabama State Bar Association and thence to Canon 15 of the ABA’s 1908 Canons of Ethics.

The Code of Professional Responsibility was adopted rapidly and nearly universally by states and state bar associations. By 1972, forty-three states and the District of Columbia had adopted all or most of the Code as law. In four other states, the bar association of that state had adopted the Code as applicable to its members; only three states had not adopted it.⁵⁰⁰ Just five years later, ABA President William B. Spann, Jr. created a special commission to assess “all facets of legal ethics.”⁵⁰¹ By 1979, even Wright Committee Reporter John Sutton, noting “[t]he adoption process [of the Code] was essentially a political one,”⁵⁰² urged “a substantial review and revision of the Code”⁵⁰³ What happened?

Sutton noted the Code’s inadequacy stemmed from the “reluctance of lawyers to depart from old, familiar standards.”⁵⁰⁴ The Court’s decision in *Brotherhood* was just the first of many perceived threats to the economics of the profession during the 1960s, and despite the growing influence and affluence of lawyers during this time, the Code was used in part to protect the profession’s economic interests. It wasn’t simply reiterating the ban on advertising found in the Canons of Ethics that was a missed opportunity. The preliminary draft of the Code attempted “to recognize the existence of and to regulate group legal services,” but the objections of lawyers commenting on the draft led the Special Committee to make “a lateral pass of the problem to the

499. See Timothy Walker, *Ways and Means of Professional Success: Being the Substance of a Valedictory Address to the Graduates of the Law Class, in the Cincinnati College*, 1 W. L.J. 542, 547 (1844) (stating that a lawyer should zealously represent clients regardless of the moral character of the clients’ causes).

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

501. Ted Schneyer, *Professionalism As Politics: The Making of Modern Legal Ethics Code*, 14 LAW & SOC. INQUIRY 677, 677 (1989) (quoting William B. Spann, Jr., *The Legal Profession Needs a New Code of Ethics*, B. LEADER, Nov.–Dec. 1977, at 2, 3).

502. John F. Sutton, Jr., *How Vulnerable Is the Code of Professional Responsibility?*, 57 N.C. L. REV. 497, 497 (1979).

503. *Id.* at 500.

504. *Id.* at 497.

United States Supreme Court.”⁵⁰⁵ Canon 2 stated the principle that “A Lawyer Should Assist the Legal Profession [in] Fulfilling Its Duty to Make Legal Counsel Available.” But, as Judith Maute noted, “In ironic contrast to Canon 2’s titular focus on access to counsel, most of its disciplinary rules restricted permissible communications between lawyers and their prospective clients and group legal services.”⁵⁰⁶ This disjunction was known and understood by Sutton⁵⁰⁷ and other members of the Wright Committee, but the final draft capitulated to the perceived self-interest of the bar. Even as the Code was widely adopted, its shortcomings became more evident. Joined by a lessening of authority accorded lawyers between 1968 and 1975,⁵⁰⁸ not only did the criticism of the Code increase, so too did economic and social pressure on the profession.

One event may symbolize the beginning of the end of the golden age. On Law Day 1969, as the Wright Committee put its final touches on a Code that was unwilling to “depart from old, familiar standards,” a group of “185 young lawyers picketed outside a New York criminal court demanding reforms in the court system.”⁵⁰⁹ To picket on Law Day was a statement of a belief in the power of the rule of law. The 185 young New York lawyers believed their actions could aid in changing the system of administration of justice, a belief in what was possible that would dissipate within a

505. John F. Sutton, Jr., *The American Bar Association Code of Professional Responsibility: An Introduction*, 48 TEX. L. REV. 255, 262 (1970); see also R.W. Nahstoll, *Limitations on Group Legal Services Arrangements Under the Code of Professional Responsibility*, DR 2-103(D)(5): *Stale Wine in New Bottles*, 48 TEX. L. REV. 334, 334 (1970) (noting the flaws in the new Code of Professional Responsibility with regard to the regulation of group legal services). The subtitle indicates the author’s perception of the Code’s regressive position on group legal services. R.W. Nahstoll, *Limitations on Group Legal Services Arrangements Under the Code of Professional Responsibility*, DR 2-103(D)(5): *Stale Wine in New Bottles*, 48 TEX. L. REV. 334, 334 (1970).

506. Judith L. Maute, *Changing Conceptions of Lawyers’ Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 TUL. L. REV. 91, 123–24 (2002).

507. See Interview by Olavi Maru with John Floyd Sutton, Jr., Reporter, Am. Bar Found., in Houston, Tex. (Dec. 20, 1976), in American Bar Foundation Program on Oral History 7 (on file with author) (“We did the worst job in the Code on Canon 2 I think Canon 2 is more flawed than all the rest of the Code put together.”).

508. See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA*, at xii (paper ed. Oxford Univ. Press 1977) (1976) (noting the “legitimate authority [that] was stripped from one institution after another,” including courts and the law).

509. Donald T. Weckstein, *Maintaining the Integrity and Competence of the Legal Profession*, 48 TEX. L. REV. 267, 267 (1970).

handful of years. The call to the legal profession by some of its members to reject complacency and look to improve the system of justice was an unrequited cry of the heart.

F. *Anxiety and the Model Rules*

A legal historian writing in 1975 of an earlier era called the period 1968–1974 “terrible years” and a “coming apart” of legitimate authority in American institutions, including law and the legal profession.⁵¹⁰ The first of the Watergate burglars was tried in early 1973, and for the rest of that year and through the first half of 1974, the public was treated to the spectacle of lawyers attempting to defend their conduct in a wholly unappealing fashion.⁵¹¹ The Department of Justice filed an antitrust suit against the ABA over several provisions in the Code.⁵¹² In 1973, ABA-approved law schools had, for the first time, filled all their seats for incoming students.⁵¹³ That merely intensified the fear that the legal profession was again becoming overcrowded. In early 1972, the ABA created a Task Force on Professional Utilization as a result of concerns over “the increase in the number of new entrants into the profession.”⁵¹⁴ In a special report on education, *Business Week* claimed that “the outlook for lawyers is grim,” and, noting a Labor Department forecast, predicted an

510. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA*, at xii (paper ed. Oxford Univ. Press 1977) (1976). These statements are taken from the preface written in 1975. *Id.* *Coming Apart* was the title of an instant history of the 1960s by William L. O’Neill. WILLIAM L. O’NEILL, *COMING APART: AN INFORMAL HISTORY OF AMERICA IN THE 1960S* (paper ed. Quadrangle Books 1971).

511. 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 also JETHRO K. LIEBERMAN, *CRISIS AT THE BAR* 35 (1978) (“More than twenty-five lawyers were formally named as defendants or co-conspirators in Watergate and related criminal proceedings.”).

512. See *Justice Department and Other Views on Prepaid Legal Services Plans Get an Airing Before the Tunney Subcommittee*, 60 A.B.A. J. 791, 792–93 (1974) (discussing the premise that provisions of the Code could be held to violate antitrust laws); *Justice Department Continues Its Contentions That the Houston Amendments Raise Serious Antitrust Problems*, 60 A.B.A. J. 1410, 1410–14 (1974) (discussing the premise that provisions of the Code could be held to violate antitrust laws).

513. James P. White, *Is That Burgeoning Law School Enrollment Ending?*, 61 A.B.A. J. 202, 202 (1975).

514. See *Report of the Task Force on Professional Utilization*, 97 A.B.A. REP. 818, 819 (1972) (quoting the ABA Board of Governors charge to the Task Force).

oversupply of 200,000 lawyers by 1985.⁵¹⁵ The Department of Labor predicted that there would be about 14,500 jobs awaiting the additional 30,000 lawyers graduating in 1974.⁵¹⁶ The Task Force reiterated this prediction and noted the fact that the increase in the number of lawyers between 1966 and 1970 was 12%, while the increase in population was only 3.2%.⁵¹⁷ Although the Task Force opposed any “attempt to arbitrarily limit or restrict the number of individuals permitted to enter the profession,” it suggested that “the expansion of existing law school capacities and the creation of new law schools should be undertaken cautiously.”⁵¹⁸ In 1975, minimum fee schedules were held unconstitutional by the Supreme Court.⁵¹⁹ The Department of Justice shortly thereafter filed an antitrust complaint against the ABA concerning its ban on advertising,⁵²⁰ and in late June 1977, the Supreme Court held that a ban on all lawyer advertising was a violation of the Free Speech Clause.⁵²¹ In December 1977, the Federal Trade Commission announced an investigation into the legal profession.⁵²² One critic writing in 1978 noted, “Since 1973, American lawyers have taken an awful beating.”⁵²³ In economic terms, Richard Posner noted, “[T]he price of legal services fell (in real, that is, inflation-adjusted, terms), rather than . . . rose[] between 1970 and 1985.”⁵²⁴

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

516. See Norman Dorsen & Stephen Gillers, *We Need More Lawyers!*, 2 JURIS DR. 7, 7 (1972) (noting the projection that in 1974 the number of first-year students was twice as high as the number of jobs that would be available to them upon graduation); see also *Special Report, The Job Gap for College Graduates in the '70s*, BUS. WK., Sept. 23, 1972, at 48, 51 (noting that in 1974 there were 10,000 more new lawyers than jobs available for them); *Report of the Task Force on Professional Utilization*, 97 A.B.A. REP. 818, 835 (1972) (quoting a comment on the Department of Labor estimate).

517. *Report of the Task Force on Professional Utilization*, 97 A.B.A. REP. 818, 826 (1972).

518. *Id.* at 835.

519. See *Goldfarb v. Va. State Bar*, 421 U.S. 773, 784 (1975) (striking county bar association schedules on Commerce Clause grounds).

520. See Lawrence Walsh, *The Annual Report of the President of the American Bar Association*, 62 A.B.A. J. 1119, 1120 (1976) (noting the filing of antitrust case by the Department of Justice).

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

522. See *F.T.C. Goes Public on Lawyer Probe*, 64 A.B.A. J. 959, 959 (1978) (discussing the Federal Trade Commission's investigation of lawyers).

523. JETHRO K. LIEBERMAN, *CRISIS AT THE BAR* 35 (1978).

524. RICHARD A. POSNER, *OVERCOMING LAW* 67 (1995).

Criticism of the Code of Professional Responsibility came from several political perspectives. On the left, such criticism was usually leavened with some praise for the Code. Jerold Auerbach's critical history of the American legal profession, including the ABA, noted that the Code "tried to balance the economic self-interest of the bar against the undisputed existence of a vast neglected public for whom legal services were unavailable,"⁵²⁵ but that balance ended up favoring the bar's economic interests. Auerbach concluded, "Like the Canons it replaced, [the Code] concentrated its energies upon the preservation of a professional monopoly, not the provision of legal services."⁵²⁶ In a book edited by Ralph Nader and Mark Green, one contributor concluded that the Code was a "monument to the profession's imagined self-interest."⁵²⁷ Jethro Lieberman concluded in 1978 that the change from the Canons to the Code "was more of form than of substance," and urged the drafting of a new code of ethics by an independent body rather than the self-interested ABA.⁵²⁸ In the *ABA Journal* itself, an article titled *The Myth of Legal Ethics* disapprovingly concluded, "The Code of Professional Responsibility, as the Canons of Professional Ethics before it, is a treasure trove of moral platitudes."⁵²⁹

A nuanced article by Professor Thomas Morgan published in the February 1977 issue of the *Harvard Law Review* concluded that the Code, while "usually relevant, strikingly consistent, and not consciously conspiratorial" was "repeatedly biased in the ordering of its priorities."⁵³⁰ One area of misplaced priorities was found in Canon 7, concerning zealous representation. Harkening back to

525. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 286 (paper ed. Oxford Univ. Press 1977) (1976).

526. *Id.* at 288.

527. Jay M. Smyser, *In-House Corporate Counsel: The Erosion of Independence*, in *VERDICTS ON LAWYERS* 208, 215 (Ralph Nader & Mark Green eds., 1976). Other commentators in this volume expressed more mixed feelings toward the Code. *See, e.g.*, Martin Garbus & Joel Seligman, *Sanctions and Disbarment: They Sit in Judgment*, in *VERDICTS ON LAWYERS* 47, 50 (Ralph Nader & Mark Green eds., 1976) ("Although several of the Disciplinary Rules have been criticized as mere subterfuge to fortify the position of the most prominent law firms—such as those prohibiting advertising and soliciting clients—they are generally rigorous, designed 'to avoid even the appearance of impropriety.'").

528. JETHRO K. LIEBERMAN, *CRISIS AT THE BAR* 65, 216–17 (1978).

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

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

the cab rank rule, Morgan noted that the Code permitted a lawyer to refuse to handle a matter for any reason.⁵³¹ This understanding was not consonant with either the Joint Conference *Report* or the 1887 Alabama Code of Ethics; it was, however, one of the defining differences between the Alabama Code and the ABA's Canons of Ethics. In addition, Morgan criticized the Code's preference for the client's interest in delay, zealotry and client confidences to the public's interest in "just and expeditious results."⁵³²

Not all criticisms were so nuanced. In the May 1977 issue of the *ABA Journal*, Emory University Law School Dean L. Ray Patterson began an article, "The time has come to renounce completely the fiction that ethical problems for lawyers are matters of ethics rather than law. The fiction pervades the Code of Professional Responsibility and is its major shortcoming."⁵³³ In Patterson's view, the Code of Professional Responsibility was a "transitional document" that suffered "from a defect common to the adolescent stage of growth": "It is rigid and simplistic, complex and contradictory, and difficult to read."⁵³⁴ Professor Geoffrey Hazard reported anonymously the comments of large firm practicing lawyers and others who participated in a legal ethics conference. The participants criticized the Code as enshrining the ethics of "downstate Illinois in the 1860s," "never applicable in the real world," and a "hodgepodge."⁵³⁵ Others criticized the litigation-centric focus of the Code,⁵³⁶ a limitation that both the

531. See *id.* at 735 (citing EC 2-25 and noting in an accompanying footnote the contrast with the English system of cab rank).

532. *Id.*

533. L. Ray Patterson, *Wanted: A New Code of Professional Responsibility*, 63 A.B.A. J. 639, 639 (1977); see also Robert J. Kutak, *The Law of Lawyering*, 22 WASHBURN L.J. 413, 413 (1983) ("What lawyers . . . have failed to appreciate is that ethics is not what the Model Rules concern; the Model Rules are about the law of lawyering."). Kutak was the chairman of the Commission on Evaluation of Professional Standards, which drafted the Model Rules.

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

535. GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* 7 (1978). Karl Llewellyn made the same complaint in the 1930s in discussing the Canons of Ethics: "The canons of ethics on business-getting are still built in terms of a town of twenty-five thousand (or, much more dubiously, even fifty thousand) . . ." K.N. Llewellyn, *The Bar's Troubles, and Poulitices—and Cures?*, 5 LAW & CONTEMP. PROBS. 104, 115 (1938).

536. See W. William Hodes, *The Code of Professional Responsibility, the Kutak Rules, and the Trial Lawyer's Code: Surprisingly, Three Peas in a Pod*, 35 U. MIAMI L. REV. 739, 745 (1981) (noting criticism that the Code "overemphasized litigation"); see also

Joint Conference *Report* and the American Bar Foundation's Special Committee had taken pains to avoid.

The Code, as Morgan noted, had a number of faults. However, the conclusion that the Code was an "adolescent" document valid only for those in the legally-primitive "downstate Illinois" of a hundred years earlier is an unfair and misleading characterization. Hazard became the reporter of the Model Rules; Patterson was one of the commission's consultants.⁵³⁷

The attack by the left was undertaken in an effort to make the profession live up to its stated ideals. Morgan's criticism was premised in part on the belief that the Code was too self-serving, and that changes in ethics codes reflecting the *public* profession of the law were both valuable and inevitable. The attack by Patterson and Hazard reflected the effort to transform the profession's understanding of its ethics code. The imperfect effort of the Joint Conference *Report* to capture the "central moral tradition" of lawyering⁵³⁸ in America was not of interest to the ABA commission that crafted the Model Rules of Professional Conduct. The Model Rules were to be understood as a type of law, and a type of law that would bind Holmes's "bad man";⁵³⁹ the moral tradition of lawyering was dead. The Code had, pursuant to Casner's request, stated its axiomatic Canons in the affirmative, in contrast with the "thou shalt nots" of the Canons. The Model Rules reverted to the negative.

The distancing of the Model Rules from the golden age is exemplified by the dispensing of the Joint Conference *Report*. It was cited in the references exactly one time in the Model Rules' *Discussion Draft*.⁵⁴⁰ The Model Rules, eventually adopted by the

Theodore J. Schneyer, *The Model Rules and Problems of Code Interpretation and Enforcement*, 1980 AM. B. FOUND. RES. J. 939, 940 (noting the *Discussion Draft* specified lawyer's duties in a number of roles, unlike the Code).

537. See ABA Comm. on Evaluation of Prof'l Standards, MODEL RULES OF PROF'L CONDUCT (Discussion Draft 1980) (listing participants of commission).

538. Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 HOFSTRA L. REV. 311, 311 (1990).

539. See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside it, in the vaguer sanctions of conscience.").

540. See ABA Comm. on Evaluation of Prof'l Standards, MODEL RULES OF PROF'L CONDUCT, at 54 (Discussion Draft 1980) (citing the *Report* after comment to section 2.1,

ABA in 1983⁵⁴¹ after significant revision (including a tightening of the reasons permitting a lawyer to disclose a client confidence), was a legal document. At the early 1982 mid-year meeting of the ABA, the Kutak Commission's recommendation that the Model Rules follow a "restatement" format was debated by the House of Delegates.⁵⁴² Robert Kutak explained that the Code "did not fully meet the needs of the individual lawyer," and "had created considerable confusion."⁵⁴³ In addition to "eliminating confusion," a restatement format "would prevent the ad hoc development of new rules."⁵⁴⁴ The ensuing discussion was spirited, and a substitute retaining the format of the Code was offered.⁵⁴⁵ It failed, and the House of Delegates approved, without further debate, the Commission's recommendation.⁵⁴⁶ Even the official name of the Kutak Commission reflected this bias in favor of law: it was called the Commission on Evaluation of Professional Standards. The Wright Committee that created the Code was named the Special Committee on the Evaluation of *Ethical* Standards. The Model Rules of Professional Conduct were rules about a type of professionalism. Ethics had nothing to do with it.

As noted in an analysis of the January 1980 *Discussion Draft*, "[t]he Model Rules were more of a black-letter criminal law style code than had ever been proposed before, but at the same time they were written in language that softened the commands considerably, and made them subject to a rule of reason."⁵⁴⁷ This difficulty was not ameliorated in the adopted Model Rules. For example, Model Rule 1.5 declared, "A lawyer's fee shall be reasonable." A lawyer thus violated Model Rule 1.5 if the lawyer's fee was not "reasonable." Determining whether a fee was reasonable required an assessment of some or all of the eight

"Independence and Candor").

541. See *Proceedings of the 1983 Annual Meeting of the House of Delegates*, 108 A.B.A. REP. 763, 778 (1983). The recommendation is found in the *Report of the Commission on Evaluation of Professional Standards*, 107 A.B.A. REP. 408, 408 (1982).

542. *House of Delegates Proceedings*, 107 A.B.A. REP. 298, 298 (1982).

543. *Id.*

544. *Id.* at 298–99.

545. See *id.* at 299 (noting William R. Moller's motion to use the format of the Model Code of Professional Responsibility).

546. See *id.* at 301 (approving Commission's restatement format).

547. W. William Hodes, *The Code of Professional Responsibility, the Kutak Rules, and the Trial Lawyer's Code: Surprisingly, Three Peas in a Pod*, 35 U. MIAMI L. REV. 739, 741 (1981).

factors listed in the rule.⁵⁴⁸

As it did with the Code, the ABA created a committee to encourage states to adopt the Model Rules. This time, the going was slower, although over half the states adopted some version of the Model Rules within five years.⁵⁴⁹ Unlike the Code, the adoption by states of the Model Rules occurred only after significant amendments. The Model Rules were not a “last word” on American legal ethics but a starting point. In 1997, however, the ABA created an Ethics 2000 Commission to evaluate and amend the Model Rules.⁵⁵⁰ No “overhaul” was undertaken, but none was intended. Instead, the effort was premised on the ABA maintaining its position as the authoritative source of the law of legal ethics in response to the challenge of the Restatement (Third) of the Law Governing Lawyers of the American Law Institute (ALI). The recommendations made by the Ethics 2000 Commission were largely rejected until the Enron fiasco left the ABA scrambling to stay ahead of Congress and federal regulators.⁵⁵¹ But the beat went on: The focus of the ABA was

548. See MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2003) (listing the eight factors to consider whether a fee is reasonable). This rule was amended shortly after the turn of the century to read: “A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.” *Id.* The eight factors remain. *Id.*

549. See *Informational Report of the Adjunct Committee on Implementation of the Model Rules of Professional Conduct*, 113 A.B.A. REP. 64, 64 (1988) (noting adoption of the Model Rules by twenty-five states, with another nine considering adoption); *Informational Report of the Adjunct Committee on Implementation of the Model Rules of Professional Conduct*, 112 A.B.A. REP. 79, 79 (1987) (noting that all but eight jurisdictions had adopted or considered adoption of Model Rules); *Informational Report of the Special Committee on Implementation of the Model Rules of Professional Conduct*, 111 A.B.A. REP. 343, 343 (1986) (noting the adoption of the Model Rules by thirteen states and consideration in twenty-four more). As of mid-2008, forty-nine jurisdictions had adopted some form of the Model Rules. See Am. Bar Ass'n, *Model Rules of Professional Conduct: Dates of Adoption*, http://www.abanet.org/cpr/mrpc/chron_states.html (last visited Nov. 10, 2008) (listing adoption in chronological order).

550. E. Norman Veasey, Commission on Evaluation of the Rules of Professional Conduct (“Ethics 2000”): Chair’s Introduction (Aug. 2002), http://www.abanet.org/cpr/mrpc/e2k_chair_intro.html; see also Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 441 (2002) (summarizing the work of the Ethics 2000 Commission).

551. See Mark Hansen, *Model Rules Rehab: House Tackles Tough Issues as Ethics Debate Begins*, A.B.A. J., Oct. 2001, at 80, 80 (“The Ethics 2000 commission won a few rounds and lost a few others when its proposed overhaul of the ABA Model Rules of Professional Conduct finally came up for debate by the association’s House of Delegates.”). The face-off between the ABA and the federal government over the

the law of lawyering,⁵⁵² and the continued fine-tuning of that law was the order of the day and decade.⁵⁵³ Joining the ABA in drafting a restatement of the law of ethics was the inventor of the restatement, the ALI, which adopted its Restatement (Third) of the Law Governing Lawyers in 2000 after studying the issue for much of the 1990s. But the anxiety within the profession did not dissipate.

V. CONCLUSION

To the fervent cry for the bread of moral life a stone of formalism and negation . . . has apparently been given. The American lawyer has a fondness for codes

Charles F. Chamberlayne, *Legal Idealism*⁵⁵⁴

Chamberlayne's century-old lament still resonates. The retreat to law in the Model Rules of Professional Conduct was intended to avoid the difficulty of choosing a particular moral and ethical path for lawyers as the golden age of lawyering receded into history. Of course, emphasizing the *legal* part of *legal ethics* doesn't resolve the demands of professionalism. Instead, the fondness for codes leads to evermore particularistic amendments. Changes at the margin of the Model Rules must be expected, for the pace of change in the legal profession continues to necessitate

regulation of lawyers in the aftermath of Enron is the subject of a forthcoming article. Michael Ariens, "Playing Chicken": An Instant History of the Battle Over Exceptions to Client Confidentiality, 33 J. LEGAL PROF. (forthcoming 2009).

552. See generally GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING (3d ed. Aspen Law & Bus. 2006) (1985) (referencing the law of lawyering as the focus of the ABA).

553. See John S. Dzienkowski, *Preface* to PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES, at iii, iii (2007–2008 ed.) (noting changes and including both the 2007 and 2001 versions of Model Rules of Professional Conduct); see also Michael Ariens, *The Ethics of Copyrighting Ethics Rules*, 36 U. TOL. L. REV. 235, 235 n.1 (2005) (listing sources concerning ABA action on Ethics 2000 Commission). The ABA's House of Delegates adopted several of the Ethics 2000 proposed amendments between 2002 and 2003. See John S. Dzienkowski, *Preface* to PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES at iii, iii (2007–2008 ed.) (noting the adoption of the proposed amendments). This work continues; in February 2008, the ABA amended Model Rule 3.8, concerning the ethical duties of prosecutors to disclose evidence when a criminal defendant might have been erroneously convicted. James Podgers, *Righting Wrongs*, A.B.A. J., Apr. 2008, at 32, 32.

554. Charles F. Chamberlayne, *Legal Idealism*, 21 GREEN BAG 436, 436 (1909).

amendments, modifications and supplements to those rules. But lost in this fetish for particularity is purpose. The drive to add more law to American legal ethics is unlikely to reduce the anxiety in the profession. Do lawyers remain part of a purposive and public profession? Much of the late nineteenth and early twentieth century criticism of the American legal profession was generated because the client-centered justifications of the lawyer's actions, by David Dudley Field and others, was rejected as insufficient to justify the exercise of power by lawyers. The 1958 Joint Conference *Report* warned the profession that rules were incapable of preserving the mediating role of lawyers in a democratic society, a role given lawyers because they were constrained in the exercise of power by their professional duties. Anxiety in the American legal profession in the past three decades has continued to increase. The response by the profession seems simply to repeat that lawyers remain part of the public profession of law. As noted by Professor Debra Lyn Bassett, "[T]he Preamble to the Model Rules uses the word 'public' ten times, repeatedly referring to lawyers as 'public' citizens and to the ideals of 'public' service."⁵⁵⁵ But actions still speak louder than words: "Despite the historical and Model Rule references, neither the general practice of law nor the Model Rules are geared toward law as a public profession."⁵⁵⁶

There is no going back to any golden age. The time for the Joint Conference *Report* and the Code of Professional Responsibility is gone, and anxious times in the legal profession are not likely to dissipate any time soon. Lawyers must accept that the anxiety concerning their status and their economic prospects is not going away. However, the turn to a nearly complete client-centered ethic has not served the long-term interests of those clients, much less the public.

In an 1871 essay on the ethics of lawyers, including the lawyers representing the Erie Railroad, the editors of *The Nation* patiently explained why lawyers asked for "certain exemptions," on "purely utilitarian grounds," "to the ethical canons which govern men in the ordinary dealings of life."⁵⁵⁷ "He is not simply the counsel of

555. Debra Lyn Bassett, *Redefining the "Public" Profession*, 36 RUTGERS L.J. 721, 722 (2005).

556. *Id.* at 723.

557. *Forensic Ethics*, THE NATION, Jan. 26, 1871, at 56, 56.

one of the parties; he is an officer charged by the government with the task of assisting in the administration of justice. When he appears in court, it is not simply as the representative of one of the litigants, but as the guardian of the general interests of the community.”⁵⁵⁸ This double-duty, as noted by *The Nation*, is not easily accomplished. The public disbelieves lawyers engage in it, and some lawyers do so as well. But, the editors note, the “special exemptions” were of necessity paired with “special restrictions” on lawyers, for their honest and honorable conduct was essential to the operation of justice. The lawyer as Janus-like was accepted as late as the Joint Conference *Report* and the Code; it is largely absent from the Model Rules. But the future of the profession may lie in its past.

558. *Id.*